VANCOUVER
23-Dec-22
COURT OF APPEAL
REGISTRY

Court of Appeal File No. CA48578

COURT OF APPEAL

BETWEEN:

Action4Canada, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Appellants

AND:

His Majesty the King in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General
British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester,** Peter **Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia**

Respondents

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INDEX

TAB **Pages**

BOOK OF DOCUMENTS

1. Joint Application Record of the Respondents received May 27th, 2022 ………….. 5-1693
2. Affidavit of Rebecca Hill, dated May 24th, 2022 ………………………………….. 1694-2025
3. Appellants Application Record, filed, May 20th 2022…………………………...... 2026-2504
4. Appellants Book of Authorities Index dated, May 20th, 2022 …………………….. 2505-2508
5. Transcript of hearing, May 31st, 2022……………………………………………… 2509-2580

TAB 1

No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

JOINT APPLICATION RECORD – VOLUME 1

Application to Strike Proceedings

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--Continued Next Page--

Date, and Time of Hearing: May 31, 2022 at 10:00 am
Place of Hearing: Vancouver, British Columbia
Time Estimate: 1 day
Joint Application Record Prepared By:
Attorney General of British Columbia

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No. 217586
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Defendants

JOINT APPLICATION RECORD INDEX

TAB **DOCUMENT**

VOLUME 1

Pleadings

1. Notice of Civil Claim filed August 17, 2021

2. Response to Civil Claim of the Provincial Defendants filed January 12, 2022

3. Response to Civil Claim of the Health Authority Defendants filed October 14, 2021

Application to Strike – Provincial Defendants

4. Notice of Application of the Provincial Defendants filed January 12, 2022

5. Amended Application Response of the Plaintiffs filed May 18, 2022

6. Application Response of the Health Authority Defendants filed January 17, 2022

7. Application Response of BC Ferries filed January 19, 2022

8. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Canada

9. Notice of Application of Canada filed April 28, 2022

10. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

11. Application Response of the Health Authority Defendants filed May 18, 2022

12. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Health Authority Defendants

13. Notice of Application of the Heath Authority Defendants filed January 17, 2022

14. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

15. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – TransLink Defendants

16. Notice of Application of TransLink filed April 14, 2022

17. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

18. Application Response of the Health Authority Defendants filed May 18, 2022

Affidavits

19. Affidavit #2 of Rebecca Hill filed May 24, 2022

VOLUME 2

Case Law of the Defendants (Applicants)

20. *Borsato v. Basra*, [2000] B.C.J. No. 2855

21. *Camp Development Corp v. Greater Vancouver Transportation Authority,* 2009 BCSC 819

22. *Dixon v. Stork Craft Manufacturing Inc.* 2013 BCSC 1117

23. *Fowler v. Canada (Attorney General),* 2012 BCSC 367

24. *Gill v. Canada,* 2013 BCSC 1703

25. *Grosz v. Royal Trust Corporation of Canada,* 2020 BCSC 128

26. *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.)

27. *Khodeir v. Canada (Attorney General),* 2022 FC 44

28. *Kuhn v. American Credit Indemnity Co.,* [1992] B.C.J. No. 953 (S.C.)

29. *Lang Michener Lash Johnson v. Fabian,* [1987] O.J. No. 355

30. *Li v. British Columbia,* 2021 BCCA 256

31. *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362

32. *Mousa v. The Institute of Electrical and Electronics Engineers, Incorporated,* 2014 BCCA 415

33. *Nevson Resources Ltd. v. Araya,* 2020 SCC 5

34. *R. v. Find,* 2001 SCC 32

35. *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42

36. *Sahyoun v. Ho,* 2013 BCSC 1143

37. *Simon v. Canada,* 2015 BCSC 924

38. *Strata Plan LMS3259 v. Sze Hang Holding Inc.,* 2009 BCSC 473

39. *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.*), [2003] 3 S.C.R. 77

40. *Toronto v. Ontario*, 2021 SCC 34

41. *Willow v. Chong*, 2013 BCSC 1083

42. *Young v. Borzoni,* 2007 BCCA 16

Legislation of the Defendants (Applicants)

43. *Supreme Court Civil Rules,* BC Reg 168/2009, Rules 3-1, 3-7, 9-5, 14

Case Law of the Plaintiffs (Application Respondents)

44. *592 U.S.* ______ (2020)

45. *A.G. Canada v. Inuit Tapirasat of Canada* [1980] 2 S.C.R. 735

46. *Adams-Smith v. Christian Horizons,* (1997) 14 C.P.C. (4th) 78 (Ont. Gen. Div.)

47. *Air Canada v. A.G.B.C.,* [1986] 2 S.C.R. 539 (SCC)

48. *Arsenault v. Canada,* 2009 FCA 242

49. *Canada v. Solosky,* [1980] 1 S.C.R. 821

50. *Canada (Prime Minister) v. Khadr,* [2010] 1 S.C.R. 44

51. *Canadian Society for the Advancement of Science in Public Policy v. Henry*, 2022 BCSC 724

52. *Carter v. Canada (Attorney General),* 2015 SCC 5

53. *Dalex Co. v. Schawartz Levitsky Feldman*, (1994) 19 O.R. (3d) 463 (Gen. Div.)

54. *Dumont v. Canada (Attorney General),* [1990] 1 S.C.R. 279

VOLUME 3

55. *Fleming v. Reid,* (1991) 48 O.A.C. 46 (CA)

56. *Grant v. Cormier – Grant, et al.,* (2001) 56 O.R. (3d) 215 (Ont. C.A.)

57. *Hanson v. Bank of Nova Scotia,* (1994) 19 O.R. (3d) 142 (C.A.)

58. *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959

59. *J.N. v. C.G.,* 2022 ONSC 1198

60. *Jacob Puliyel v. Union of India & Ors.*

61. *M.A. v. De Villa,* 2021 ONSC 3828

62. *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14

63. *Miller (Litigation Guardian of) v. Wiwchairyk,* (1997) 34 O.R. (3d) 640 (Ont. Gen. Div.)

64. *Nash v. Ontario,* (1995) 27 O.R. (3d) 1 (Ont. C.A.)

65. *Nelles v. Ontario,* (1989) 60 DLR (4th) 609 (SCC)

66. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263

67. *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441

68. *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991) 5 O.R. (3d) 778 (C.A.)

69. *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217

70. *Roncarelli v. Duplessis,* [1959] S.C.R. 121

71. *Sgt. Julie Evans v. AG Ontario*

72. *Singh v. Canada (Citizenship and Immigration),* 2010 FC 757

73. *TD Bank v. Delloitte Hoskins & Sells,* (1991) 5 O.R. (3d) 417 (Gen. Div.)

74. *Thorson v. AG of Canada,* 1975 1 S.C.R. 138

75. *Trendsetter Ltd. v. Ottawa Financial Corp.,* (1989) 32 O.A.C. 327 (C.A.)

76. *Vancouver (City) v. Ward,* 2010 SCC 27

Case Law – Additional Struck Claims

77. *Al Omani v. Canada,* 2017 FC 786

78. *Almacén v. Canada,* 2016 FC 300

79. *Almacén v. Canada,* 2016 FCA 296

80. *Cabral v. Canada (Minister of Citizenship and Immigration),* 2016 FC 1040

81. *Committee for Monetary and Economic Reform v. Canada,* 2015 FCA 20

82. *Committee for Monetary and Economic Reform v. Canada,* 2016 FC 147

83. *Committee for Monetary and Economic Reform v. Canada,* 2016 FCA 312

84. *Committee for Monetary and Economic Reform v. Canada,* [2017] S.C.C.A. No. 47

85. *Da Silva Campos v. Canada (Minister of Citizenship and Immigration),* 2015 FC 884

86. *Gill v. Maciver,* 2022 ONSC 1279

87. *Mancuso v. Canada (Minister of National Health and Welfare),* 2014 FC 708

88. *Mancuso v. Canada (Minister of National Health and Welfare),* 2015 FCA 227

89. *Mancuso v. Canada (National Health and Welfare),* [2016] S.C.C.A. No. 92

90. *Sivak v. Canada,* 2012 FC 272

91. *Wang v. Canada,* 2016 FC 1052

92. *Wang v. Canada,* 2018 FCA 46

93. *Wang v. Canada,* [2018] S.C.C.A. No. 368

17-Aug-21

Court File No. VLC-S-S-217586

Registry No.
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General **British Columbia Ferry Services Inc**. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester,** Peter **Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)**

Defendants

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

1. (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above- named registry of this court within the time for response to civil claim described below, and
2. (b) serve a copy of the filed response to civil claim and counter claim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

> (a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,
>
> (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,
>
> (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or
>
> (d) if the time for response to civil claim has been set by order of the court, within that time.

Table of Contents of the Claim

Page

Part 1: Statement of Facts

- The Parties…………………………………………………………………..5
- The Plaintiffs and their personal facts…………………………………………5
- The Defendants……………………………………………………………....82

- THE FACTS………………………………………………………………..85

A/ "COVID 19" THE TIMELINE…………………………………………………...85

B/ THE COVID-19 MEASURES

- Federal measures…………………………………………………………..103
- Provincial measures……………………………………………………….....104

Page

- Orders of Provincial Health Officer Bonnie Henry……………………………105
- Ministerial Orders……………………………………………………………106
- Reckless and Unlawful Statements and Actions of Leaders………………...114

C/ IGNORING AND FAILING TO ADDRESS MEDICAL EXPERTS' EVIDENCE

- The Nature of Viral Respiratory Illness (or Disease) and COVID-19……….122
- Contrary Views of the Experts to WHO protocol……………………………125
- Covid measures worse than virus……………………………………………….148

D/ THE SCIENCE & MEDICINE OF COVID-19

- Summary (Overview)………………………………………………………...…160
- The Covid -Measures Unscientific, Non-Medical, Ineffective, and Extreme……………………………………………………...…162

E/ HYPER – INFLATED, DISTORDETED TOTAL NUMBER OF CV-19 "CASES" & "DEATHS"……………………………………180

F/ GLOBAL POLITICAL, ECONOMIC AGENDA BEHIND UNWARRANTED MEASURES

- The Non-Medical measures and Aims of The Declared
- Pandemic- The Global Agenda…………………………………………….…...188
- Bill Gates- Vaccines, Pharmaceuticals & Technology……………………..…...211
- The WHO / Gates/ Trudeau and Dr. Teresa Tam………………………….....212
- Dr. Bonnie HENRY – Vaccines and the WHO……………………………....244

G/ CONSEQUENCES OF MEASURES TO THE PLAINTIFFS AND OTHER CITIZENS, AND VIOLATION OF CONSTITUTIONAL RIGHTS…………………………………………………247

H/ THE COVID-19 VACCINE- "WE DO NOT GET BACK TO NORMAL UNTIL WE HAVE A VACCINE"……………………......255

- Microchipping /Immunity Passports/ Social Contact Vaccine Surveillance & 5G………………………………………………….…...259
- Authorized COVID "Vaccines"……………………………………..…...261
- Vaccines in General…………………………………………………...….290

I/ THE MEDIA……………………………………………………………….303

- Negligence…………………………………………………………….304

Page
J/SUMMARY……………………………………………………………………309

Part 2: Relief Sought…………………………………………………………..312

Part 3: Legal Basis……………………………………………………………..356

CLAIM OF THE PLAINTIFF(S)

Part 1: STATEMENT OF FACTS

- **THE PARTIES**

- **The Plaintiffs and their personal facts**

1. The Plaintiff **"Action4Canada"**, is a grassroots organization centred in British Columbia, whose facts, in support of its claim for relief, are as follows:

    (a) Action4Canada was co-founded in August of 2019;

    (b) The activities of Action4Canada are in direct response to government legislation that undermines Canada's ***Constitution***, the ***Charter***, and Canadian democratic values.

    (c) At the onset of 2020, Action4Canada took note of the ongoing emergency measures that were being enacted in response to the Covid-19 pandemic. Many concerned citizens reached out to Action4Canada, to voice the hardships they faced due to these measures such as loss of job/income, business closures, school closures, and the re-scheduling of emergency surgeries. Action4Canada stepped up to advocate for those concerned citizens, and has continued to listen to their pleas, and find ways to take action for them.

    (d) Action4Canada advocates, educates and takes action in pursuit of upholding the Rule of Law, the Constitution and democratic governance in accordance with Canada's constitutional order and the Rule of Law.

2. The Plaintiffs **Kimberly Woolman** (“Kimberly”), **The Estate of Jaqueline Woolman** (“Jaqueline”) are residents of British Columbia, whose facts, in support of their claim for relief, and who have suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

   (a) Kimberly is the adult daughter of Jaqueline Woolman, who passed away on January 30th, 2021. Jaqueline’s eldest daughter passed away in August 2005, and her husband passed away in July 2011. Kimberly moved to British Columbia from Ontario to help take care of their mother, who had developed dementia in or about 2018.

   (b) Jaqueline’s remaining three (3) grown children, Sheldon, Kimberly and Michelle all lived within a few blocks of Jacqueline’s Long-term care residences: New Horizons (Discovery Harbour), and eventually Yucalta Lodge both located in Campbell River, British Columbia.

   (c) Once diagnosed with dementia, a decision was made in April 2019 to have her placed in a private long-term care, at New Horizons (Discovery Harbour) on 850 14th Avenue, in Campbell River, British Columbia. The decision came after Jaqueline had experienced two (2) falls, and two (2) hip surgeries on both hips, the first fall and surgery took place in December 2017, and in January 2018 she has her second fall, while in the New Horizons care home, and her surgery was also in January of 2018.

(d) Kimberly and Michelle had many issues with New Horizons for advocating for their mother's health, and on April 4th, 2019 they were banned without explanation from visiting Jacqueline.

(e) After multiple complaints filed against New Horizons care home by Kimberly and her siblings with regards to Jaqueline's care, punitive restrictions were put in place by the home. As a result of those restrictions, the children had Jacqueline transferred to a different care home, Yucalta Lodge, which operates as a public (publicly-funded) under the Vancouver Island Health Authority at 555 2nd Ave, Campbell River, British Columbia in early 2019. Jacqueline's transfer to the Yucalta Lodge facility was completed in May 2019, with Michelle's assistance through her work connections as the scheduler at a social work office.

(f) In May 2019, upon completion of Jaqueline's transfer, Jae Yon Jones, the manager at Yucalta Lodge, constantly changed the rules, contradicted herself and outright lied about many issues brought forth by Kimberly and her siblings in relation to their mother. Kimberly and her siblings tried to resolve these issues in many meetings, to no avail. These issues went on to persist, and only became amplified by the Covid-19 restrictions put in place in 2020.

(g) Sometime in 2019, Jaqueline's doctor approved allowable alcohol shots to manage her pain. By March 2020, Nursing staff were not offering Jaqueline any alcohol, without any medical reason as to why. A decision was made after the Covid-19 pandemic began, to put Jaqueline on fentanyl, which was later increased from 25mcg to 37.5mcg. however Jaqueline was no longer asking for any alcohol at that point because she would become too sedated. Similarly, also in March of 2020, the staff at Yucalta Lodge forced Jaqueline to quit smoking, a habit that helped her remain calm, by administering a nicotine patch for Jaqueline, without the consent of Michelle and Kimberly.

(h) Jaqueline was left to waste away in bed, obtaining bed sores as a result of staff removing her access to her wheelchair, which in turn resulted in muscle atrophy.

(i) On April 24th, 2020 Kimberly visited the Yucalta Lodge to take her mother supplies as she had done on numerous occasions. Kimberly was stopped at the door by staff who informed her that she could not enter due to newly implemented Covid-19 restrictions. Kimberly pulled up documentation on her phone that stated she could enter, as she did not understand what the security measures were about. The Director, Jae Yon Jones took the phone from Kimberly's hand, informing her that she could not come in. Kimberly decided to leave the items for her mother, and was told that the items would have to be "quarantined" for a few days.

(j) After the interaction that took place on April 24th, 2020, Kimberly went to visit her mother from outside of her room's window. There were two (2) nurses inside with Jaqueline, without any PPE equipment on. Kimberly was confused, as she had thought that the new measures had mandated that PPE equipment was necessary in all spaces at the time. Kimberly decided to take a picture, to document the nurses at Yucalta Lodge failing to follow Provincial health mandates, while denying entry to concerned family members such as herself. As Kimberly was outside the window, many staff members passed by, and one staff member took a photo of her license plate as she entered her car.

(k) On April 24th, 2020, after Kimberly had left the Yucalta Lodge premises, and returned home, the police began banging on Kimberly's apartment door. This lasted for about five (5) or ten (10) minutes. Kimberly was terrified they were going to break the door down. The Police officers then circled the building in their car, and drove past her apartment several times before leaving. They returned several times, over the course of several days either in their cruisers around the parking lot outside of Kimberly's apartment, or banging on the inside apartment door, again without notice, and without identifying themselves. Kimberly was distraught that the someone from Yucalta Lodge may have notified the police that she had purportedly defied their Covid-19 policies.

(l) On April 29th, 2020, Kimberly posted the photo of her mother, Jaqueline in her room with the two (2) nurses who had no PPE-equipment to her Facebook page, and was subsequently asked to remove it by the Yucalta Lodge staff. As a result of the photo on Kimberly's Facebook page, she was informed that she could no longer attend at Yucalta Lodge property. Yucalta Lodge alleged that Kimberly, and Jaqueline's entire family were security threats to staff safety. Kimberly was told all calls to her mother would go through management. At that time, the Manager also assured Kimberly that when her visitation restrictions were removed, she would be notified. They were later removed in May of 2020, and no one in the family was notified.

(m) After the visits stopped in April of 2020, Jaqueline was calling Kimberly and Michelle constantly, while having breakdowns. She was often found trying to leave the building, thinking she could go to the airport or other places in her state of dementia.

(n) In June of 2020, Kimberly was on a zoom call with her mother when the activities-worker entered the room with Jaqueline wearing a mask. Kimberly commented to Jaqueline on how the efficacy of masks was questionable when it came to the prevention of the spread of viruses. Shortly afterwards, Michelle received a letter dated June 12th, 2020 from Jae Yon Jones, Manager outlining her 'disrespectful behaviour', despite Michelle not even being on the zoom call in question. Michelle was then informed that all zoom sessions had been cancelled, and she was no longer allowed on Yucalta Lodge property, including anywhere near Jacqueline's window.

(o) From June 12th, 2020 onwards, Michelle, and Kimberly's calls to the nurses phone on the unit to speak with their mother were repeatedly denied, and staff told them that they had to go through the manager or social worker to speak with their own mother. Yucalta Lodge staff consistently failed to answer the questions posed by Jaqueline's children as to whether or not the process that they had to go through in order to speak to their mother was standard protocol for all clients, or a sanction placed on their family alone.

(p) Sometime in June 2020, Jacqueline's son Sheldon went to Yucalta Lodge to see his mother and was confronted with security guards as if he were a threat. He was also told that he was not allowed in the building and later the Manager confirmed that he too was now banned from the property. This was only the second time during Jacqueline's entire stay at Yucalta Lodge that he was ever there to see here in person.

(q) On June 15th, 2020, Kimberly and Michelle received another written notice that all Zoom visits were cancelled, and told to direct all issues regarding Jacqueline's health to her Doctor. Michelle replied to this email notice by asking what the reason for the cancellation was, and if all resident's zoom sessions were cancelled. This question was never answered, or addressed in any manner. Instead, Michelle received a letter detailing her "disrespectful behaviour" towards all staff by simply asking questions. Michelle was told to not be present on the property. At that point, all three

(3) of Jacqueline's children had been banned arbitrarily without cause, from the physical property, in addition to being banned via phone and zoom calls.

(r) On July 3rd, 2020 Kimberly and Michelle found out that visits had been re-instated since May 2020 and they had not been notified. Yucalta Lodge had two (2) full months to notify the children that they could have been seeing their mother despite being previously assured that they would be notified when they could see their mother again. Kimberly had, at the time spoken to a new care-worker who was very kind, and obliged their requests to take their mother out for drives and informed them that other clients were having visits from their family members. The odd time that Kimberly and Michelle were able to try to talk to their mother, the new care-worker would be the one to answer the phone. They never stopped calling to try to talk to their mother.

(s) On July 10th, 2020 Yucalta Lodge claimed the new nurse was misinformed. By July 13th, 2020 the children were informed that they could only have 'supervised' visits with their own mother, although they only allowed Michelle to do so. All sorts of harsh conditions were laid out for the visits such as "social distancing in a car", wearing masks at all times, and 14-day "quarantines". Michelle began being followed by the staff when she would pick up Jaqueline, and so she would often have to drive to remote locations to meet Jaqueline's son, Sheldon, and Kimberly so that they could see their own mother without the surveillance of the Yucalta Lodge staff.

(t) In one instance, Michelle picked up her mother with her mask that had horizontal slits to breathe and not fog up her glasses on. This was subsequently reported to the director Mae Jon Jones as Michelle having "holes" in her mask, and the punitive action for that was another fourteen (14)-day quarantine for Jacqueline. The same care worker who dropped off Jaqueline to Michelle had the same gaps on the sides of her face and nose.

(u) Several times, Jacqueline had been prepared for the outings with soiled briefs, despite Michelle making constant reminders to staff prior to picking her up, it persisted.

(v) Staff workers were bringing Jacqueline to Michelle's car in her chair until sometime in July 2020, when she was delivered by two (2) or more security staff. This was another tactic by the manager to convey that there is something dangerous about Jacqueline's family, specifically Michelle as they decried that only Michelle was allowed to pick up her mother, and indeed see her during these drives. When Michelle pulled in to pick up Jacqueline, security staff were observed coming from another location outside, likely sent to intimidate her.

(w) On July 14th, 2020 Jacqueline's son, Sheldon called Yucalta Lodge to talk to Jaqueline, and his call was denied. He was told that he would have to go through the Manager to seek approval for his phone call.

(x) On September 3rd, 2020 Michelle called the Yucalta nurses' phone, as directed to talk to her mother, and was denied three (3) times. The first time she was told that she had to call the Manager, or head nurse and then was told not to call again. She called called back anyway, and was transferred to Louise Smith, the head Registered Nurse, who told her that she could not talk to her mother without the Manager's approval. Michelle repeatedly asked if this is the policy for all clients and family members, to which she was given a repetition of the "policy" as an answer.

(y) On September 14th, 2020 Michelle sent a notice that she would be stopping payment for Jaqueline's care if her Rights were not respected, including her ceasing restriction of family members visiting with her in person and on the phone. No response to this notice was ever received.

(z) September 19th, 2020 Michelle went to pick up Jacqueline. Jaqueline's birthday is September 21st, and so they had planned to celebrate at Michelle's house, alongside Kimberly. When Michelle presented to pick up Jacqueline, she was slumped in her chair, could not move her feet/legs at all on her own. Michelle was unable to transfer Jacqueline to the car without hurting her. The security guards kept watch the entire time and when asked to help, refused to do so. Michelle asked staff workers leaving the building for help, they too refused her. Michelle called her brother Sheldon for help, but he did not answer his phone. Jacqueline was in a great deal of pain, and could hardly express herself. As a result, Jaqueline was unable to go home to celebrate her birthday with her family but was returned into the home by the security guards who refused to assist her to get into her daughters' car.

(aa) On September 21st, 2020, Jacqueline's birthday, Michelle called and spoke with a person named "Melissa" asking to speak to her mother, and was told that she had to go through Manager's, Ms. Jones. Her call to Ms. Jones was denied.

(bb) On September 22nd, 2020, Michelle called the Vancouver Island Health Authority complaint line and spoke with a person named "Sophia" who sounded very surprised by the Manager, and other staff's behaviour. She then provided the process to file a formal claim against Yucalta Lodge with the Vancouver Island Health Authority, which Michelle did.

(cc) In October of 2020, due to Jacqueline's decline in health and threat of death, the family managed to schedule a visit in Jacqueline's room with her. This included Sheldon, Kimberly and Michelle. More rules were set in place, and the threat of this visit being cancelled was constantly put forth to the children. They all felt that it might be the last time they would see their mother alive. They agreed to washing their hands, masks, and a questionnaire. They would not agree to their temperatures being taken.

Kimberly’s temperature goes up when she was in pain, as the result of a car accident, and Michelle was at the end of menopause. Kimberly and Michelle’s requested were obliged, and they were escorted to Jaqueline’s room by the Social Worker, and a security guard as they were a perceived threat within the facility.

(dd) They noticed on their way out after the visit, that several staff members were sitting around a table talking, and none of them were wearing masks, or gloves.

(ee) Sometime later in October of 2020, the children noticed during Zoom sessions that Jacqueline’s wheel chair was not beside her bed. Their belief was that this had been the case since they had stopped them from going in to see Jaqueline in March, 2020, which lead to her experiencing muscle atrophy. The children further believe, that they removed access to her wheelchair to deliberately cause atrophy in her muscles so that she could no longer move around independently, around the same time that they took her smoking rights away.

(ff) Throughout November, and December 2020, the children were able to have Zoom visits at request to the Social Worker. The last two (2) visits included an automatic timer of forty (40) minutes which cut the meeting off automatically.

(gg) During the Zoom call of December 10th, 2020 Michelle asked the operator click to allow for recording, and she obliged this request. Michelle also asked her why there was a timer, and she stated that they have always been forty (40) minutes. This was not true, as they have visited on Zoom with their mother for an hour or more during past zoom calls.

(hh) Jacqueline's rapid decline could easily be seen and heard in pictures and audio/video recordings, and had seen an increase since the covid-19 related measures began.

(ii) From February 20th, 2020 until her death on January 30th, 2021, the children clearly discerned that her cognitive abilities and speech were in major decline due to the lack of any stimulation, increases in medication, hopelessness, helplessness, depression, and despair in missing her family. Jacqueline always expressed to her children how thankful she was for her children, and constantly said she did not know what she would do without them every time they talked to her before she became completely sedated due to the drugs she was being prescribed.

(jj) Jacqueline was cut off from all her friends and family in Ontario, as none of them have been able to get through to her since at least March 2020. She had been isolated completely and treated even worse than prisoners in solitary confinement. Toward the end, Jaqueline was unable to hold up the phone to speak with her own children.

(kk) Jaqueline's condition became grave, as both staff and her doctor admitted, yet Michelle and Kimberly were not allowed to be with her throughout her final days.

(ll) Other residents of the care home were able to engage with their families without having security surrounding them, and without having to have their phone calls cleared by management.

(mm) Following each car outing Michelle and Kimberly had with their mother, she would not be allowed out for another fourteen (14) days. In prison, even people in solitary are allowed out for an hour a day for fresh oxygen. Jacqueline was only getting out for approximately **one (1) hour every fourteen (14) days**, and by that point, she had not been outside since September 19th, 2020.

(nn) On December 21, 2020 the family made arrangements with Chris MacDonald (social worker) for several zoom sessions with their mother over Christmas holidays, while he was to be off work.

(oo) On December 22, 2021 Kimberly and Michelle had a zoom session with Jacqueline during which, Jacqueline complained of 'chest pain'. Michelle called for a worker to tend to her. One worker came rather quickly, and was told Jacqueline is having chest pain. After 28 minutes another came in with antacids. At no time was indigestion mentioned. Kimberly and Michelle asked why antacid and why no one is checking any of Jacqueline's vital signs. The second 'care worker' walked out of the room. Shortly after that, Jacqueline was crying and the timer on the Zoom meeting cut the session. The timers were new. Previously there was no timer and they talked with their mother for an hour; sometimes more each time. The timers were punitive.

(pp) On December 24th, 2020, as a punitive measure to the Dec 22nd zoom call, all previously arranged Zoom calls were cancelled. Again, all phone calls were either ignored, or staff continued to tell Kimberly, Michelle, and Sheldon that they could not talk to their own mother due to the 'Safety Plan'.

(qq) Sheldon spoke with a staff member named Joanne, and asked her if she would put on the film "Scrooge, A Christmas Carol" for Jacqueline that night as it is family tradition to watch the film around Christmas. She agreed and when Sheldon asked to speak with Jacqueline he was told he as to talk with the manager or social worker, none of whom were in the office for at least a week. He was denied again. Joanne then agreed to set up a phone call for the children with their mother on Christmas Day.

(rr) On December 25th, 2020 there was no call from Yuculta Lodge so the children called repeatedly later in the day to wish their mother a 'Merry Christmas'. They were denied again, and the "Safety Plan" was the excuse provided by Yuculta Lodge. They were again told that they could only talk to their mother with management's permission, none of which were available for at least a week.

(ss) On December 31, 2020, Michelle requested (FOIA) a hard copy of the "Safety Plan" that since June, 2020, all staff stated was the reason no one could communicate with Jacqueline Woolman on the phone. Family questioned staff repeatedly asking what the safety plan has to do with the children speaking with their mother. They never answered, only continually referred to the "Safety Plan" as the reason they wouldn't put any of our or other family and friend's calls through to Jacqueline.

(tt) On January 13th and 14th, 2021 Michelle called the Social Worker as directed to speak with her mother, and left messages. Both went to voice mail, none were returned. All through this time, the family tried desperately to speak with their mother. All calls were DENIED claiming orders per the 'Safety Plan', or ignored and sent to voice mail with no returned calls.

(uu) On January 20, 2021 Michelle Woolman received a written response (Request ID: 29609074) to her FOIA request for the Safety Plan. A copy of the "Safety Plan" has to date, never been received. This letter states in part; "They (Yuculta) have advised me that they follow the Island Health's Safety Plan and that there is no written plan in regards to the family." This legal document confirms, since June, 2020 until Jacqueline's death, six (6) months later the staff lied about the contents of the safety plan.

(vv) On January 21, 2020, at approximately 1:00 p.m. Michelle received an email from Philip Friesen (approximately 300 kms away) stating in part; "I would like to ask that you no longer directly contact the Yucalta site by telephone and email, and no longer consider Chris MacDonald as your point of contact." Mr. MacDonald, the family's 'designated contact' at the time to speak with their mother, had been ignoring all of our calls and requests to talk to their mother. Mr. Friesen offered to set up regular zoom visits for Wednesdays at 10:00a.m.. The very next morning, Michelle received a call that Jacqueline Woolman was palliative. Jacqueline was palliative and non-communicative at that time of Mr. Friesen’s email and beforehand for 2 days.

(ww) On January 22, 2021at 09:39 a.m., Michelle received a call from “Greg” at Yuculta informing her “your mom has taken a bit of a turn, so she’s palliative now, ah, she hasn’t been eating for a couple of days”. He directed Michelle to call Philip Friesen (Director in Victoria, BC) to set up visits. Michelle asked Greg to take the phone to Jacqueline and place at her ear so she could hear Michelle’s voice. Frist, he claimed he couldn’t because he was not on a remote phone. Then Michelle asked him to call back on the portable phone and he refused to do so.

(xx) Michelle made arrangements with the Director in Victoria for 1:00 p.m. hrs for all three (3) adult children to visit their mother that same day. Sheldon, Kimberly and Michelle all attended and were escorted by security to Jacqueline’s room.

(yy) The first thing they noticed was her two (2) wing back chairs had been removed. Then they noticed there were no liquids for her anywhere in the room. When staff brought back the chairs, they were asked why Jacqueline wasn’t getting any fluids. They replied that they offer them and she declines, then said “she has to ask for them.” The children informed the staff ‘she can’t ask’, as she couldn’t speak. Jacqueline was non-communicative. Staff refused to accommodate her need for hydration and walked out of the room as they always did.

(zz) Michelle then asked the security guard who was sitting outside Jacqueline’s door, if he would ask for some swabs and cups. He did so immediately and they began swabbing Jacqueline’s mouth with water. After a short time Jacqueline began to respond and perked up a little bit. She recognized who they were and they even got her to smile a few times. Family stayed for just over an hour. While there, family noticed they stuffed a picture of Jaqueline’s husband (married 52 years until his passing) in a drawer where she couldn’t see it, and a 64 year old picture of her father that was on the wall in a frame was removed from the frame and had been deliberately folded (ruined) and bent. The frame and glass were intact. It had not fallen from the wall.

(aaa) After Jaqueline’s children’s visit, on their way out at the lobby, the Manager, Ms. Jae Yon Jones was there and Sheldon asked her (holding up the ruined 64 year old picture of our grandfather) ‘Who did this?”. He was not physically close to her (at least 25 feet) and he was not threatening. She did not answer the question and turned to walk to her office calling the police as she did so.

(bbb)On January 30th, 2021 Jaqueline died. Michelle had to make arrangements through the Director in Victoria for pick up of the now late Jacqueline's belongings. Michelle was told no family member was permitted on the property and to arrange for someone else to attend. Mr. Friesen then offered to hire a moving company to which Michelle replied she had already made arrangements with a family friend to do the task. Then the (interim) Manager, Yuculta, Chris MacDonald (the 'social worker' beforehand) insisted on a moving company to do so. Michelle informed him she already had a contract with Mr. Friesen (offer, consideration, acceptance) and that he would be held accountable if he did not allow access to the family friend.

(ccc) The Covid-19 measures while purportedly having the intention of increasing safety, actually had an adverse reaction on Jaqueline's health, rapidly increasing her decline, and eventual death. Kimberly, Michelle, and Jaqueline's estate seek relief against the Vancouver Island Health Authority for the undue hardship that Jaqueline faced as a result of their enactment of Covid-19 measures that saw her treated like a prisoner.

(ddd)The children were not able to hold a proper funeral with other family members to give their last respects as is tradition. There was no proper grieving and healing for Jaqueline's death. No proper funeral, or ceremony. Jaqueline's treatment resulted not only in pain and suffering, and mental distress to Jaqueline but also to her children in suffering trauma and severe depression as a result. All of Jacqueline's adult children have been traumatized by treatment Jacqueline suffered in both facilities; especially Yuculta Lodge.

3. The Plaintiff **Jane Doe #1** ("Jane"), is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:
   (a) Jane is a Nurse Aid in the Luther Court long-term care home for seniors, located in Victoria, British Columbia and has expressed deep-seated concerns with regards to the ill-treatment of her care home clients.
   (b) Jane has witnessed clients live in an abusive, patronizing, and stressful environment. As seniors having to make a big adjustment to accommodate Covid-measures, they often forget to comply with masking mandates. It is during those moments that Jane has witnessed them being policed and abused for such "mistakes".
   (c) Jane is also quite concerned for her own health, as she noted that Bonnie Henry, who has previously been supportive of Nurses Unions, shared sentiments that Nurses should not be in the profession unless they vaccinate. Jane is distressed by such coercive statements, which violate her constitutional rights.
   (d) Jane has also asked the British Columbia Health Authority to provide an FOI on a request for the arbitration that Bonnie Henry signed on in 2019

stating, in support of the Nurses Union, that masks are useless. However, the Health Authority has refused to oblige this request.

(e) The Plaintiff states, and the fact is that, the measures enacted by British Columbia Chief Medical Officer Bonnie Henry, has created a stressful environment for many like Jane, who have watched the Long-term care system become similar to a jail/prison. Jane feels concern not only for herself, but also for her clients. The measures failed to uphold health and safety for seniors and in fact the measures have led to deplorable conditions which in fact have caused and/or accelerated the untimely and premature deaths of many seniors.

(f) The Plaintiff, Jane Doe #1, does not wish to reveal her identity for fear of reprisal, and dismissal, by her employer.

4. The Plaintiff(s) **Amy Muranetz** and **Brian Edgar** are residents of British Columbia, whose facts, in support of their claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, with respect to using the B.C. Ferries Inc. transportation system are as follows:

    (a) **Amy Muranetz** ("Amy") is a Victoria, British Columbia resident and mother, who shares custody of her daughter with her daughter's father, who resides in Delta, British Columbia. As such, Amy has been using the British Columbia Ferries every other week for the past four-and-a-half (4.5) years as she shares joint custody of her daughter.

(b) On November 2nd, 2020 Amy had an incident on British Columbia Ferries that left her distressed. She was, and is currently living on Vancouver Island, and boarded the ferry at 5:00 p.m. at the Swartz Bay terminal to Tsawwassen terminal, as a walk-on passenger with her daughter. Amy made her medical exemption to masking known to the reception, and was let through with her daughter. Once aboard the ferry, Amy purchased her return ticket for 7:00 p.m. from the gift shop.

(c) As Amy began to board the ferry at the Tsawwassen terminal reception desk, to make her way back home, she was stopped by the ticket seller who asked her where her mask was. In reply, Amy stated her medical exemption. She was then asked where her medical documentation of such was, but Amy did not have any documents to show on her, as none are required. The ticket seller proceeded to threaten Amy, stating that she would not be allowed on the ferry. Amy simply continued on through the gateway.

(d) After making her way onto the ferry, Amy was stopped on the front bow of the ship by five (5) British Columbia ferries employees, and the Chief Steward, who stated that Amy would not be let on to the ferry. Amy proceeded to share personal, and confidential medical information in response, to indicate proof of her medical exemption, however the British Columbia ferries employees then proceeded to threaten her with force. Amy was escorted off the bow by security. Brittany Sylvester, the terminal manager at Tsawwassen Ferry, escorted Amy down to the main waiting area. Amy broke down as a result of the traumatic, and embarrassing experience that she had just gone through.

(e) A first aid attendant employee came to Amy's assistant, as she was having trouble breathing, and began having PTSD flashbacks to being four (4) years old, and remembering dealing with a very aggressive sexual attack. The first aid attendant assured her that they would get her home on the 9:00 p.m. ferry, however he also asked if Amy could hold a mask up to her mouth, and suggested that they could, perhaps, smuggle her via a van onto the ferry. Amy recorded this interaction.

(f) Amy continued to be pressured to leave the premises, although she had no place to go if she did. Amy was repeatedly asked where she was going to go, and she continued to cry, and plead that they stop pressuring her.

(g) It was then suggested to Amy by the first aid attendant that perhaps the main ticket agent who initially threatened her, had stereo-typed her as an 'anti-masker'. Brittany, the manager then argued with him, stating "no, she wasn't stereo-typing, she was doing her job". Brittney then began to ask Amy if she had been asked about masks before, and Amy informed her that she would be recording their conversation. Brittney then ordered the first aid attendant to leave Amy's side and demanded that all staff leave the area. Amy was then informed that Brittney would be calling the police.

(h) As the room emptied, Amy was left by herself as police arrived on the scene. The Delta police officers then proceeded to drive her to a Tim Horton's coffee shop in Tsawwassen, and left her there. Amy then called a cab to her daughter's father's house. Amy filmed the entire incident, as she was quite distraught by their conduct.

(i) The following morning, November 3rd, 2020, Amy found a local clinic that provided over-the-phone consultations. The clinic emailed Amy a letter stating that, as she suffers from anxiety/Post-traumatic stress disorder, the British Columbia Ferries must take that into consideration with regards to her masking exemption.

(j) On November 4th, Amy returned to the Tsawwassen ferry terminal with the intention of returning home. She purchased a ticket at the ticket ATM, and was asked by reception about where her mask was. Amy simply stated that she had an exemption, and, when asked if she had a letter, did not hesitate to produce the one she had procured from the clinic the previous day. The receptionist asked Amy if she had a mask on her person, which she did, and then they let her go through.

(k) At approximately 11:10 a.m., Amy was in the BC Ferries cafeteria, and just about to eat a salad when Brittney, the terminal manager approached her. Brittney stated, "you know why I'm here". Amy simply replied by noting that she had a letter, and was more than willing to show Brittney that letter, however Brittney stated that Amy would need to exit the ship before she would read her letter. Amy declined, and told Brittney she could read it then, and there, however Brittney refused this suggestion, and that is when Amy began recording the interaction. Brittney then stated that the ferry would not leave the harbour so long as Amy was on it, and that she was calling security. Amy asked why, as she had been more than willing to produce her medical exemption letter, to which Brittney replied that she was now banned from travelling due to what had "happened the other day".

(l) Brittney left Amy for a few minutes, as about five (5) or six (6) security guards and employees began to gather, and two (2) Delta Police Department Officers arrived. Amy produced her letter to the police, and although they appeared just as confused as she was, they asked her to leave the vessel.

(m) Amy quietly stood up and, was escorted off of the ferry. She then asked Brittney to refund her trip. The two (2) police officers escorted Amy to a car, where one drove her to her ex's home. To date, British Columbia Ferries employees have made no further note about Amy being able to return home to her city, and life. She is under great distress, although she has gone to great lengths to prove that she has a masking exemption. As a result of the Defendants' abusive and illegal conduct, she has suffered damages in mental distress, anxiety and violations to her constitutional rights.

5. **Brian Edgar** is a resident of Mill Bay, British Columbia.
    (a) Brian travelled from Departure Bay, Nanaimo on the 8:25AM ferry scheduled to travel to Horseshoe Bay on October 17th, 2020. Brian, and his friend Karla arrived at the terminal, and paid for their vehicle, and themselves. They then parked in the vehicle waiting area. They walked out of the area to look for some friends in long-term parking who were coming with them. They were travelling to Vancouver.
    (b) They arrived on deck five (5) and started walking to the back of the boat, passing the Chief Steward's office, and just as they walked by, a man came out and told them masks are mandatory on board, and that if they did not want to wear them they would have to go upstairs onto the outer decks. It was clear that most of the people in that area were not wearing masks and anyone who was wearing a mask was very well distanced from the group not wearing masks. Because of this situation, Brian felt it was a good place to be without infringing on anyone so he joined the group and remained there until it was time to return to the vehicle.
    (c) While on board a couple things occurred that Brian was not witness to. One was that one of his new friends returned from the bathroom with her two (2) year old daughter and said that another passenger had stood in front of her blocking her passage back to where their group was seated. The other passenger told her she had to wear a mask. There was more interaction verbally and other passengers were commenting as well. As she got past the

individual blocking her passage, someone yelled out “your baby is f***ed”. Her baby heard all of this. Shortly before returning to the car, Brian was told that RCMP had been called to meet the ship because of something that had happened on board.

(d) Brian returned to the car and waited to disembark. Shortly thereafter, the boat docked but the unloading did not begin. Brian recalls being held on board for approximately twenty (20) minutes before cars were allowed to disembark. During that time, Brian could see there were people with dogs (presumably RCMP) and others that appeared to be police or security.

(e) When they were allowed to disembark, they were guided out of the flow of traffic and brought to a halt in front of the traffic that was waiting to board the ferry. They were detained there for fifteen (15)- twenty (20) minutes. An RCMP officer and a BC Ferries employee approached them. The Officer asked Karla to produce her License, which she did. The rest of the group were asked for ID, and declined. They were then notified that somehow they had gathered information, which indicated that their group was connected to some incident that had occurred on board and that they were being banned from further travel aboard any British Columbia Ferries vessel for the rest of that day.

(f) They expressed that they had plans to return home that evening and had done nothing wrong and had been involved with no incidents aboard the vessel. Karla let them know that she had remained in her vehicle for the duration of the ferry ride. They were informed that as a private service British Columbia

Ferries had the right to ban them from travel for the day, as British Columbia Ferry Services Inc., operating as BC Ferries (BCF), is a former provincial Crown corporation, now operating as an independently managed, publicly owned Canadian company. The RCMP officer returned Karla's license and they were allowed to drive away, feeling both confused, and inconvenienced by this interaction with British Columbia ferries.

(g) The BC Ferries is realistically the only daily or regular means of travel from the Islands to the mainland and therefore an **essential** service fir B.C. residents and BC Ferries is abusing its authority and **not** applying the law. The responsible minister, in omitting to properly regulate this abuse is violating these platintiff's s.7 and s.15 ***Charter*** rights of the Plaintiffs.

6. The Plaintiff **Jane Doe #3** ("Jane") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) Jane is a nineteen (19)-year old young woman residing in Abbotsford, British Columbia with her parents.

    (b) Jane has fought, and survived through two bouts of cancer, has had her left leg amputated, has a hearing disability, and is currently experiencing heart failure.

(c) On October 16th, 2020 Jane attended at St. Paul's Hospital in Vancouver, British Columbia upon referral from her pediatric oncologist/cardiologist at Surrey Memorial hospital, due to her experiencing sudden onset of heart failure.

(d) Upon Jane's arrival at approximately 10:30 p.m., with her parents, at St. Paul's Hospital, they were offered masks which they refused citing their exemptions, which were honoured without question.

(e) As Jane and her mother transitioned through various meetings with doctors, and various waiting areas, their mask exemptions continued to be honoured. Jane's father was also allowed to continue into the acute ER ward to join them, all the while having his own masking exemption honoured in addition to his wife, and daughter's exemptions.

(f) At approximately 3:30 a.m. on October 17th, 2020 a Dr. Angela M. approached Jane and her parents to speak with them. Jane clearly outlined her care needs, including 24/7 parental support and Dr. Angela M. confirmed that this need would be upheld. Neither Jane, nor either of her parents wore masks during this entire interaction.

(g) At approximately 5:20 a.m. on October 17th, 2020 an attendant sought out Jane, and her parents to take them to the room that they would be staying in, room 5B. Neither Jane, nor either of her parents wore masks during this interaction.

(h) Upon their arrival at 5B, Jane and her parents were approached, and subsequently attacked by a nurse named Andrea. Andrea attacked Jane by asking her “Don’t you know we are in a Pandemic? Don’t you care about people?” Jane simply replied that while she did of course care for others, she was experiencing heart failure, and as such would not engage in any action that would increase that risk. Her parents also stated that neither of them were able to physically tolerate masks, and were as such exempt as well.

(i) Upon hearing Nurse Andrea’s loud accusations, the individual who was sharing a room with Jane began to yell out “What is going on out there? Is someone not wearing a mask? My family has to wear masks? I am afraid, very afraid.”

(j) Jane, and her parents calmly went on to explain that there was no provincial, or city-wide mask mandate, and that a requirement to wear a masks when one is exempt is a violation of the Human Rights Code. Jane, and her parents also added, that masks produced an anxiety/trauma response.

(k) Jane, and her parents were then informed that they had to sign a waiver stating that they were declining service from the hospital, so as to illustrate that the hospital was waiving all responsibility, and placing that upon Jane and her family. However, Jane, and her parents were not declining service, in fact, they were at the hospital seeking care, and treatment for Jane’s heart failure. Jane’s parents explained that not only does her condition require constant parental supervision, but also that, due to Jane’s hearing disability, they could not wear masks when communicating with her.

(l) In response to the vast explanation provided by Jane’s parents, even as their own child experienced heart failure, the nurses handed them a copy of a document entitled “Essential Visits During COVID-19 Recovery”. Jane’s parents noted that the document did not, in fact mention anywhere that the wearing of masks is mandatory. Dr. Angela M. returned to visit the family, and expressed to them that her hands were tied with regards to hospital policy.

(m) Jane felt that the situation was compromising her, and placing her at risk. As such, she asked who else the family could speak with. Dr. Angela M. said that she would go to speak with her boss, Dr. Pritchard. Unfortunately, Dr. Pritchard also stated that the masking exemption would not be allowed. Dr. Angela M. then informed the family that if they could not comply, the choice was theirs.

(n) As Jane and her family waited in the hallway to speak to an administrator, they were approached by a nurse named Jodi, who harshly informed them that they had already been told to wear masks multiple times, and that this had been documented throughout their stay at the hospital. Jane and her family noted that they had already spoken to Nurses Andrea, and Sapna, along with Dr. Angela M. who were all acquainted with their exemptions.

(o) Jane and her family were then told that they needed to leave the unit, or face the threat of security. Nurse Jodi escorted the three to the door of the unit, and left upon being asked who else the family could speak with. Nurse Jodi never returned, so Jane's mother sought her out. Jane's mother was again, escorted to the door of the unit by Nurse Jodi, who simply stated that an individual named Janet Silver was the only person that they could speak to, but that she was not working at the time, and that she would not come up to the floor. Nurse Jodi then walked away without providing any further information by way of documentation, nor orally.

(p) At 7:00 a.m. Jane, and her parents realized they had no choice but to leave St. Paul's Hospital, as they had no one else to speak to. Jane and her parents followed up with the referring physician, Dr. Hoskings, of the British Columbia Children's Hospital, however it took days before contact was achieved.

(q) During that time period, Jane continued to suffer from lack of sleep, swelling, inability to walk, and overall distress.

(r) Since that time, Jane, and her parents have tried to reason with Wynne Chui, a clinical nurse specialist, and Dr. Virani of the Heart Function Clinic. Both individuals work out of St. Paul's Hospital. Despite their attempts to appease Jane, and her parent's requests, it was determined that Jane would not be able to receive in-patient care in a way that honoured her exemptions in all circumstances.

(s) As a result of this entire situation, Jane, and her parents feel abandoned by their health-care system. St. Paul's Hospital negligently placed Jane at risk of severe heart failure, and as such, Jane and her parents remain scarred, and anxious as to who, and what system they can rely on for the necessary care Jane requires going forward.

(t) Since October 2020, Jane has not been able to access medical treatment through the public health system which is causing her immeasurable pain, suffering, stress and anxiety as well as endangerment of her very life.

7. The Plaintiff **Ilona Zink** ("Ilona") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) Ilona Zink has been investing in her business since the age of sixteen (16) when she achieved a level one Makeup Artistry Certification. Shortly thereafter, she went on to attain two (2) additional advanced makeup diplomas that covered advanced photography, theatrical and film makeup, aesthetics, hair styling, colour analysis, and nail technician. In addition, Ilona completed the STAR personality profiling program. By the age of twenty-four (24), she launched her first salon 'Ilona's Aesthetics Inc.'

(b) In 2007, Ilona launched Garrison Studio in the Garrison Crossing, Chilliwack, British Columbia area. Ilona was generating approximately $100,000 annually, prior to re-locating to the Okanagan. Upon her move to the Okanagan, she settled into Kelowna, British Columbia, and began starring in a local makeover show entitled “Garage Makeovers”, in addition to re-launching the Kelowna location of Garrison Studio.

(c) From 2007, until the beginning of the Covid-19 pandemic in 2020, Garrison Studio successfully survived three (3) years of heavy construction in the area, including 8 months of road closures. Ilona invested into building the salon from the ground up, including the necessary expenses such as plumbing, utilities, permits, and all of the salon supplies. The community was just as enthusiastic about the arrival of Garrison Studio as Ilona was passionate about it.

(d) When March of 2020 hit, and the Province of British Columbia began enacting measures that ordered businesses to close, her business was hit hard. In the entire mall, Ilona’s was the only business that was forced to close on March 9th, 2020. To make matters worse she was required by mall management to maintain and upkeep her storefront “daily” as though it were operating. Ilona witnessed all the other stores in the mall remaining open and making money while she was forced to stay closed. She was also informed that any vandalism would not be at the responsibility of mall management.

(e) In an attempt to keep up with customer service, Ilona forwarded the salon phone number to her home line. However, over the course of a three (3)-month period only nine (9) clients ever reached out.

(f) Not only did Ilona's business suffer, but her income as a landlord also suffered. Her tenant decided that she was not going to pay her any further rent. The government informed tenants that they did not have to pay rent, and informed Ilona that she could not evict her to seek a paying tenant. Thus, neither Ilona's business, nor the tenant were bringing in any income, yet she still had a $3000/month payment to shell out for her home as well as an additional $300/month for property taxes.

(g) As a consequence of the tenant not paying rent, Ilona was put in a precarious position with the landlord/house financier as she was in a rent to own contract. Ilona was forced into court proceedings to protect and uphold her contractual agreement to remain in her home.

(h) When Ilona contacted the government seeking financial support, she was informed that as a self-employed individual she was ineligible for such support. She was also ineligible for a business loan, as such a loan required $50,000+ in staff payroll which does not exist for the type of salon that Ilona was running.

(i) As a single mother to a 14-year-old daughter, Ilona became overwhelmed by the simple fact that she was unable to purchase groceries, let alone foot bills such as rent, utilities, phone, car payments, and many other such necessary payments. As a result, Ilona's mental health has suffered immensely.

(j) Ilona was finally able to apply for CERB support payments in late May of 2020, approximately two-and-a-half (2.5) months after she was forced to close her doors on March 9th, 2020. However, after being closed for only 8 weeks at that point, her business had already suffered irreparable damage. Ilona had already fallen behind on all necessary payments both business and personal in nature, and thus, her credit score dropped so low that she was denied the chance to open up a bank account. Due to falling behind on internet service provider payments, Ilona has also lost access to her business email, thus making it difficult for her to collect pertinent evidence. Now a fifty-seven (57)-year-old woman, Ilona feels that the government has wiped out everything she has invested in her business, and by extension, her life since the age of sixteen (16), in a single move with their highly unjust, and baseless Covid-measure orders.

8. The Plaintiff **Federico Fuoco** ("Federico"), is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) Federico Fuoco is the owner of the restaurant 'Gusto', which serves up authentic Italian food in the centre of downtown Vancouver, British Columbia, and has been an active restauranteur for the past twenty-one (21) years. He was also sole shareholder and director of "Fire Productions

Limited" and "F2 Productions Inccorporated", two (2) companies duly incorporated under the laws of British Columbia which were forced to cease operation due to the Covid-measures and their enforcement.

(b) Federico lost one of his restaurants, 'Federico's Supper Club' as a result of the 2020 lockdowns, despite having spent countless dollars on masks for staff, and safety features within the restaurant. His loss also had a domino effect on his staff, and as such he is fearful, and anxious of the newer, stricter measures currently being imposed by Bonnie Henry.

(c) On March 29th, 2021 British Columbia health officer Bonnie Henry announced that all restaurants must close their indoor services effective midnight of the following day, March 30th, 2021.

(d) Federico, like countless other restauranteurs in the Province, was caught completely off-guard by this announcement that was made without prior consultation or forewarning.

(e) For Federico, this complete lack of consultation by the Bonnie Henry was reminiscent of the last-minute decision to cut off liquor service at 8:00 p.m. on New Year's Eve 2020, and with the upcoming Easter holiday, he had, like many other restauranteurs in the Province, spent thousands of dollars on food supplies in preparation for the Easter weekend.

(f) Federico chose to remain open, so that both he, himself, and his staff could continue to gain a livelihood. That all came to an end on Thursday April 1st, 2021 when he was served with a business closure order by his local health inspector, Greg Adamson. Federico was given no prior warning(s), and at the time he was served with this Closure Order. Federico only had two customers drinking tea in his restaurant at the time. After serving the closure order, the health inspector directed his attention to the customers and employees, harassing them, and instruction them to leave.

(g) Federico complied with the ban on indoor dining, over the Easter long weekend. He closed as per his annual norm on Good Friday, and Easter Sunday. On Saturday April 3rd, 2021, he was open in compliance with the most recent health orders, but in contravention of the Closure Order he was served with.

(h) At 1:00 a.m. on Monday, April 5th, 2021 Federico found a Business License Suspension, and Closure Order duct-taped to the glass of his front door at Gusto restaurant, indicating that the suspension would last until April 20th, 2021 at minimum.

(i) On Tuesday, April 6th, 2021 Federico received a Liquor License suspension as "an establishment cannot have a liquor license without a valid business license in place." Federico was devastated, as he had already spent thousands of dollars on renewing all of the licenses related to his business for the year.

(j) When Federico approached Kathryn Holm, the Vancouver Chief License inspector if the extension could be reduced, in order to allow him to open on April 20th, 2021 he was met with flat out hostility. Holm responded by letting Federico know that not only would she not oblige his request, but she also threatened to extend the closure indefinitely, meaning only the City Council could override her decision.

(k) Federico has always tried to remain in full compliance with safety recommendations, and orders from Bonnie Henry for the safety of everyone, including his staff, however he is adamant that the inequity and inconsistency of these orders that penalize restaurant owners above others is completely arbitrarily, negligent, and target the forced closure of only small, independent businesses in favour of multi-national corporations, and denies any concept of evenly applied justice. For example, while customers cannot stand up at Federico's bar to taste wines, even if socially distanced, Bonnie Henry has exempted and allowed for people to engage in wine-tasting at wineries in B.C. This is obviously because Bonnie Henry owns a winery.

9. The Plaintiff **Valerie Ann Foley** ("Valerie Ann"), is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) Valerie Ann is a single mother residing in Richmond, British Columbia. She is a 'person with disability' and has respite care.

(b) On December 5th, 2020 at approximately 1:10 p.m., Valerie Ann boarded the Pacific centre skytrain in downtown Vancouver, British Columbia, when she noticed a transit officer following her.

(c) The transit officer, Peter Kwok with badge #325 then began harassing Valerie Ann about not wearing a mask, and she responded by simply producing her exemption card, which she was not required to do by law.

(d) The transit officer continued to harass Valerie Ann for further proof of a masking exemption. He then informed Valerie Ann that she either had to put on a mask, or cover her face. Valerie Ann informed him that she needed a healthy amount of oxygen to breathe.

(e) The transit officer refused to leave Valerie Ann alone, and continued harassing her, and threatening to place her under arrest for refusing to wear a mask, or face covering. The transit officer then grabbed Valerie Ann by her left arm and began punching her in her side, back, and ribs.

(f) This caught the attention of other passengers, and one of the passengers in the back of the train began yelling for the transit officer to leave Valerie Ann alone. The transit officer momentarily let Valerie Ann go, and then grabbed her again and slammed her against the wall twice.

(g) Valerie Ann tried to move away from the transit officer, and sit back down in her seat, but he grabbed her by her right arm and dragged her right off of the Skytrain as it pulled to a stop. The transit officer then handcuffed Valerie to a railing, where two (2) other transit officers came to his assistance. While Valerie Ann was handcuffed to the railing an announcement was made over the transit loud-speaker reminding travelers to wear a mask but explicitly stated: “unless you are exempt”.

(h) The two (2) other transit officers escorted Valerie to an elevator where she was taken out to the street, still handcuffed, and detained in the back of a police car. After twenty (20) minutes, two (2) police officers arrived and performed a thorough search of Valerie’s person, and her belongings.

(i) After waiting inside the police car for an additional twenty (20) to thirty (30) minutes, the police officers drove Valerie Ann to a garage in Vancouver where she was told she was going to have her photo, and fingerprints taken.

(j) Valerie Ann did not actually get out, and get her fingerprints taken. Instead, the two (2) police officers drove her to Lansdowne mall in Vancouver, British Columbia, to where her car was parked by the Skytrain station. The police officers asked Valerie to sign a document, that she did not properly understand, however she felt undue influence to sign in their presence and did so. Valerie Ann was told that the police officers needed to seize her phone, and they did so.

(k) Valerie Ann was, and remains well aware that masks are mandatory in public spaces in British Columbia, except for those with qualifying medical exemptions. Such measures are not being enforced properly, and Valerie Ann’s experience is one such example of the extremes that people are not resorting to, to uphold the covid-19 restrictions. She has been physically and psychologically traumatized and injured by the illegal conduct and assault of the transit officers.

10. The Plaintiffs **Linda Morken** ("Linda") and **Gary Morken** ("Gary"), are residents of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) Linda Morken resides with her husband, Gary Morken in East Sooke, British Columbia.

    (b) On Friday, February 5th, 2021, at approximately 1:40 p.m. Linda was shopping with her husband Gary for groceries at Village Foods Market in Sooke, British Columbia.

    (c) The store did not have any dedicated personnel stationed at its entrance, so Linda and Gary were not questioned about their lack of masks. They often shop at that same store, without masks on.

    (d) After about twenty (20) minutes of shopping, Linda decided to ask an employee where the plastic bags could be found. Linda required a plastic bag for the oysters that she was planning on purchasing.

    (e) The employee informed Linda that she required a mask to shop in the store. Linda replied that she had a masking exemption, and then repeated her question about the location of the plastic bags. The employee pointed

Linda in the direction of the plastic bags, and then informed her that they do not accept exemptions in their store.

(f) As Linda moved through the store, she asked another employee for clarity on the location of the plastic bags along the way. The employee provided her with directions, and made no mention as to her lack of mask.

(g) Upon Linda's return to the Fish monger with plastic bag in hand, Linda was informed by another employee that she would have to leave the store as she was not wearing a mask. Linda informed him that she was exempt, and would be leaving the store shortly, after paying for her groceries.

(h) The employee stated that exemptions were not honoured in their store, and left the scene, seemingly to go and inform a supervisor, of Linda and Gary's presence in the store.

(i) Several other customers had overheard the employees' statement. A few of them became disrespectful toward Linda and Gary. One man proclaimed himself to be a lawyer, and then proceeded to inquire as to what Linda's exemption was. Linda was well aware that she was within her rights to keep details of her exemption confidential.

(j) One woman spoke up in defense of Linda and Gary. The woman identified herself as a lawyer and informed the inquisitive onlookers that some people were exempt from wearing masks. She herself, along with everyone else in the store was masked.

(k) The store manager then approached Linda and Gary, with an angry and hysterical demeanor. He only identified himself as the store manager, but refused to identify himself by name. He stated that they did not allow exemptions in the store, that there were no exemptions, and that all of his employees and customers must be masked.

(l) Linda and Gary made attempts to explain their exemptions, but were told that they must leave the store immediately and that they would not be allowed to pay for their groceries.

(m) Linda stated that she would be waiting to talk to the police upon their arrival, but that she and Gary would be waiting for them in the store. Neither Linda nor Gary raised their voices as they advocated for themselves. The store manager continued to engage in boisterous, angry theatrics throughout the entire encounter.

(n) Gary went on to wait in the area just outside of the doors, but Linda remained inside, choosing to stand quietly out of the way of any other customers.

(o) While Linda was waiting, she noticed an empty till. She approached the till, placed her groceries on it, and the cashier began cashing her out. Linda was already finalizing payment for her groceries via credit card, when the store manager ran over, yelling that the groceries could not be paid for. Linda informed him that the transaction had already been approved, and suggested that he calm down.

(p) Linda informed that store manager that she would stand out of the way, and continue to wait for the arrival of the RCMP officers, which she did.

(q) As Linda stood waiting, another employee shouted at her to leave the store and never return. Linda replied that she would be leaving soon, however she would be back to shop in the store once they realized that they were the ones breaking the law by not honouring masking exemptions.

(r) Linda later learned from her husband Gary, that the store manager, along with one of the employees were harassing him throughout the duration of the time that Linda stood inside waiting for the RCMP officers to arrive.

(s) Two (2) RCMP vehicles arrived. A truck driven by RCMP Constable Steve James ("Constable James"), and a car driven by RCMP constable Kathleen Biron ("Constable Biron"). Upon their arrival they spoke to Gary, along with the store manager and his assisting employee.

(t) RCMP constable James then approached Linda, and informed her that she was not allowed to shop in the store without a mask. Linda attempted to calmly assert her exemption.

(u) Constable James informed Linda that masks were mandated, and that she must have one on to be inside the store. Linda attempted to speak, but she was silenced by constable James, who told her that if she said anything more, she would be placed under arrest.

(v) Linda asked what exactly she would be arrested for, and constable James informed her that she would be arrested for not wearing a mask in an indoor public space. Linda attempted to speak again, and constable James silenced her again, stating that she had done enough talking.

(w) Immediately following this, the time was approximately 2:00 p.m. when Linda was arrested, handcuffed, and subsequently escorted from the store by RCMP Constable Steve James, and Kathleen Biron.

(x) While still in the store, and during the process of Linda's arrest, Constable Steve James stated that the reason for Linda's arrest came as a result of her failure to wear a mask while frequenting a public space.

(y) Neither of the Constables made mention to Linda at that time of trespassing, or assault. She was only informed that the reason for her arrest was due to her non-compliance with masking measures in place.

(z) Linda was not asked for her name, or identification. Both Constables also failed to inform her of her rights at any time during her handcuffing, arrest, removal from store, and subsequent detainment within the police car.

(aa) As Linda was being placed in the backseat of the RCMP car, she refused to get in until she was told where she was doing. She asserted that she would not be going anywhere until her husband was informed about where she was being taken. Linda was extremely fearful that they would attempt to detain her at a "quarantine centre".

(bb) Linda was informed that she would be taken to the RCMP detachment on Church Street in Sooke, British Columbia. Linda told Gary that she would see him there, and was then taken away without another word from either constable.

(cc) RCMP Constable Kathleen Biron drove Linda to the Sooke RCMP detachment.

(dd) Upon Linda's arrival at the garage of the Sooke RCMP detachment, constable Kathleen Biron formally placed her under arrest, and charged with assault. Linda was shocked upon learning her charge, as she had not assaulted any individual at the store.

(ee) Linda questioned the charge of assault, however Constable Biron advised her not to speak any further, and began reading off Linda's rights to her.

(ff) Linda then requested that the handcuffs be removed, as she was experiencing significant pain in her wrists, and shoulders. They were not removed. Linda recalls having a very difficult, and painful time attempting to exit the police cruiser, with her hands still behind her back.

(gg) Linda was then brought from the garage, into an office area of the RCMP detachment.

(hh) Linda was asked whether she was experiencing any flu-like symptoms such as fever, cough, or any sort of sickness in general. Linda answered "not at all". She was then asked to wear the mask that constable Biron had provided, which she refused, asserting her exemption.

(ii) Linda went on to answer questions about her identification, and place of residence. Linda had, in the presence of the constables, left her purse which carried her identification with her husband Gary prior to getting inside their vehicle. Therefore, Linda did not have any physical forms of identification on her person at the RCMP detachment.

(jj) Linda had only her Vaccine Choice Canada business cards, and a Vaccine Choice Canada “Stand Up for Freedom” pin on her person at the time.

(kk) Linda could feel the adrenaline of stress coursing through her body throughout the entire ordeal, which increased her heart rate to very rapid levels.

(ll) Linda has had a long-standing heart condition, that is well known to, and well documented by her family physician.

(mm) After a considerable amount of time had passed, Linda’s handcuffs were finally removed, and she was instructed to remove her jacket, sweater, jewelry, watch, and shoes. Linda was very cold, so she requested to have only her jacket, sweater, and shoes back. Her requests for those items of clothing were denied, and she was told that she would get them back only upon her release.

(nn) Linda was never given the opportunity to discuss her experience in having had her rights violated at the store, or at the detachment. Each time that Linda tried to speak, she was silenced. Although both Linda and Gary made note that Constable James made considerable efforts to discuss the events that took place with the store manager, and employees.

(oo) Linda suggested that the constables take note of the poster that had recently been issued by the British Columbia Office of the Human Rights Commissioner in hopes that they would see that she and Gary had the right to be exempt from masking.

(pp) Linda's person was then thoroughly searched by the Constables.

(qq) Linda's indicated legal counsel, was then telephoned by the RCMP constables, as Linda herself was placed in a small, and cold room. There was a single phone in the room, and Linda was instructed not to touch it until it rang, at which point it would be her legal counsel on the line. Linda waited in that room for about thirty (30) minutes, until the constables informed her that they were not able to reach her legal counsel.

(rr) Linda was then placed in a cell, and was later given a blanket after expressing that she felt cold.

(ss) Linda was extremely uncomfortable, and began experiencing joint pain due to not having a sweater, jacket, or shoes with her. Her shoulders, and wrists were still in pain due to being handcuffed. Linda experienced amplified symptoms of her diagnosed illnesses as a result of being too cold. Her diagnosed illnesses include Hemochromatosis, Psoriatic Arthritis, CFS, Fibromalgia, and Sjogren's Syndrome.

(tt) Linda once again requested that constable Biron return her articles of clothing to prevent her arthritic pain from worsening in the cold. Linda was simply informed that the heat was turned up. Although Linda did not have her watch, she estimated that she was left in this state for three (3) – four (4) hours.

(uu) At some point during Linda's time in the cell, she was informed that the constables had returned to the store to review video footage of the events that had taken place.

(vv) Upon their return, constable Biron informed Linda that she was being released. While Linda was still confined to her cell, she was asked to provide Gary's phone number so that he could be called to pick her up.

(ww) Linda informed Constable Biron that Gary did not have a cell phone, but that he was likely waiting for her in the detachment parking lot. Constable Biron then asked Linda to describe Gary's truck and provide her with his full name. She also informed Linda that they could not find her drivers license in the system, although Linda assured her that it was active, and updated.

(xx) Linda was then asked to re-state her address, and the spelling of Gary's name, and for confirmation that Gary and Linda resided at the same place of residence.

(yy) Constable Biron recorded the information that Linda relayed onto the blue latex gloves that she was wearing, and left Linda in the cell for approximately another thirty (30) minutes.

(zz) Upon her release from the Sooke RCMP detachment, Linda was given back her belongings, and presented with two fines. One fine was for the "Failure to wear a face covering indoor public space – CRMA 3(1)" in the amount of $230. The second was for the "Failure to comply with direction from an enforcement officer – CRMA 6" also in the amount of $230.

(aaa) When Linda inquired about her assault charge, she was informed that video footage had confirmed that no such assault had taken place. Linda was informed that an individual at the store had claimed that she had purposefully coughed on the cashier. Linda understood that the video confirmed that she was standing alone, at a distance from others, where she coughed once. Linda noted herself that, in any event, it would have been difficult to cough on the cashier as they were situated behind plexiglass.

(bbb)Linda requested a copy of the video footage from the store, and was informed that she could attain it via FOI, or through legal counsel and that the RCMP would not be providing her with a copy.

(ccc) Linda requested to register a formal complaint with the RCMP officers against the store owner, and employee(s) for falsifying claims of assault. As a result, Linda felt shamed, and humiliated by the staff, and customers. Constable James informed her that the assault was a concern raised by the staff, and that had determined that no such assault had ever taken place.

(ddd)Constable James also stated that the store was within its rights as it was private property, and went on to compare it to Linda's home. Linda replied that during operational business hours, the store is open to the public and as such, is not private property. Constable James continued to insist that it was, though neither himself, nor Constable Biron ever made any mention of trespass.

(eee) Constable James also informed Linda that he has looked up the documents on masking exemptions from the British Columbia Office of the Human Rights Commissioner. He stated that they follow orders given to them from the RCMP. Linda realized that Constable James may have never been informed of the legalities with regards to masking exemptions.

(fff) Linda stated once again, that she wished for the RCMP to lay charges against the store, and its staff for making frivolous, vexatious claims against Linda, causing her immense distress. This request was once again denied, and Linda was released.

(ggg) When Linda was re-united with Gary, he informed her that Constable Biron had presented him with a ticket that, without checking, he had assumed was for Linda. Gary simply placed it in the glove compartment. However, Linda had her own blue ticket sheet with her, and upon re-inspection, Gary realized that he himself had been issued with a ticket for frequenting an indoor public space without a mask on.

(hhh) Both Linda, and Gary remain extremely distraught, and mistrustful of the RCMP’s lack of knowledge of the law surrounding masking exemptions, and their abusive and false arrest. For individuals with such serious health complications, this is deeply concerning. They both suffered physically and psychologically from the RCMP officers’ misconduct.

11. The Plaintiff **Pastor Randy Beatty** ("Randy"), is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) Randy Beatty is a pastor at the Living Waters Fellowship located at 2222 Regent Rd, Black Creek, British Columbia V9H 1A1.

    (b) Randy maintains that Bonnie Henry's Orders are in violation of the constitutional right to worship, assemble, and Section 176 (1-3) of the ***Criminal Code***.

    (c) Due to Bonnie Henry's Orders, Randy's church has been subjected to three (3) encounters with the RCMP thus far, as of April 7th, 2021.

    (d) During the first encounter, which was on February 21st, 2021, an officer came to "educate" Randy, and his congregation, following their morning service. They were informed that they were in violation of Covid-19 orders and would be fined if they continued to hold any services. The officer was respectful and considerate. They asked him why the big stores, liquor stores, bars and restaurants were allowed to be open, but the church was forbidden to hold service. He replied, "We are in a tough position. A neighbour had called in a complaint."

    (e) Social Media slander has been rampant for the church, and on FB Merville and Black Creek, Rant and Rave were also debating the church holding services, and causing backlash against them. Threatening messages have been left on the church answering machine.

(f) On March 14th, a police car was parked outside the church property watching, but they made no contact.

(g) On March 22nd, Randy received a call warning of tickets for the church, and its attendees. This conversation was followed up with an email informing Randy of the health officers' directives and that if anyone else submitted a complaint, Randy was told that he was under threat that the RCMP would issue a ticket of $2300 to the church and a second ticket of $230 per person for each attendee at the church service.

(h) In addition to s. 176 of the ***Criminal Code***, the harassment by Police violated the freedom of conscience, belief, religion, and association contrary to the ***Constitution Act, 1867*** and s.2 of the ***Charter***.

12. The Plaintiff **Michael Martinz** ("Michael") is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) On Wednesday March 3rd, 2021 Michael Martinz was returning to Canada from a two (2)-week fly fishing expedition in Colombia via Houston and San Francisco on United flight UA5689. The flight arrived in Vancouver at approximately 1:00 p.m.

(b) Upon exiting the aircraft, Michael walked through Vancouver Airport without a face mask using his British Columbia medical doctor issued medical exemption. He arrived at the automated kiosks in the customs area and filled out his entry information, and proceeded to enter the serpentine queue to speak with a CBSA officer.

(c) Shortly after Michael entered the serpentine queue a CBSA officer politely asked him if he had a face covering. Michael replied that he had a medical exemption, and offered the officer to have a look at his documents.

(d) The officer took the exemption document from Michael and examined them, and immediately asked what the exemption was for. Michael replied that he was under no obligation to provide that information to the officer. The officer acknowledged that Michael was correct, and returned to his original position behind the CBSA stations. The officer returned moments later, and escorted Michael to the far side of the CBSA stations, near the south wall declaring that he did not want Michael "out in the open with the other passengers without a face mask on". Michael complied, and followed the officer.

(e) At the furthest south CBSA station Michael was greeted by another CBSA officer, who asked him some generic questions, including asking him as to why he was traveling during a pandemic. He then questioned Michael as to why he had not booked a designated covid quarantine hotel. Michael replied that he had no intention of staying at a quarantine hotel or taking their PCR test, citing both his section 6 **Charter** rights, and section 14(1) of the ***Quarantine Act*** prohibiting medical tests which penetrate his body.

(f) The officers then informed Michael that he would have to speak with a Health Canada agent and state his case to that individual. Michael's documents were stamped, and retained, and it was indicated to Michael that the officer was handing off the documents to the Health Canada agent.

(g) Michael was then led to the far northern wall of the entrance hall and placed behind a plastic paneled wall. He was informed, once again that they did not want him out with the other passengers unmasked. Michael was then approached by another CBSA officer, who engaged him in generic conversation. During this time the officer offered to collect Michael's luggage, and returned with the luggage on a cart.

(h) Soon after Michael obtained his luggage, the Health Canada agent arrived with two (2) RCMP members at her side. The CBSA officer departed at this point.

(i) The Health Canada agent declared that she was a Registered Nurse and began asking Michael a series of questions regarding his health status. He replied in the negative to all questions, which were in relation to flu-like symptoms. The agent then began to state to Michael as to why such covid measures are in place, and threatened to fine him for non-compliance. Michael asserted his s. 6 **Charter** rights, and told her that he had no interest in complying with unconstitutional orders. The agent probed

Michael as to why he had a medical exemption, to which he again replied that he was under no obligation to disclose that information. The agent did not like this answer, and instructed Michael that she needed to know, and encouraged him to cooperate. Michael obliged, and informed her of the underlying cause. The agent then tried to co-erce Michael into taking a PCR test by telling him that it “only enters your nose about an inch”. Michael replied “one inch or one millimetre is still a contravention of section 14(1) of the ***Quarantine Act***”. The agent then left, seemingly angered by Michael’s response.

(j) After roughly twenty (20) minutes, the agent returned. She exclaimed that she could fine Michael $3,450.00 for every day that he was not in the Covid hotel, and other fines for missing the day eight (8) PCR test. He politely re-asserted his rights, and that he would not be complying. She then told him that he was in contravention of s.58 of the ***Quarantine Act***.

(k) When she departed, Michael quickly referenced the ***Quarantine Act*** which he had previously downloaded. Michael noted that what text he could read on her paper work as she rapidly flipped through and pointed to sections was the word Covid appearing many times. This word appears nowhere in the ***Quarantine Act***, as he noted. He was highly suspicious of her unlawful behaviour at this point.

(l) Another twenty (20) minutes later, the agent returned, with and the RCMP escort. She informed Michael that she had contacted his doctor with regards to his exemption, and that his doctor had confirmed it as being valid. She then produced a ticket, and fined Michael for $3,450.00

(m) She then discussed what further enforcement actions could be taken against him.

(n) At approximately 2:00 p.m. on the afternoon of June 11th, 2021 Michael landed at the Calgary (YYC) International Airport on a flight from Denver, Colorado. He was returning from a trip abroad to Oklahoma City, and various locations in Costa Rica seeking new life opportunities.

(o) He had left Canada on May 22nd, 2021, with his spouse Kari Strobel and she accompanied him for the duration of the trip and throughout the re-entry process.

(p) Upon their arrival at Calgary, and as soon as they exited the aircraft for United flight UA5388, they proceeded to walk through a very empty airport towards the customs and immigration area. They both carry medical mask exemptions provided by their physician. While they were in the CBSA line up a female CBSA officer approached them asking if they needed masks. Michael replied that they did not and they produced their paperwork. The officer was courteous, reviewed their paperwork and asked no further questions before walking away.

(q) After a period of twenty (20) to thirty (30) minutes in the line-up, it was their turn to engage with a CBSA officer. Michael presented their paperwork, Passports, PCR tests, and ‘Arrive Can’ printout, and informed him that they would not be staying in the Government Quarantine facility, and that they would be exercising their section 6, 7, and 9 **Charter** rights. The CBSA officer asked some questions about their travel, whether they had anything to declare, and then directed us to the Health Canada station at the East side of the customs area.

(r) The CBSA officer expressed no concerns about their non-compliance with the illegal travel order. As directed, they approached the Health Canada unit. They were met by a very curt and disrespectful woman that began asking questions in a "rapid fire" fashion.

(s) Michael informed her that they would not be taking the arrival PCR test, and that they would not be staying at the Government Quarantine Facility. She began threatening them fines and produced some paperwork, which she filled out in rapid succession, and erroneously checked the box indicating that they had failed to answer relevant questions in contravention to Sec 15(1) of the ***Quarantine Act***. This is a false statement. When she provided the form for Michael to sign, he noticed that she had transcribed his name incorrectly including his last name, and Michael pointed this out to her, which she then corrected. Michael produced his phone to take a picture of the document and she loudly exclaimed that no photos are allowed in this area.

(t) Michael then asked if he was going to be provided a copy of this document to which she replied that he would. He then signed the document, although felt that he was under duress to do so, and handed the form back to her.

(u) Michael's wife, Kari refused to sign her copy.

(v) They then moved on to the next station where Michael again explained their situation, and a Health Canada official in the neighbouring wicket found great humour in his statements regarding section 14.1 of the ***Quarantine Act*** being poorly written for this situation. They were all able to have a laugh, and the process of having their paperwork stamped lasted no longer than four (4) to five (5) minutes and they were on their way to collect their luggage.

(w) Upon leaving the arrival hall, an airport official was directing compliant travelers toward the PCR testing station, and Michael informed her that they were declining the tests and she said "Okay" with a smile and that was that. Michael was surprised at the stark difference in his experiences, and was taken aback at how a federal order and could be carried out so disparately between regions, that is between Vancouver and Calgary.

12. The Plaintiff **Makhan S. Parhar** ("Makhan") is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) In January, 2020 discussions of Covid-19 began to frequent the media, and **Makhan S. Parhar**'s yoga studio, incorporated as "North Delta Real Hot Yoga Ltd." in Delta, British Columbia started suffering financially as people started to become afraid of attending class. Regular students and even long-term students began cancelling memberships, or asking to have a hold put on. The new year, January to March is the time that the studio usually has the most influx of new students and revenue.

    (b) By March, 2020 Makhan's studio was barely hanging on as class numbers had dwindled due to the fear of contracting Covid-19. He had no intention of closing down, he simply could not afford to shut down. What little amount the studio had left in memberships, was essential for them to pay their bills.

    (c) Makhan had no idea that a 'state of emergency' was declared, as he was stressed in his own life about paying upcoming bills, and keeping his now struggling business running. Makhan sent an email advising students to continue classes to keep their immune system healthy.

    (d) This email triggered many people, and people started calling Delta City Council, Delta Police, the MLA's and the media. Immediately, Makhan started receiving mass amounts of hate emails and phone calls. He also started receiving horrible reviews, and had to close the Studio Facebook page.

(e) Makhan started to receive calls from the media, and spoke with CBC only. The day that he spoke to them, March 19th, 2020 and in the days following, he had horrible and negative articles written about him by every media outlet in the Vancouver area.

(f) A Delta By-law enforcement officer attended at Makhan's studio, and asked why they did not shut down. He told them it was his business, and that he needed to stay open. The By-law enforcement officer then asked if Makhan, and his patrons were "social distancing" inside the studio, and Makhan stated that he did not know that he had to do so. He also informed the officer that business was very slow, and patrons were spaced out by default as a result of that. The officer said he would be by the next day to check if the studio was in compliance.

(g) However, two (2) hours later, the By-law officer came back with a supervisor and they told Makhan that his business licence was suspended by Delta City Council to which Makhan replied that he was just told that the one officer would be coming back the next day to check if the studio was in compliance with social distancing protocols. The supervisor ignored this, and said that they were acting on orders from Delta council. Any subsequent questions that Makhan tried asking were ignored.

(h) At that point, Makhan felt hopeless, and depressed, a feeling that has grown worse since that day.

(i) The hate that Makhan has experienced after the studio closing, and the articles spun by media outlets has been overwhelming. He has even been recognized at stores such as The Home Depot. Throughout the past several months, he has stopped going to stores unless absolutely necessary. When he does go out, he is never alone, and lives in constant fear that someone will stir up an altercation with him.

(j) In August 2020, Makhan was denied boarding at the gate by Air Canada after agreeing to wear a mask for a flight. They were not honouring his medical exemption, and as such Makhan gave in and agreed to wear one. At the gate, just before boarding, they denied his boarding because they did not trust that he would keep the mask on. Air Canada subsequently banned Makhan for life and refused to refund his money. He had to go through his credit card company to get that money back.

(k) On October 27th, 2020 Makhan was returning from visiting friends at Flatoberfest in South Carolina. The final leg of three (3) flights was from San Francisco to Vancouver. Makhan was handed a covid-19 quarantine form by the flight attendant just as the plane started its descent. Makhan did not fill it out, and at about 9:30 pm he went to Canadian customs and handed his passport to them. They asked for the quarantine form, and Makhan answered that he did not fill it out, and did not have any plans of doing so. He was then asked to go speak to the health officer.

(l) Makhan explained the same to the health officer. He was informed that he needed to fill it out as RCMP officers stood off to the side. Makhan filled out the form and signed it.

(m) The following day, October 28th 2020, Makhan went on with his regular life. Around approximately 4:30 pm, he received a phone call from his daughter. She told him that the police were at their home. Constable Jacob Chong with badge #262 took the phone from Makhan's daughter and informed him that, as he was not at home, he would be writing Makhan a $1,150.00 violation ticket, and leaving it there. He refused to tell Makhan his first name at the time, and informed him that he would be back to check on Makhan the following day.

(n) Makhan's daughter was traumatized and afraid after this encounter. She did not want to come home after school the following day.

(o) The following day, October 29th 2020, Makhan stayed home all day. Constable Chang with badge #262, of the New Westminster Police Department came at approximately 7:30 pm with and unidentified officer holding badge #330. He would not answer any questions that Makhan asked of him with regards to what jurisdiction he was operating under. He served Makhan another ticket and told him to toss the ticket from the previous day.

(p) The next four (4) days saw Makhan going about his business, and this entailed him being outside of the home most of the day. The police came several times and he was home once during their visits.

(q) On November 2nd, 2020 at approximately 11:15 pm, Makhan was coming home and noticed a New Westminster Police SUV outside of the parking garage. As he recognized Makhan's car, he turned on his emergency lights. Makhan pulled into the underground and waited for the police. Constable Hildebrand with badge #323 approached the car and told him he was under arrest. He told Makhan to get out of the car.

(r) After Makhan parked and got out of the car, he was arrested and put in handcuffs. He asked several times, if he had committed a crime. The constable refused to answer his questions. Makhan stated several times that this was a false arrest.

(s) Constable Chris Faris with badge #337 started reading Makhan his rights. Makhan repeated the same questions as to whether or not he had committed a crime, or if there was a victim or a complainant. The officer refused to specify the charge and took Makhan to the station.

(t) At the police station, Makhan told all the police that this was a false arrest.

(u) Makhan declined a phone call to a lawyer, and was placed in a cell.

(v) The police damaged his $70 track pants by cutting the draw-strings out of them, and when he asked if they would be reimbursing him the cost of the pants, they replied "no".

(w) After falling asleep, Constable Hildebrand woke Makhan up and told him that he needed to confirm his name and birthdate in order to get out in the morning. Makhan declined, and Constable Hildebrand repeated himself. Makhan stated that he needed to think about the lawfulness of answering. He repeated himself and he said it was to get Makhan out in the morning. Makhan was fatigued at that point, he stated that he was under duress and provided him the information he requested.

(x) Later that night, or in the early morning, Constable Jacob Chong with badge #262, woke Makhan up and told him that he was issuing another violation ticket.

(y) On the morning of November 3rd, 2020 while Makhan was in the holding cell, he received a call from duty counsel. Makhan told the guard that he did not ask for a lawyer. The guard told him that duty calls all the detainees in jail to help get them out. Makhan decided to speak to the duty counsel. He told Makhan that his bail hearing would be before noon and that he would then find out from the Crown what the matter with Makhan would entail.

(z) At around 3:00 pm, Makhan started to worry about his release, as he still had not heard from the duty counsel. Makhan asked the guard to speak to his lawyer, and provided the lawyer’s name. The guard looked up the phone number, and returned twenty (20) – thirty (30) minutes later. He held up a phone and informed Makhan that it was his bail hearing.

(aa) Makhan had trouble hearing the other end of the phone-line. In addition, there was a very loud vent in his cell.

(bb) The Crown prosecutor spoke for twenty (20)-thirty (30) minutes, and stated that they wanted Makhan detained up until the trial. The Duty Counsel suggested that Makhan be released on his own recognizance. In the end, the judge allowed Makhan out as long as a surety signed and would be responsible for him adhering to his bail conditions.

(cc) The judge said that Makhan's surety would have to come to the Court during business hours. It was 4:20pm at that point, and the Court Registry was closed. Makhan spent another night in jail. He was told that he could call someone, and that he would be transferred to a bigger jail for the night. A female police officer got Makhan to sign off on his bail conditions while a justice of the peace was on the phone.

(dd) At approximately 6:00-7:00 pm, Makhan arrived at the North Fraser pre-trial Detention Centre. He was placed on 'Droplet Protocol'. The nurse told him that he would be swabbed. Makhan refused any swabs, or anything placed inside of his bodily cavity. Makhan was segregated immediately after intake. He asked for a phone call, but was repeatedly denied. He was told that he could not interact with the general population until he had obtained a negative test result.

(ee) Makhan told them that he had a bail surety, but needed to phone someone. He stated repeatedly that no one knew of his arrest, and he simply wanted to inform them of such. The prison staff showed Makhan no sympathy.

(ff) Makhan was given a bagged vegetarian dinner, and informed them he was vegetarian for future meals. He was fed three (3) meals a day. Breakfast was at about 7:30 am. Lunch was usually brought at about 10:45 – 11:00 am, and dinner was at about 4:30 pm on Wednesday, Thursday and Friday. On Friday, Makhan was released just as dinner was served, so he did not eat dinner.

(gg) Both Wednesday, and Thursday night's dinners and Thursday's lunch contained meat, therefore Makhan did not get to eat the full meals. He had previously requested, as denoted above, that he was a vegetarian, and the prison denied his request for vegetarian meals.

(hh) On Thursday, when Makhan realized that he might be in jail until after the weekend, and maybe longer. Makhan cleaned the cell by dipping his shower towel (though he was not actually allowed to shower), in the toilet, and wiping down the top bunk, and other areas of the cell.

(ii) Makhan was not allowed to shower nor use the phone because he was not allowed to leave his cell. He asked repeatedly for phone use. The supervisor told him the same thing repeatedly. Makhan required a negative covid-19 test result to be allowed out of his cell. However, the supervisor agreed to take a number and make a call on Makhan's behalf.

(jj) That same day, Makhan asked for, then begged multiple times to get clean underwear and socks. The guards kept agreeing, but the requested garments were never delivered. Finally, very late on Thursday, one (1) of the guards provided Makhan with the requested garments.

(kk) Out of fear that he would be in jail past the weekend and for weeks ahead, Makhan was left in very little choice but to submit himself to a Covid test. This was done in hopes of getting a negative result. Makhan was told that if the test was positive they would contact him, however he never heard from them.

(ll) Thus far, Makhan has had his first court appearance, pre-trial conference, and awaits another pre-trial conference on May 5th, 2021. His bail conditions instruct him to abide by all regulations stipulated by Bonnie Henry. A trial date is set for July 20th, and 30th, 2021.

(mm) Makhan remains very distraught, for himself, and his family's sake.

13. The Plaintiff **Melissa Anne Neubauer** ("Melissa") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) Melissa is a Teacher at the Clearwater secondary school, in Clearwater, British Columbia.

(b) Melissa was on a medical leave from work from March 9th, 2020 – June 30th, 2020 due to having a break down in March of 2020, and being admitted to the mental health unit at Royal Inland Hospital in Kamloops, British Columbia.

(c) By June 30th, 2020, school was finished for the Summer, and as such Melissa physically returned to her work in September of 2020, when school was back in session again.

(d) When Melissa returned for health and safety training the first week of school in September 2020, the Principal of the school, Darren Coates insisted that she wear a mask. Melissa explained that she was exempt. Melissa was then required to have her doctor complete a four(4)-page medical form to allow her exemption. After that, a Disability Accommodation Plan was created for Melissa, which restricted her movement within the school. Restrictions included limiting her access to a washroom, only allowing her access to the building at certain times, and through a specific door, and limiting her access to the office supplies room. These restrictions made Melissa's job difficult.

(e) Melissa made efforts to follow the restrictions, however the principal often harassed her both verbally, and in writing to do a "better job" at following them.

(f) In February 2021, the principal sent Melissa a letter outlining further restrictions on her movements in the school. Melissa only worked half-days at that point, and one of the new restrictions mandated that she was not allowed to be in the hallways between 8:00 a.m. and 3:20 p.m., meaning that she would not be able to exit the building on days that she finished work mid-day, and she would be unable to arrive on days that she started work mid-day. The new restrictions also prevented Melissa from using the washrooms during those times, and the suggested solution was that she leave her class unattended, and use the washroom when there were no students in the hallways. The restriction also meant that any preparation that Melissa needed to do using the printer/photocopier had to be done outside of her contractual workday.

(g) The principal called two (2) meetings: on February 17th, 2021, and February 19th, 2021 as he felt Melissa still was not following the restrictions correctly. Melissa then received a call from the Human Resources Deparement on February 22nd, 2021 telling her that she was being placed on administrative leave pending an independent medical exam by a psychiatrist. The purpose of this medical exam was to confirm that Melissa's family doctor and psychiatrist were providing accurate medical information, and to determine if she was competent to be in a position of responsibility as a teacher. Melissa's first day off of work was February 23rd, 2021. The Independent Medical Exam took place on March 31st, 2021, and Melissa was finally allowed to return to work April 28th, 2021.

(h) Since returning to work she has been wearing a plastic face shield and have not experienced restrictions with her movement around the school, until

May 5th, 2021 when the principal handed Melissa a surplus letter. This letter means that Melissa no longer has a job after the end of the current school year, in June 2021. The school district has an obligation to find Melissa another position in the district, but the position does not have to be in the same community that she currently lives in. As there are no positions available in Melissa's current community of Clearwater, British Columbia, she is being forced to move. Melissa has a mortgage and is at risk of losing her home should her position get suspended, and she will be forced to sell her home and move if her job is relocated to another region. Melissa strongly feels that she was chosen to receive the surplus letter because she did not comply with the masking mandates in the school, and because she is being discriminated against due to her medical conditions. Furthermore the government (Crown) and its Ministers of Education, Health, Public Safety, as well as Chief Medical Officer Bonnie Henry are breaching her constitutional rights, by way of commission, and omission, in not protecting her rights.

14. The Plaintiff **Jane Doe #3** ("Jane") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:
    (a) Jane is a Licensed Practical Nurse ("LPN") at Royal Inland Hospital in Kamloops, British Columbia where she resides.

(b) At the beginning of 2020, Royal Inland Hospital had made a goal to reduce the number of patients being admitted in order to prepare for the "First Wave" of Covid-19 patients. Normally the hospital census is running at 115-120 %. This information was given to Jane, and her team each morning by the charge nurse. Through May 2020 to the middle of June 2020, the Hospital census had been declining greatly, around 80%. Patients had been told not to admit themselves unless it was absolutely critical requiring immediate medical attention.

(c) Jane's father had been one of those patients that had ignored his medical needs in order to stay clear of a hospital in fear of getting Covid-19, causing the severity of his condition to progress. Shortly after, he had suffered a heart attack and was admitted to the hospital anyways. The hospital informed him that they would need to put off a scheduled surgery he had scheduled in Kelowna, British Columbia due to Covid-19 measures "until further notice". He was then put on more medication to alleviate symptoms he was having.

(d) As Jane was working in the Hospital, she was feeling concerned that beds would fill up due to an influx of Covid patients, but they never did. The hospital census stayed at 80% for some time, and then declined even further. Nurses that worked casual shifts soon started to worry that there was not enough work for them to obtain any shifts. During this period, Jane was extremely worried about her father for whom she was caring at his house regularly.

(e) After the hospital began to open up for surgeries around October of 2020, the census began to climb again. The increase in patient census was not related to Covid-19 but from patients who had put their health on hold from the beginning of the year. Jane observed that Covid-19 precautions were not at all organized, and that Nurses would get emails one (1) – two (2) weeks later pertaining to someone who had tested positive with no actual record of the person's name. Instead, room numbers those patients had stayed in were referred to, but who had been in the rooms could not be tracked, nor could the location of where those people had gone, and who else they had interacted with. This then led to further intervention, patients considered high risk for covid-19 were tested on admission. At various times, there would be patients considered high risk in rooms with three other patients, most of whom suffered from cognitive decline and would not know to stay away from the closed curtain with a precaution sign pinned to it.

(f) Throughout the later Fall months of 2020, Jane would often read on social media that the Hospital was overrun with Covid patients, and that it was over census. This was not true, although Jane did not work on the "Covid Floor", she knew nurses that did and they reported to her that there was an average of eight (8) patients total at the time. Although, it was true that the hospital was over census, that was normal pre-pandemic for the hospital.

(g) By February 2021 Covid-19 Vaccines were being distributed to the staff. While at work on one shift in February 2021, Jane heard a "Code Blue" meaning cardiac/respiratory distress being called out over the loud speaker on the vaccine distribution floor. This had not been the only one as Jane had been told by multiple nurses. It was around late February, when "the big outbreak" at Royal Inland hospital went to main stream news. And ninety (90) people had been reported to be positive cases (approximately sixty (60) of these were hospital staff).

(h) Nurses were already scarse and this had put even more strain on the remaining nurses as the nurses who tested positive had to quarantine at home for fourteen (14) days. This had also created fear amongst all of the Kamloops community.

(i) Despite all of this, many Nurses that had been working on the Covid floor and had been around other nurses who had tested positive, without a mask were not testing positive. Jane noted that this did not make any sense. Also, nurses who had taken the vaccine had adverse reactions and tested positive fir Covid-19. One nurse with an underlying heart condition, but previously with no need for treatment, suddenly came down with an exacerbating heart condition characterized by extreme fatigue and heart palpitations as well as becoming significantly ill, and has since been unable to return to work for more than six (6) hours.

(j) In March 2021 Jane had been pulled to the Covid floor. There was one patient considered “Red” meaning that they were covid positive and were in an isolation negative pressure room. However, Jane’s patient, whose test was pending, was put in an room with three (3) other patients, one of whom had severe dementia and would be unable to identify danger. Later that night, Jane checked that patient's results only to find out they were negative and there was only one (1) active Covid positive case in the hospital.

(k) By the end March 2021, Jane had asked her family doctor, Dr. Victor De Kock for a mask exemption due to her increased anxiety and history of asthma that had become exceptionally worse due to the consistency of wearing something over her face for twelve (12) hours a day. This was denied by Dr. Victor De Kock, as he stated that he had been ordered by ‘Interior Health’ not to give out exemptions, especially not to health care workers.

(l) On April 8th, 2021 Jane made another Appointment to attempt to get a mask exemption as her mental health was becoming noticeably worse. Jane recorded Dr. Victor De Kock this time, as she stated “I can not breath” and that her anxiety was getting out of control. He had again refused to provide her with an exemption, and prescribed her anxiety medication along with a refill on her inhaler.

(m) Throughout March and April of 2021,Vaccines were being pushed on staff. Staff that refused to get the shot were being shamed by others, for allegedly "putting others in harm's way". Work began to be too much for Jane, and new information about shedding vaccines had emerged while Interior Health remained silent about it. Jane had been researching the information on the transmitting and/or shedding that can occur via coming into contact with vaccinated people, and was very distressed about her well-being. Jane remained fearful that she would lose her job, and because she was concerned about the possibilities of shedding, she decided to take a stress leave from work, with May 1st being her final day of work. She is presently still on stress leave, relying on Employment Insurance, and awaiting further information that can guarantee her safe return to work.

(n) Jane has not revealed her name on this action for fear of reprisal and/or dismissal by her employer for being a Plaintiff.

- **The Defendants**

23. The Defendant, Justin Trudeau, is the current Prime Minister of Canada, and as such, a holder of a public office.

24. The Defendant, Dr. Theresa TAM, is Canada's Chief Public Health Officer and as such a holder of a public office.

25. The Defendant Her Majesty the Queen in Right of Canada**,** is statutorily and constitutionally liable for the acts and omissions of her officials, particularly with respect to **Charter** damages as set out by the SCC in, ***inter alia***, ***Ward v. City of Vancouver***.

26. The Defendant Attorney General of Canada is, constitutionally, the Chief Legal Officer, responsible for and defending the integrity of all legislation, as well as responding to declaratory relief, including with respect constitutional declaratory relief, and required to be named as a Defendant in any action for declaratory relief.

27. The Defendant Omar ALGHABRA is the Federal Minister of Transport, and as such a public office holder.

28. The Defendant Her Majesty the Queen in Right of British Columbia**,** is statutorily and constitutionally liable for the acts and omissions of her officials, particularly with respect to **Charter** damages as set out by the SCC in, ***inter alia***, ***Ward v. City of Vancouver***.

29. The Defendant Attorney General of British Columbia**,** is, constitutionally, the Chief Legal Officer for British Columbia, responsible for and defending the

integrity of all legislation, as well as responding to declaratory relief with respect to legislation, including with respect to its constitutionality, and required to be named as a Defendant in any action for declaratory relief.

30. The Defendant John HORGAN, is the current Premier of British Columbia, and as such a holder of a public office.

31. The Defendant Dr. Bonnie HENRY, is British Columbia's Chief Medical Officer, and as such a holder of a public office.

32. The Defendant Mike FARNWORTH, is the current Minister of Public Safety and Solicitor General and, as such, a holder of public office.

33. The Defendant, Adrian DIX, is the current Minister of Health for the Province of British Columbia and as such a holder of a public office.

34. The Defendant Jennifer WHITESIDE, is the Minister of Education for British Columbia, and as such, a public office holder.

35. The Defendant, The Canadian Broadcasting Corporation ("CBC"), is Canada's publicly-funded broadcaster and governed, **inter alia**, under the Federal **Broadcast Act,** with a public mandate as Canada's national, publicly-funded broadcaster.

36. The Defendant, British Columbia Ferry Services Inc., operating as BC Ferries, is a former provincial Crown corporation, now operating as an independently managed, publicly owned Canadian company, under Crown license and authority.

37. The Defendant, Mable Elmore is the current British Columbia Parliamentary Secretary for Seniors' Services and Long-Term Care.

38. The Defendant, The Royal Canadian Mounted Police ("RCMP") are the federal and national police service of Canada, providing law enforcement at the federal level, as well as the Province of British Columbia under renewable memorandum and contract.

39. The Defendant, Vancouver Island Health Authority provides health care services through a network of hospitals, clinics, centres, health units, and long-term care locations in British Columbia.

40. The Defendant, Brittney Sylvester is the current BC Ferries Terminal Manager (Relief) at the Tsawwassen, British Columbia, Canada Ferry Terminal.

41. The Defendant, Providence Health Care is a Catholic health care provider that operates seven facilities in Vancouver, British Columbia, Canada. Providence Health Care was formed through the consolidation of CHARA Health Care Society, Holy Family Hospital and St. Paul's Hospital on April 1st, 1997.

42. The Defendant, TransLink (British Columbia), is the statutory authority responsible for the regional transportation network of Metro Vancouver in British Columbia, Canada, including public transport, major roads and bridges.

43. The Defendant, Peter Kwok, is a Translink Transit officer with Badge #325.

- **THE FACTS**

A/ "COVID- 19"- THE TIMELINE

44. **In 2000** Bill Gates steps down as Microsoft CEO and creates the 'Gates Foundation'' and (along with other partners) launches the 'Global Alliance for Vaccines and Immunization ('GAVI''). The Gates Foundation has given GAVI approximately $4.1 Billion. Gates has further lobbied other organizations, such as the World Economic Forum ("WEF") and governments to donate to GAVI including Canada and its current Prime Minister, Justin Trudeau, who has donated over $1 Billion dollars to Gates/GAVI.

45. **In 2002** Scientists engage in "gain-of-function" (GOF) research that seeks to generate viruses *"with properties that do not exist in nature"* and to *"alter a pathogen to make it more transmissible (to humans) or deadly."* [1] [2]

46. In **November, 2002,** China's Guangdong province reports the first case of ''atypical Pneumonia'', later labeled as SARS. In the same month at the University of North Carolina (UNC) Ralph Baric announced the creation of a **synthetic** clone of a mouse coronavirus.

47. On **October 28th, 2003** the Baric group at UNC announces a **synthetic** recreation of the SARS virus.

48. **In 2005** Research demonstrates that Chloroquine is a potent inhibitor of SARS coronavirus infection and transmission. It was deemed a safe drug by the WHO in 1979, except in high doses. [3] [4]

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[1] https://www.ncbi.nlm.nih.gov/books/NBK285579/

[2] https://www.sciencemag.org/news/2014/10/us-halts-funding-new-risky-virus-studies-calls-voluntary-moratorium

49. From **2009** to the present, the "Bill and Melinda Gates Foundation" donates millions to the 'Imperial College of London''(ICL), and further funded the debunked modeling, by Neil Ferguson, at the ICL, that set the COVID-19 'pandemic'' declaration in Motion and acceleration, through the WHO and governments around the globe following suit.

50. **In January 2010** Bill Gates pledges **$10 billion** in funding for the World Health Organization ("WHO") and announces "the Decade of Vaccines." In fact, Bill Gates and GAVI are the second and third largest funders of the WHO after the US government under the Presidency of President Trump. The USA, through its President, cut off funding to the WHO for loss of confidence in it. (Various other countries have also expelled the WHO on allegations of corruption, attempted bribery of its officials, and lack of confidence).

51. **In May 2010**, the Rockefeller Foundation writes a Report, later leaked, unintentionally from within the organization, with a study of a future pandemic scenario, where an unknown virus escapes, and a "hypothetical" scenario on what the appropriate response would be, and its core scenario entitled "how to secure global governance in a pandemic". The Plaintiffs state , and the fact is, that the scenario scripted in this May 2010, Report is what has unfolded during the "COVID-19" so-called "pandemic".

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[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1232869/

[4] https://apps.who.int/iris/bitstream/handle/10665/65773/WHO_MAL_79.906.pdf?sequence=1&isAllowed=y

52. **In 2011** a review of the literature by the British Columbia Centre for Disease Control to evaluate the effectiveness of social distancing measures such as school closures, travel restrictions, and restrictions on mass gatherings to address an influenza pandemic concluded that *"such drastic restrictions are not economically feasible and are predicted to delay viral spread but not impact overall morbidity."* [5]

53. **In May, 2012,** the 194 Members States of the "World Health Assembly" endorse the 'Global Vaccine Action Plan (GVAP) led by the Bill and Melinda Gates Foundation in collaboration with GAVI, and the World Health Organization (WHO).

54. **In 2014** Under President Obama, the National Institute of Health (NIH) **halts federal funding** for gain-of-function (GOF) research. The funding hiatus applies to 21 studies "reasonably anticipated to confer attributes to influenza, MERS, or SARS viruses such that the virus would have enhanced pathogenicity and/or transmissibility in mammals via the respiratory route." NIH later allows 10 of the studies to **resume.**

55. **In 2015** NIAID awards a five-year, $3.7 million grant to conduct gain-of-function studies on the "risk of bat coronavirus emergence." Ten percent of the award goes to the Wuhan, China, Institute of Virology.

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[5] Social Distancing as a Pandemic Influenza Prevention Measure
https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

56. **In January, 2015** at a public appearance, Bill Gates states: ‘’ We are taking things that are genetically modified organisms and we are injecting them into little kids’ arms; we just shoot them right into the vein’’.

57. In 2018 the World Economic Forum (“WEF”) puts forward a proposal for future “Vaccine Passports”.

58. **In 2017** Dr. Marc Lipsitch of the Harvard School of Public Health tells the *New York Times* that the type of gain-of-function experiments endorsed by Dr. Fauci’s NIAID have “done **almost nothing** to improve our preparedness for pandemics, and yet risked creating an accidental pandemic.”

59. **In 2019** NIAID awards a six-year renewal grant of $3.7 million to EcoHealth Alliance and the Wuhan Institute of Virology (in China) to continue their gain-of-function studies on bat coronaviruses.

60. At the January, 2019, World Economic Forum in Davos, Switzerland, **on January 23rd, 2019,** on a CNBC interview Bill Gates boasts that he expects to have a “twenty-fold” return on his $10 Billion vaccine investment with the next few decades.

61. British and French researchers **publish** a study (May 5, 2020) estimating that COVID-19 could have started as early as **October 6, 2019.**

62. On **October 18th, through 27th, 2019** Wuhan, China hosts the Military World Games, held every four years, where more than 9,000 athletes, from 100 countries complete. The telecom systems for the Athletes’ Village are powered with 5-G technology “showcasing its infrastructure and technological prowess’’.

63. **On October 18, 2019 -** The Bill & Melinda Gates Foundation, the World Economic Forum and the Johns Hopkins Center for Health Security convene an invitation-only "tabletop exercise" called **Event 201** to map out the response to *a hypothetical global coronavirus pandemic*.

64. **In November-December, 2019, -** General practitioners in northern Italy start noticing a "**strange pneumonia.**"

65. **On December 2nd and 3rd, 2019** Vaccine scientists attending the WHO's Global Vaccine Safety summit confirm **major problems** with vaccine safety around the world.

66. **On December 3rd, 2019**, At the Global Vaccine Safety Summit in Geneva Switzerland, Prof Heide Larson, MA PhD, Director of the "Vaccine Safety Project", stated:

> "I think that one of our biggest challenges is, as Bob said this morning, or yesterday, we're in a unique position in human history where we've shifted the human population to vaccine-induced, to dependency on vaccine-induced immunity and that's on the great assumption that populations would cooperate. And for many years, people lined up the six vaccines, people were there; they saw the reason. We're in a very fragile state now. We have developed a world that is dependent on vaccinations. We don't have a choice, but to make that effort."

67. **On December 18th, 2019,** researchers at the Massachusetts Institute of Technology (MIT) report the development of a novel way to record a patient's **vaccination history,** by using smart-phone readable nano-crystals called ''quantum dots'', **embedded** in the skin using micro-needles. In short, a vaccine

chip embedded in the body. This work and research are funded by the Bill and Melinda Gates Foundation.

68. **On December 31,2019 -** Chinese officials inform the WHO about a **cluster** of "mysterious pneumonia" cases. Later, the *South China Morning Post* reports that it can trace the first case back to **November 17th , 2019.**

69. **On January 7th, 2020** - Chinese authorities formally **identify** a "novel" coronavirus.

70. **On January 11, 2020 -** China records its **first death** attributed to the new coronavirus.

71. **On January 20, 2020 -** The first **U.S. coronavirus case** is reported in Washington State.

72. **On January 23rd, 2020,** Shi Zheng-Li releases a paper reporting that the new corona virus (COVID-19) is 96% identical to the strain that her lab isolated from bats in 2013 but never publicized.

73. **On January 30, 2020 -** The WHO declares the new coronavirus a **"global health emergency."**

74. **In January, 2020** - A study of US military personnel confirms that those who received an influenza vaccine had an increased susceptibility to coronavirus infection. [6]

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[6] https://www.sciencedirect.com/science/article/pii/S0264410X19313647

75. On **February 5th, 2020 -** Bill and Melinda Gates announce **$100 million** in funding for coronavirus vaccine research and treatment efforts. **On February 11th, 2020** the WHO gives the virus its name: 'COVID-19''.

76. **On February 28th, 2020** - The WHO states that most people will have mild symptoms from SARS-CoV-2("COVID19") infection and get better without needing any special care.

77. **On February 28th, 2020 ,** the WHO announces that more than 20 vaccines are in development globally.

78. **On February 28th, 2020,** the WHO states – "Our greatest enemy right now is not the virus itself. It's fear, rumors and stigma." [7]

79. **On March 5th, 2020** - Dr. Peter Hotez of Baylor College told a US Congressional Committee that coronavirus vaccines have always had a "unique potential safety problem" — a "kind of paradoxical immune enhancement phenomenon." [8]

80. On **March 11, 2020 -** The WHO declares COVID-19 a **pandemic.**

81. On **March 16th, 2020 -** Neil Ferguson of Imperial College London, scientific advisor to the UK government, publishes his computer simulations warning that there will be **over two million** COVID-19 deaths in the U.S. unless the country adopts "intensive and socially disruptive measures." **Imperial College London receives funding from Bill and Melinda Gates Foundation.**

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[7] WHO Director-General's opening remarks at the media briefing on COVID-19 - 28 February 2020 https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---28-february-2020

[8] https://www.c-span.org/video/?470035-1/house-science-space-technology-committee-hearing-coronavirus&start=1380

82. On **March 16th, 2020 -** Dr. Anthony Fauci tells Americans that they must be prepared to "**take more drastic steps**" and "hunker down significantly" to slow the coronavirus's spread.

83. On **March 16th, 2020 -** NIAID launches a **Phase 1 trial** in 45 healthy adults of the mRNA-1273 (COVID-19) coronavirus vaccine co-developed by NIAID and Moderna, Inc. The trial skips the customary step of testing the vaccine in **animal models** prior to proceeding to human trials.

84. On **March 17th, 2020** – Prime Minister Trudeau asks for lockdown measures, under the **Federal Quarantine Act,** banning travel**.** On **March 18th, 2020** British Columbia declares its emergency under the ***Emergency Program Act [RSBC 1996] c. 111.***

85. **On March 19th, 2020** - The status of COVID-19 in the United Kingdom is downgraded. COVID-19 is no longer considered a high consequence infectious disease (HCID). The Advisory Committee on Dangerous Pathogens (ACDP) in the UK is also of the opinion that COVID-19 should no longer be classified as an HCID (High Consequence Infectious Disease). [9] [10]

86. **On March 20th, 2020,** documents in three (3) countries outline Government's policy on coronavirus was going to use applied psychology in order to ramp up

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[9] https://www.gov.uk/topic/health-protection/infectious-diseases

[10] https://prepforthat.com/uk-officials-covid-19-no-longer-high-consequence-infectious-disease/

fear in the population, in order to get the population to adhere more closely to the Government's policy over the response to Coronavirus.[11]

87. **On March 24th , 2020** - Global medical experts declared that efforts to contain the virus through self-isolation measures would negatively impact population immunity, maintain a high proportion of susceptible individuals in the population, prolong the outbreak putting more lives at risk, damage our economy and the mental stability and health of the more vulnerable. [12] [13]

88. **On March 24th, 2020** - Professor Peter Gotzche issues a statement - *"The coronavirus mass panic is not justified."*

89. On **March 24th, 2020 -** Bill Gates announces funding for a company that will blanket Earth with $1 billion in **video surveillance satellites.**

90. **On March 26th, 2020** Microsoft announces it is acquiring 'Affirmed Networks'' focused on 5-G and "edge" computing''.

91. On **March 26th, 2020 -** Dr. Fauci publishes an **editorial** in the *New England Journal of Medicine* stating that "the overall clinical consequences of Covid-19 may ultimately be more akin to those of a severe seasonal influenza," with a case fatality rate of perhaps 0.1%.

92. On **March 30th, 2020,** Dr Michael J. Ryan, Executive Director of the Health Emergencies Programme at the World Health Organization publicly stated, during a press conference that:

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[11] https://childrenshealthdefense.eu/eu-issues/brian-gerrishs-testimony-to-reiner-fullmich-our-oppressors-are-very-frightened-people/

[12] https://off-guardian.org/2020/03/24/12-experts-questioning-the-coronavirus-panic/

[13] https://www.europereloaded.com/twenty-two-experts-questioning-the-coronavirus-panic-videos-scientific-common-sense/

> "And at the moment in most parts of the world due to lock-down most of the transmission that's actually happening in many countries now is happening in the household at family level.
> In some senses transmission has been taken off the streets and pushed back into family units. Now we need to go and look in families to find those people who may be sick and remove them
> and isolate them in a safe and dignified manner".

93. **March 31, 2020**, Dr. Theresa Tam states that, "it is not clear that masks actually help prevent infections, and may increase the risk for those wearing them."

94. On **April 2nd, 2020** - Bill Gates states that a coronavirus vaccine "is the only thing that will allow us to return to normal."

95. **In April, 2020-** A review of the scientific literature conducted by Denis Rancourt, Ph.D., with regards to the use of masking, concluded there is **no** scientific evidence to substantiate the effectiveness of masking of the general public to prevent infection and transmission. [14]

96. **On April 6th, 2020** - German epidemiologist, Knut Wittkowski, releases a statement warning that artificially suppressing the virus among low risk people like school children may *"increase the number of new infections"* as it keeps the virus circulating much longer than it normally would. [15]

97. On **April 6th, 2020 -** Dr. Anthony Fauci states, "I hope we don't have so many people infected that we actually have **herd immunity."**

98. **On April 9th, 2020** - Canadian public health officials stated – "In a best-case scenario, Canada's total COVID-19 deaths can range from 11,000 to 22,000."

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[14] https://www.researchgate.net/publication/340570735_Masks_Don't_Work_A_review_of_science_relevant_to_COVID-19_social_policy

[15] Stand Up for Your Rights, says Bio-Statistician Knut M. Wittkowski. American Institute for Economic Research. April 6, 2020 https://www.aier.org/article/stand-up-for-your-rights-says-professor-knut-m-wittkowski/

And "In the bad scenarios, deaths go well over 300,000." (As of May 21, 2020, the total reported deaths from COVID 19 in Canada was 6,145.) The number of deaths attributed to COVID-19, is in line with typical yearly seasonal viral respiratory illness deaths in Canada. However, the Covid-death numbers are inflated based on the parameters dictated by the WHO to list a death as a Covid-death, namely anyone who has the Covid-19, at time of death ,regardless of whether another clear primary cause of death is evident apart from the simple presence of the covid-19 virus.

99. **On April 10th, 2020** - John Carpay, president of the Justice Centre for Constitutional Freedoms in Canada stated there is reason to conclude that the government's response to the virus is deadlier than the disease itself. [16]

100. On **April 15th, 2020 -** Bill Gates pledges another $150 million to coronavirus vaccine development and other measures. He states, "There are **seven billion** people on the planet. We are going to need to vaccinate nearly everyone."

101. **On April 18th, 2020,** US News reports corona virus tests are ineffective due to lab contamination at the EDC and the CDC's violation of its manufacturing standards.

102. On **April 24th, 2020 -** The Ontario government took the "extraordinary step" to release a database to police with a list of everyone who has tested positive for COVID-19 in the province.[17]

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[16] https://www.jccf.ca/the-cost-of-the-coronavirus-cure-could-be-deadlier-than-the-disease/

[17] https://toronto.ctvnews.ca/mobile/ontario-takes-extraordinary-step-to-give-police-list-of-all-covid-19-patients-1.4910950?fBritish Columbialid=IwAR10jfu_5OYq5BPZJKMyyqiN2P47dK_wbZzFMqC8WEpFxiIhEFt81cGnfqc

103. On **April 30th, 2020 -** Bill Gates writes that “the world will be able to go back to the way things were . . . when **almost every person on the planet** has been vaccinated against coronavirus.” Gates also states that “Governments will need to expedite their usual drug approval processes in order to deliver the vaccine to over 7 billion people quickly.”

104. **On May 5th, 2020,** Neil Ferguson resigns from the UK government’s Scientific Advisory Group for Emergencies (SAGE) after flouting and breaking his own social distancing rules. **On May 6th, 2020**, an anonymous soft-ware engineer (ex-Google) pronounces Neil Ferguson’s COVID-19 computer model “unusable for scientific purposes’’. In fact, Ferguson’s COVID-19 model has been a laughing-stock and debacle.

105. **On May 11th, 2020**, UK Chief Medical Officer Whitty states that COVID-19 is ‘harmless’ to the vast majority’’.

106. **On May 14th, 2020**, Microsoft announces that it is acquiring UK-based ‘Metaswitch Networks’’, to expand its Azure 5-G strategy.

107. On **May 19th, 2020 -** Health Canada approves human trials of a SARS-CoV-2 (COVID-19) vaccine without clear evidence that prior animal testing to identify the potential risk of pathogenic priming (immune enhancement) has been conducted.

108. **On May 21st, 2020** - Four Canadian infectious disease experts, Neil Rau, Susan Richardson, Martha Fulford and Dominik Mertz state - “the virus is unlikely to

disappear from Canada or the world any time soon" and "It is unlikely that zero infections can be achieved for COVID-19." [18]

109. **By May 2020** - Over six million Canadians have applied for unemployment benefits and 7.8 million Canadians required emergency income support from the Federal government, [19] because of economic shut-downs and closures dictated by Covid-measures.

110. **By May, 2020** - Estimates of the Federal deficit resulting from their response to SARS-CoV-2 (COVID-19) ranges up to $400 billion. [20] (This exceeds the Canada's national budget for a year). By April 20th, 2021, according to the Federal Budget released, the national debt has climbed to $1.2 Trillion.

111. On **May 20th, 2020 -** Dr. Teresa Tam, Canada's Chief Medical Officer, publicly advised the use of non-medical masks for the general public to provide an *"added layer of protection"* that could help prevent asymptomatic or pre-symptomatic Covid-19 patients from unknowingly infecting others. Dr. Tam's advice is not supported by scientific evidence. [21]

112. Throughout the "pandemic" Bonnie Henry was on record saying masks do not work and was also part of the 2015 nurses arbitration as an expert witness, reporting the same.[22]

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[18] https://nationalpost.com/opinion/opinion-we-are-infectious-disease-experts-its-time-to-lift-the-covid-19-lockdowns

[19] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[20] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[21] https://www.politico.com/news/2020/05/20/canada-non-medical-masks-provinces-reopen-271008

[22] https://action4canada.com/masks/

113. **On May 21st, 2020** - A letter from Mark Lysyshyn, MD, Deputy Chief Medical Health Officer with Vancouver Coastal Health states – "Although children are often at increased risk for viral respiratory illnesses, that is not the case with COVID-19. Compared to adults, children are less likely to become infected with COVID-19, less likely to develop severe illness as a result of infection and less likely to transmit the infection to others." Dr. Lysyshyn further states – "Non-medical masks are not needed or recommended. Personal protective equipment such as medical masks and gloves are not recommended in the school environment." [23]

114. On **May 22nd, 2020** - Prime Minister Justin Trudeau told reporters that "contact tracing" needs to be ramped up across the county. Trudeau stated that he "strongly recommends" provinces use cell phone apps when they become available, and that this use would likely be mandated.

115. On or about **May 25th,2020**, the Federal government announced potential **Criminal Code** provisions, making it a criminal offence to publish "misinformation" about the COVID-19. "Misinformation" quickly evolves to mean as any opinion or statement, **even from recognized experts**, which contradicts or criticizes measures taken and/ or mandated by the WHO, to be implemented globally by national and regional governments.

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[23] http://www.vch.ca/Documents/COVID-VCH-Schools-May-21-2020.pdf

116. **As of June 9th, 2020,** neither Prime Minister Trudeau, nor British Columbia Premier Horgan are willing, and in fact refusing to disclose what medical advice, and from whom, they are acting upon.

117. The Plaintiffs state and the fact is, that the Defendants and their officials, were stepping up compulsory face-masks in order to maintain a physical and visual tool to maintain panic, fear, and to enforce compliance of their baseless measures due to increasing public resistance, and of their groundless and false basis. The masks, further act as a visual and present symbol of intimidation and show of who is in power, and do not act to medically assist but to publicly muzzle, panic, instill fear, and exert compliance to irrational and ineffective COVID measures from the Plaintiffs and others. The Plaintiffs state and the fact is, that these measures were up-stepped after a Canadian survey was released that revealed, **inter alia**, that:

(a) 50% of Canadians did not believe Justin Trudeau was being honest about the COVID-Measures ;

(b) 16% of the Canadians believe that the COVID-Measures are being used to effect mandatory vaccination and contract tracing and other surveillance;

(c) 19% of the Canadians do not believe that COVID-19 is no more harmful then a common flu; and

(d) 7% of the Canadians believe that COVID-19 does not exist at all and is being mis-used as pretext for other, ulterior motives.

118. On **June 3rd, 2020** Federal Minister of Transport, Omar Alghabra, announced that face-masks are required by **all,** when taking public transportation in Canada whether by plane, train, ship, or transit.

119. Between **April 1st and June 15th, 2020** the Canadian Civil Liberties Association (CCLA) reports that approximately 10,000 Covid related charges were laid across Canada.

120. **On June 17th, 2020,** the Toronto Hospital for Sick Children, considered the world's Premier Children's hospital completed an advisory report, publicly released days later, to the Minister of Health and Education, with respect to recommendations for the re-opening of school in September, 2020. The report was prepared by two experts (in Virology) , upon the **contribution and review** of another **twenty (20)** experts as well as the "SickKids Family Advisory Networks". The 11-page report is resound and clear on the facts stat:

(a) Children are at extremely **low** risk when it comes to COVID-19;

(b) Schools should re-pen in a normal setting in September, 2020 in Ontario;

(c) That **no** mask should be worn by children because of no evidence of effectiveness and in fact masks pose a health risk for children;

(d) Social distancing should not be employed; and

(e) That masks and social distancing pose significant physical and psychological health risks to children.[24]

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[24] "COVID-19: Recommendations for School Re-opening", Toronto Hospital for Sick Children, Report dated June 17th, 2020.

121. **On June 23rd, 2020**, the Justice Centre for Constitutional Freedoms calls for, in a 69-page report, an end to the lock-down measures based on an analysis of the lack of medical and scientific evidence for their imposition and the infliction of unwarranted and severe **Charter** violations.[25]

122. **On June 26th , 2020**, Sweden's COVID-19 expert, Anders Tegnell, blasted the WHO'S response to COVID-19 and states that the "world went crazy" and further stingingly criticized the WHO as "mis-interpreting data" in branding Sweden as one of eleven (11) countries who are seeing a "resurgence" in COVID-19 cases. The Plaintiff state, and the fact is, that Sweden was one of the few countries in the World who did **not** adopt, wholesale, the WHO protocol and in fact faired much better then the countries who did, including Canada, in that there was no economic shut-down in Sweden. Dr. Tegnell further stated that the lockdowns "fly in the face of what is known about handling virus pandemics.[26]

123. **On June 30th, 2020,** the Ontario Civil Liberties Association called for the extraordinary step, calling on the public to engage in "civil disobedience" of the masking By-Laws, based on the overwhelming scientific and medical evidence, that masks are ineffective and pose health risks.

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[25] "Unprecedented and unjustified: a **Charter** Analysis of Ontario's Response to COVID-19" June 22nd, 2020.

[26] "Daily Mail Online", Daily Mail.com, June 26th, 2020

124. **As of June 23rd**, 2021 it has come to light that a Portugal court ruling revealed that only 0.9% of 'verified cases' died of COVID, numbering 152, not the 17,000 deaths that have been claimed[27]

125. Since the summer of 2020, to the present, the saturated criticism of the Covid measures, from the world scientific, medical and legal community has been overwhelming, with an avalanche of peer-reviewed studies that indicate that: lockdowns do not work; masks do not work; social distancing does not work. As well as Public Health Officers, including Bonnie HENRY, warning that the Covid-19 "vaccines" will **not** ensure immunity, will further not prevent re-transmission of the virus to and from the people vaccinated.

126. Meanwhile, from the summer of 2020, to the present, the avalanche of the preponderance of the scientific and medical evidence also clearly demonstrates that the harms, including the death-toll, from the measures themselves exponentially **far** out-numbers the harm and deaths from the virus.

127. The Plaintiffs state, and the fact is, that the lockdowns themselves, of schools and businesses, and to independent business, and that community is that their lockdowns are both unnecessary, ineffective, and wholesale destructive.

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[27] https://americasfrontlinedoctors.org/frontlinenews/lisbon-court-rules-only-0-9-of-verified-cases-died-of-covid-numbering-152-not-17000-claimed/

- **B/ THE COVID-19 MEASURES**

- **Federal Measures**

128. On or about March 17th, 2020 Justin Trudeau announces a lock-down and invoked the following legislation with respect to "pandemic":

    a) The **Federal Quarantine Act,** stipulating the lock-down of flights to Canada, and that Canadians returning to Canada, self-isolate and quarantine themselves for a 14- day period;

    b) Various pieces of legislation setting out financial assistance for various persons and sectors.

Trudeau further and effectively shut down Parliament. Parliament has only "convened", sparingly, to pass spending measures, with an amputated, hand-picked, selection of 25 MPs, notwithstanding that technology such as "Zoom", exists to accommodate and convene the entire Parliamentary contingency of the 338 MPs, to date it has not happened. Parliamentary Communities rested in a legislative coma until April, 2020, where after some sit virtually.

129. Justin Trudeau held (holds) daily press conferences to "inform" Canadians, and further issues decrees and orders, such as "stay home", which decrees and fiats have no legal effect, notwithstanding, that they were acted upon by Municipal and Provincial enforcement officers, but at that no time has the Federal Parliament invoked the Federal **Emergencies Act .**

- **Provincial Measures**

130. In British Columbia, the government followed suit as set out below.

131. On **March 17, 2020**, Bonnie Henry issued a notice under purportedly the ***Public Health Act*** **(the** ***"PHA")*** that the transmission of the infectious agent SARS-CoV-2, had caused cases and outbreaks of an illness known as COVID-19 in British Columbia.

132. On March 18, 2020, the British Columbia Provincial Government declared a "state of emergency" under the ***Emergency Program Act [RSBC 1996] c.111***.

133. The declaration of a public health emergency further purports to empower Bonnie Henry (the Chief Provincial Health Officer), to issue verbal orders that had immediate effect.

134. The purported rationale for the emergency in the period between January 1st to March 31st, 2020, was that there were three (3) reported deaths attributed to the COVID-19 virus in Canada. Two (2) in Ontario, and one (1) in British Columbia.

135. In the following months, the mortality rate attributed to COVID-19 increased but was mainly concentrated in care home facilities, and especially those that were understaffed and without sufficient medical supplies, just like every other previous year where the elderly die, in similar numbers, from the complications of yearly influenza.

136. In its "emergency" response, the Provincial Government closed large sectors of the British Columbia economy: closing restaurants, fitness facilities, shopping centres, religious and other peaceful gatherings, issued travel bans, cancelled

medical treatments, as well as purported to prohibit constitutionally protected association and assembly for protests.

137. While hospitals prepared for an influx of COVID-19 patients, many medical procedures and operations were cancelled under the Provincial Government's directives. As a result, many died from cancelled surgeries and non-seeking of medical treatment. However, the high number of intensive care COVID-19 patients did not materialize. Most people infected with COVID-19 experienced mild to moderate influenza-like symptoms that dissipated quickly.

138. By **June 24, 2020**, the British Columbia Provincial Government and Public Health Officer's restrictions on non-essential travel, hotels, and film industries were lifted. By **September 2020**, on site, and in person instruction at public schools, was reintroduced, after having been locked down.

139. The authority to exercise emergency powers under Part 5 of the ***PHA*** purportedly ends when the Provincial Health Officer provides notice that the emergency has passed (s. 59(1)).

- **Orders of Provincial Health Officer Bonnie Henry**

140. The Provincial Health Officer has issued more than fifty (50) orders purportedly under the authority of Part 5 of the ***Public Health Act [SBC 2008] c. 28,*** including verbal orders (the "PHA Orders").

141. Most of the Provincial Health Officer's ***Public Health Act [SBC 2008] c. 28*** Orders do not reference the medical or scientific basis for issuing the order and do not satisfy the requirements of s. 52 of the ***Public Health Act [SBC 2008] c.***

28, and further constitute the constitutional violation of "dispensing with Parliament under the pretext of Royal Prerogative". In a word, Bonnie Henry is illegally and unconstitutionally acting and governing as if she were the Queen.

132. Order of the Provincial Health Officer, Bonnie Henry, was issued on February 5th, 2021.

133. Order of the Provincial Health Officer was issued on April 21st, 2021.

134. Order of the Provincial Health Officer dated June 30th, 2021.

134. In British Columbia, like elsewhere, the deaths caused by the **covid-measures themselves** far outnumber the deaths purportedly caused by Covid-19.

142. Despite the relatively low number of persons infected by COVID-19 in British Columbia, the Public Health Officer failed to provide notice that the emergency had passed and the Lieutenant Governor in Council continued to extend the emergency declaration under *EPA*, through a series of indefinite and unjustified extensions to the present day.

143. British Columbia is currently in the longest state of "emergency" in its history.

- **Ministerial Orders**

144. Furthermore, As of **June 17, 2020**, the British Columbia Provincial Government had issued thirty(30) orders under the authority of s. 10(1) of the ***Emergency Program Act [RSBC 1996] c.111,*** including orders that were later repealed and replaced. More orders have been issued since then. All of the orders issued

by the Minister contain provisions stating that they apply only for so long as the declaration of the state of emergency is in effect, which has, to date, been in perpetuity.

145. Most of the Provincial Government's orders do not reference a specific sub-paragraph under s. 10(1) but instead rely on the general provision in s. 10(1) that the Minister may "do all acts and implement all procedures necessary to prevent, respond to or alleviate the effects of any emergency or disaster.", without specifying the “effects” and how those “effects” justify the state of emergency.

146. The Plaintiffs state, and fact is, that reality is that either all or most of the Ministerial orders were not necessary to "prevent, respond or alleviate" any of the effects of COVID-19 to the population of British Columbia.

147. The Provincial Government also failed to establish legally binding conditions on the use of sub-delegated powers to suspend, waive or otherwise alter statutory provisions for the following Ministerial orders and subsequent orders replacing them:

a) Ministerial Order M083 which issued on March 26, 2020, after the initial declarationof a provincial state of emergency. This order applied to municipalities, regional districts and the City of Vancouver. Ministerial Order M083 was repealed and replaced by a new order on May 1, 2020, M139, subsequently in turn repealed and replaced by a new order, M192, on June 17, 2020.

b) M139, Local Government Meetings and Bylaw Process (COVID-19) Order No. 2,which repealed and replaced M083, Local Government Meetings and Bylaw Process (COVID-19) Order;

c) Ministerial Order M089, Residential Tenancy (COVID-19) Order, 30 March 2020.

d) Ministerial Order M179, Commercial Tenancy (COVID-19) Order, 29 May 2020;

e) Ministerial Order M416, Food Liquor premises, Gatherings and Events (COVID-19) Order No. 2;

f) Ministerial order M425 was issued on November 24th, 2020;

g) Ministerial Order M172 was issued on April 21st, 2021.

141. Indeed, the Ministerial Orders and ***Public Health Act [SBC 2008] c. 28*** Orders (collectively, the “orders") were and continue to be, inconsistent, contradictory, and contrary to reasonably established medical and scientific principles and research, and do not satisfy the requirements of s. 9 of the ***Emergency Program Act [RSBC 1996] c.111*** and s. 52 of the ***Public Health Act [SBC 2008] c. 28,*** including for, but not limited to, the following reasons:

(a) discouraging the public from wearing masks on the basis that they were ineffective;

(b) mandating that masks be worn in public places;

(c) closing in-house dining but permitting take-out;

(d) not mandating that cooks in public dining establishments wear maskswhile preparing food for take-out;

(e) allowing in-house dining for groups of the same household, that could sitnext to groups of different households;

(f) failing to enforce these orders;

(g) allowing shopping in large warehouse grocery and "big box" franchisessuch as Walmart, Costco, and others (the "Big Box Stores");

(h) prohibiting and interfering with religious gatherings contrary to s.176 of the ***Criminal Code***;

(i) prohibiting peaceful gatherings if unrelated to work contrary to constitutional rights as set out below in the within Notice;

(j) limiting shopping in shopping malls;

(k) prohibiting certain travel throughout British Columbia but allowing travelers from other provinces to travel within British Columbia;

(l) admitting that the limit on the size of gatherings is arbitrary and was never grounded in science.

142. The effects of these restrictions placed on the Plaintiffs and other British Columbians, have caused damage disproportionate to any threat posed by COVID-19, including but not limited to the following:

(a) Significant increase in overdose deaths. For example, approximately five people die per day in British Columbia due to an overdose, which is more than the number of people attributed to COVID-19 related deaths in British Columbia;

(b) Increase in suicide rates;
(c) Increase in depression and mental-health illness;
(d) Loss of gainful employment;
(e) Increase in domestic violence, including child battery;
(f) Increase in bankruptcies and foreclosures;
(g) Increase in divorces and deteriorations in personal relationships;
(h) Decrease in critical services for the homeless and low income;
(i) Increase in deaths due to medical treatments/surgeries being denies. 40% increase in cancer deaths forecasted as people were too fearful to see their physician to receive early diagnosis;
(j) Increase in insurance premiums;
(k) Such other effects as may be proved at trial.

143. The Plaintiffs state, and fact is, that placing this in perspective, in 2018, three-

hundred and fourteen (314) British Columbians died in motor vehicle incidents. In 2019, nine-hundred and eighty-four (984) people died from illicit drug use in British Columbia and in 2020, one-thousand, five-hundred and forty-eight (1,548) people died from illicit drug use.

144. In contrast, there were 678 deaths in British Columbia attributed to COVID-19 by the end of week 50 in 2020.

145. The Plaintiffs state, and fact is, that ten-fold times more people are dying from the Covid measures than from Covid-19 itself.

146. This kind of economic harm has impacted and will continue to impact British Columbians and all those who do business in British Columbia for decades by making British Columbian goods and services less competitive in the global marketplace.

147. The Plaintiffs, like many British Columbians, have experienced, and continue to experience, severe economic hardship as a result of the Orders.

148. Meanwhile the Provincial Government, the Provincial Health Officer, and her staff continue to enjoy economic security through salaries, other benefits, and pensions. All government salaries, other benefits, and pensions are at public expense and far less subject to market conditions than the millions of British Columbians' lack of economic security caused by the continued state of "emergency".

149. Neither the Provincial Government nor the Public Health Officer to-date have conducted a risk assessment to assess the likelihood and severity of the

negative consequences of the Orders, including those negative outcomes to economic, physical,emotional, and mental wellbeing mentioned but not limited to the Restriction Effects.

150. The net, summary effect, of the orders contained above are as follows:

(a) Ordering the shut-down of all business, except for ‘essential’’ businesses which were tied to food, medicine, doctors, and hospitals;

(b) A ‘social distancing’’ of two (2) meters;

(c) No ‘public gathering’’ of more than five (5) persons, who are un-related, with ‘social distancing’’ of two (2) meters, which was later increased to ten (10) persons;

(d) Restaurant and bar shut-downs, except for take-out service;

(e) The physical closure of all public and private schools, daycares, and universities;

(f) The mandatory use of face-masks, mandated by the Ministry of Health, to all the Medical Regulatory Medical Services Colleges, to direct all their licensed members to impose mandatory masking of all patients, employees, and members, in their place of work;

(g) The shut-down of all park amenities including all play-grounds and facilities for children;

(h) The elimination of one-on-one, and all other programs for special-needs children, and those suffering from neurological and physical disabilities;

(i) Banning all public gatherings over five (5) persons, notwithstanding a social distancing of two (2) meters, including the banning of religious services, including a restriction on marriages, funerals, and other religious actions and ritual and rites.

151. On May 21st, 2021, Dr. Bonnie Henry, and her department announced the availability of the Covid vaccines for twelve (12) to seventeen (17) year olds, without the need for their parents' consent, notwithstanding:

(a) That the Vaccines have NOT undergone required trial and safety protocols but were all made under and "emergency" basis;

(b) That there has NOT been a recorded death or life-threatening case of any twelve (12) to seventeen (17) year old in Canada;

(c) That twelve (12) to seventeen (17) year olds are not at risk of Covid-19;

(d) That, in the absence of informed consent, it constitutes medical experimentation and thus constituted a "crime against humanity" emanating from the Nuremberg trials, and principles following the medical experimentations by the Nazi regime and codified in Canada, as a Criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act;***

(e) And that on June 5th, 2021 Dr. Joss Reimer, Medical Lead for the Manitoba Vaccine Implementation Task Force, in asserting that the various vaccines can be mixed, publicly declared that the Covid-19 vaccinations are a "big human experiment";

(f) That many twelve (12) to seventeen (17) year olds do not possess the intellectual capacity to give informed consent;

(g) And by doing so Dr. Bonnie Henry, and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

- **Reckless and Unlawful Statements and Actions of Leaders**

152. The Plaintiffs state, and the fact is, that Trudeau, and the other Co-Defendants reckless in their groundless, ignorant, and arrogant dictates, without legal basis, so as to cause and instill a general atmosphere of fear, panic and confusion. Such decrees by Trudeau, and others, including Henry, included, but are not restricted to the following:

(a) With respect to Prime Minister Justine Trudeau, he made the following (mis)statements, for example:

(i) Prime Minister Justin Trudeau told Canadians: "**People should be staying home, self-isolating with family.**"[28]

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[28] Retrieved at : https://ottawacitizen.com/news/local-news/covid-19-confirmed-cases-latest-news-and-other-developments-in-ottawa/

(ii) **"We've all seen the pictures of people online who seem to think they're invincible," Trudeau said. "Well, they're not. Go home and stay home."**[29]

(iii) Justin Trudeau has issued a stern warning to Canadians who ignore social distancing advice, telling citizens to "**go home and stay home!"** – and leaving open the possibility his government could take more extreme measures as the number of confirmed coronavirus cases continues to rise.[30]

(iv) "To all the kids out there, **who can't go on play dates** or on spring break vacation...I know this is a big change, but we have to do this for our grandparents and for the nurses and doctors in hospitals."[31]

(v) "So, to everyone**, stay at home,** and no matter what stay 2 meters apart, if you do have to go out. When it gets hard let's remember we are all in this together." (24:35) "…how important it is not just for ourselves, but for our loved ones and health care workers, for our seniors, **that we stay home,** that we stay 2 meters apart**,** as much as we can and that we continue to wash our hands regularly." (30:12)[32]

(vi) "I know it is tough to stay home, especially as the weather gets nicer. If you have kids, it is even tougher, but to get back outside and running around the playground and park as soon as possible, **you need to keep them inside for a little longer**. (10:22)[33]

(vii) "…but I can tell you that we know it is very difficult situation for Canadians. There are very challenging projections out there that will emphasize how important it is for all of us to do our part, **to stay home**, to keep ourselves safe, to keep our loved ones safe and get through this…"(42:26)[34]

(viii) More and more Canadians are avoiding public spaces. If your friends or family members are still going to parks and playgrounds, they are risking lives. Tell them to stop.[35]

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[29] Retrieved at: https://www.vice.com/en_ca/article/g5xng4/coronavirus-updates-canada-ottawa-and-justin-trudeau-may-jail-and-fine-people-to-keep-them-home

[30] Retrieved at: https://www.theguardian.com/world/2020/mar/23/justin-trudeau-canada-coronavirus-stay-home

[31] https://www.richmond-news.com/news/trudeau-dodges-covid-19-lockdown-appeals-1.24103564

[32] Retrieved at: https://www.youtube.com/watch?v=76iqxbZz4X8

[33] Retrieved at: \https://www.youtube.com/watch?v=A3GDk8uHv5A

[34] Retrieved at : https://www.youtube.com/watch?v=mfAa0vLItn8

[35] https://pbs.twimg.com/media/EVf0_maXkAE7qBg.jpg

(ix) On the topic of Asymptomatic viral shed contradiction puts to questions the merit of social distancing among healthy people: A reporter asks Mr. Trudeau, after his wife had been tested positive for coronavirus, what kind of advice he had received from medical doctors.

> "In terms of advice I have gotten from medical professionals, it was explained to me that **as long as I do not show any symptoms at all, there is no value in having me tested."** (15:30)A reporter asks about the possibility of transmission to other members of the cabinet,17:02 "According to Health Officials **the fact that I have expressed no symptoms means that anyone that I engaged with throughout this week has not been put at risk** (17:12)[36]

(b) While Trudeau made the above-noted comments and decrees, **without legal basis whatsoever**, and further contradicted actual Provincial laws, Trudeau, all the while breaks social distancing Provincial Laws by:

(i)On March 29, 2020 ; **Dr. Theresa Tam,** the **Chief Public Health Officer of Canada**:

> "Urban dwellers/Cottagers should RESIST THE URGE to head to the cottage and rural properties as these communities have less capacity to manage COVID19."

(ii) On April 1st, 2020 the government of Quebec introduced strict **travel restrictions** across the province, including police checkpoints to prevent unnecessary travel in and out of Quebec.

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[36] Retrieved at: https://www.youtube.com/watch?v=SjEgtT98jqk

(iii) Shortly after **calling on Canadians to “stay home”** and “Skype that big family dinner,” Trudeau crossed the provincial border from Ottawa into Quebec on Easter Weekend to visit his wife and three children who had been living at their Harrington Lake cottage since **March 29** , 2020.[37]

(c) With respect to Premier Doug Ford of Ontario:

(i) Premier Ford tells business they can refuse customers that will not wear a mask.

> "Any business has the right to refuse anyone. That's their business," Ford said on a teleconference last week. Despite the fact that no mandatory masks order was in place, and contrary to the legal opinion of the Canadian Civil Liberties Association (CCLA);[38]

(ii) Ford tells people to stay away from their cottages but goes to visit his own cottage;[39]

(iii) Doug Ford has over his two daughters, and family, who each live in different households for a total of 6 – violating 5 person maximum orders.[40]

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[37] Retrieved at https://globalnews.ca/news/6815936/coronavirus-justin-trudeau-andrew-scheer-easter-travel/

[38] https://www.cambridgetimes.ca/news-story/9994798-doug-ford-says-businesses-can-refuse-anyone-not-wearing-a-mask-but-rights-watchdog-says-not-so-fast/?fBritish Columbialid=iwar2_ba_3eddfpm0shzqjpnht6fmhw0yjfualjugjrnxczcvi_70gfwodqla https://www.inbrampton.com/no-mask-no-service-businesses-have-the-right-to-require-masks-on-customers?fBritish Columbialid=IwAR2UMCjwOtyIXU898j_EwlnBr1nuqiM7TJxJDs6ECz5tACPAHFMipGiHB7c

[39] https://toronto.citynews.ca/2020/05/08/ford-cottage-coronavirus/

[40] https://www.cbc.ca/news/canada/toronto/ford-physical-distancing-daughters-1.5564756

(d) With respect to Toronto Mayor John Tory:

  (i) **On April 19, 2020:** numerous photos of social distancing violations during a parade to salute health care workers (pictured standing shoulder to shoulder down University Ave.)[41]

  (ii) May 23: Here is Tory violating social distancing rules and modeling counterproductive mask use at Trinity Bellwoods park, where **thousands** had gathered;[42]

(e) With respect to Bonnie Henry, by imposing lock-down measures but exempting wine-tasting at wineries, because Henry owns a winery which begs the question: if you can stand and wine taste at her winery, why can you not taste at a bar?

(f) With respect to Jagmeet Singh,

(g) With respect to Jason Kenney,

(h) With respect to Mike Farnworth,

(i) With respect to John Horgan,

153. The Plaintiffs state, and the fact is, that the various leaders are fast and loose with ignoring their own rules, contrary to law, and ignoring the actual rules implemented, because they know the measures are false and ineffective and that the virus is no more dangerous than a seasonal viral respiratory illness. This further holds true for Neil Ferguson who put out the false modeling early on, in

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[41] Retrieved from: https://www.cbc.ca/news/canada/toronto/toronto-salutes-health-care-workers-covid19-1.5537982

[42] retrieved at: https://www.cp24.com/video?clipId=1964623

March 2020, and who had to resign his post in the UK for breaching the Rules. Other examples of such reckless behaviour and statements include:

(a) British Columbia Premier John Horgan has made statements referring to British Columbia citizens as "selfish", telling those who hold a masking exemption to "Buy a Boat", as opposed to exercising their exemption to ride the BC Ferries. He has also used methods of guilt-tripping, and fear-mongering to encourage compliance above consent: "It does disappoint me that British Columbians are disregarding good advice," even making further threats to treat citizens in a matter akin to cattle: "The challenge is personal behaviour," he said, then added by way of warning: "We don't want to use a stick." And has also gaslighted women, "Pregnant **people** are now a priority population to get their vaccine. All Health Canada - approved vaccines are safe and effective, including for **people** who are pregnant.", and young people, who have been proven to exhibit the lowest risks for contracting deadly cases of Covid-19, "the cohort from 20 -29 was not paying attention to the Covid broadcasts," "Do not blow this for the rest of us".

(b) Public Safety Minister Mike Farnworth has been quoted making bigoted, threatening, and condescending statements toward British Columbia citizens.

> "Shut up, grow up and mask up,"
>
> "These irresponsible idiots need to look in the mirror,"

> "They are the problem and the sooner we get this curve bent down, the sooner we get COVID under control, then they can go back to their narcissistic self-indulgent ways - but until that time, they don't have the right to endanger the health of the public."

154. The Plaintiff states, and fact is, that Horgan has no clue, and is wholly unqualified, and has not, assessed the "well accepted science" and "advice", and same holds for Farnworth and TRUDEAU, all of whom simply follow one singular dogma from the WHO, while refusing to disclose the "science", its substance or source, and what "advice" is being given by whom to them all-the-while ignore vast pool of experts who state that the measures are **NOT** warranted;

(c) Andrew Scheer and family, Elizabeth May, and Liberal Cabinet Minister ignore social distancing orders:

> "Parliamentarians packed onto a small nine-seat government jet last week — ignoring pandemic health guidelines to maintain a distance of two meters from others — in their haste to reach Ottawa for a vote on federal emergency economic legislation that passed on Saturday. Green Party Leader Elizabeth May, who lives in British Columbia, boarded the Challenger jet along with Liberal British Columbia cabinet minister Carla Qualtrough, Conservative Opposition Leader Andrew Scheer, his wife and their five children last Friday — filling all seats on the aircraft."[43]

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[43] Retrieved from: https://www.cbc.ca/news/politics/challenger-flight-may-scheer-qualtrough-1.5530542

(d) Dr. Bonnie Henry, British Columbia Provincial Health Officer allows gatherings of 50 and when challenged on conflicting figures from across Canada confirm "None of these are based on scientific evidence."[44]

(e) Dr. Yaffe: Ontario's Associate Chief Officer of Health Dr. Yaffe caught blatantly violating the social-distancing rules, just minutes after the premier said that based on public-health officials' advice we'll have to stay on lock-down for an indefinite period.[45] No such indefinite "lock-down" was mandated by any law.

(f) Dr. Bonnie Henry: Bonnie Henry was caught taking a helicopter trip, while unmasked over the 2021 Easter long weekend, in violation of her own mandates limiting intra-provincial travel over the holiday. Bonnie Henry also continued to allow wine tastings during the time period that provincial ministerial orders in British Columbia prohibited restaurants, bars, and pubs from allowing indoor dining. Bonnie Henry is a part-owner of the Clos du Soleil winery in Keremios, British Columbia.

155. The Plaintiffs state, and the fact is, that the illegal actions, and decrees issued by The Defendants and other public officials were done, in abuse and excess of their offices, knowingly to propagate a groundless and falsely-declared 'pandemic'', and generate fear and confusion on the ground, not only with citizens, but further, and moreover, with enforcement officials who are pursuing,

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[44] Retrieved at: https://www.1043thebreeze.ca/2020/04/01/British Columbia-not-budging-on-50-person-limit-restirction/

[45] https://twitter.com/RosemaryFreiTO/status/1254908247322083331

detaining, ticketing for perfectly legal conduct, because of the contradictory laws, and conduct of these public officials. All the while, their own personal conduct clearly manifests a knowledge that the 'pandemic'' is false, and the measures phony, designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs.

• C/ IGNORING AND FAILING TO ADDRESS MEDICAL EXPERTS' EVIDENCE

•The Nature of Viral Respiratory Illness (or Disease) and COVID-19

156. From the on-set of the declared emergency, and shortly thereafter up to the summer of 2020, experts such as Dr. Denis RANCOURT, Ph.D., set out that the scientific preponderance of the evidence which contradicted and criticized the measures invoked, as set out below, and the fact is that, as is borne out by vast preponderance of medical and scientific study, that regardless of the novel viral specification ("strain"), viral strains which lead to Seasonal Viral Respiratory Illness (Diseases) annually follow the same pattern, namely:

(a) That classifying causes of death by "influenza" or "influenza-related", or "pneumonia" is unhelpful and unreliable in the face of under-lying chronic diseases, particularly in the elderly (co-morbidity");

(b) That what is of more and central relevance is simply the total number of excess deaths during a viral strain season;

(c) That the year-to-year winter-burden (excess) mortality in mid- latitude nations is robustly regular, with respect to Seasonal Viral Respiratory illness due to the following:

(i) The absolute humidity which directly controls the impact of the transmission of airborne, pathogen-laden aerosol particle droplets;

(ii) In mid-latitude countries, on either side of the Equator, "Flu-season" emerges in the late fall-winter months, owing to the dry, humidity-free, air which allows the pathogen-laden aerosol particles to travel freely and effectively to infect and be transmitted from person to person which phenomenon occurs on both sides of the Equator, at different times on the calendar year, given the reversal of the seasons on the opposite sides of the Equator;

(iii) As the temperature rises, and humidity content in the air increases, the incident of transmission is reduced.[46] In tropical year-round hot climates this phenomenon is not generally in play. Nor is it at play in extreme cold climates towards both North and South Poles.

157. The Plaintiffs further state, and the fact is, as reflected in the scientific and medical literature that:

(a) The above means that all the viral respiratory diseases that seasonally plague temporal-climate populations every year are extremely contagious for two reasons: (1) they are transmitted by small aerosol particles that are part of the fluid air and fill virtually all enclosed air spaces occupied by humans, and (2) a single such aerosol particle carries the minimal infective dose (MID) sufficient to cause infection in a person, if breathed into the lungs, where the infection is initiated.

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[46] "All-Cause Mortality during COVID-19". Denis G. RANCOURT PhD., June 2nd, 2020, and all cited scientific and medical studies therein.

(b) This is why the pattern of all-cause mortality is so robustly stable and distributed globally, if we admit that the majority of the burden is induced by viral respiratory diseases, while being relatively insensitive to the particular seasonal viral ecology for this operational class of viruses. This also explains why the pattern is inverted between the Northern and Southern hemispheres, irrespective of tourist and business air travel and so on.

(c) The data shows that there is a persistent and regular pattern of winter-burden mortality that is independent of the details, and that has a well constrained distribution of year to year number of excess deaths (approximately 8% to 11% of the total yearly mortality, in the USA, 1972 through 1993). Despite all the talk of epidemics and pandemics and novel viruses, the pattern is robustly constant.

(d) An anomaly worthy of panic, and of harmful global socio-economic engineering, would need to consist of a naturally caused yearly winter-burden mortality that is statistically greater than the norm. That has not occurred since the unique flu pandemic of 1918 (the “Spanish Influenza”).

Covid-19 is no exception and no more virulent than all others apart from the influenza pandemic of 1918.

(e) Scientific studies show that the three recent epidemics assigned as pandemics, the H2N2 pandemic of 1957, the H3N2 pandemic of 1968, and the H1N1 pandemic of 2009, were not more virulent (in terms of yearly winter-burden mortality) than the regular seasonal epidemics . In fact, scientific studies further show that the epidemic of 1951 was concluded to be more deadly, on the basis of P&I data, in England, Wales and Canada, than the pandemics of 1957 and 1968).[47]

- **Contrary Views of the Experts to WHO protocol**

158. The Plaintiffs further state that the COVID-19 measures have in fact accelerated, and caused more than would be normal deaths, and in the elderly population, which has accounted for 81% of the deaths with respect to COVID-19, mostly in Long-Term Care facilities.[48]

159. The Plaintiffs state and fact is that these Defendants, while purportedly relying on "advice" from their medical officers, are not transparent as to what the advice was, nor the scientific/ medical basis was, and in fact suppressing it. In fact, to date, they refuse to disclose where they are ultimately getting this 'advice'', and from whom, based on what medical evidence. The fact is that they are simply parroting the "advice" and dictates of the WHO without any scrutiny whatsoever,

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[47] "All-Cause Mortality during COVID-19". Denis G. RANCOURT PhD., June 2nd, 2020, and all cited scientific and medical studies therein.

[48] "All-Cause Mortality during COVID-19". Denis G. RANCOURT PhD., June 2nd, 2020, and all cited scientific and medical studies therein.

and without ever addressing nor recognizing Canadian and international experts who took, and continue to take, a contrary view and criticism of those directives from the WHO.

160. The Plaintiffs state that such experts include, early on, but are not restricted to:

(a) **Dr Sucharit Bhakdi**, a specialist in microbiology. He was a professor at the Johannes Gutenberg University in Mainz, Germany, and head of the Institute for Medical Microbiology and Hygiene and one of the most cited research scientists in German history.

(b) **Dr Wolfgang Wodarg**, a German physician specializing in Pulmonology, politician and former chairman of the Parliamentary Assembly of the Council of Europe. In 2009 he called for an inquiry into alleged conflicts of interest surrounding the EU response to the Swine Flu pandemic.

(c) **Dr Joel Kettner** , a professor of Community Health Sciences and Surgery at Manitoba University, former Chief Public Health Officer for Manitoba province and Medical Director of the International Centre for Infectious Diseases.

(d) **Dr John Ioannidis**, a Professor of Medicine, of Health Research and Policy and of Biomedical Data Science, at Stanford University School of Medicine and a Professor of Statistics at Stanford University School of Humanities and Sciences. He is director of the Stanford Prevention Research Center, and co-director of the Meta-Research Innovation Center at Stanford (METRICS).

(e) **Dr Yoram Lass**, an Israeli physician, politician and former Director General of the Health Ministry. He also worked as Associate Dean of the Tel Aviv University Medical School and during the 1980s presented the science-based television show Tatzpit.

(f) **Dr Pietro Vernazza** , a Swiss physician specializing in Infectious Diseases at the Cantonal Hospital St. Gallen and Professor of Health Policy.

(g) **Frank Ulrich Montgomery** ,a German radiologist, former President of the German Medical Association and Deputy Chairman of the World Medical Association.

(h) **Prof. Hendrik Streeck**, a German HIV researcher, epidemiologist and clinical trialist. He is professor of virology, and the director of the Institute of Virology and HIV Research, at Bonn University.

(i) **Dr Yanis Roussel et. al.** – A team of researchers from the Institut Hospitalo-universitaire Méditerranée Infection, Marseille and the Institut de Recherche pour le Développement, Assistance Publique-Hôpitaux de Marseille, conducting a peer-reviewed study on Coronavirus mortality for the government of France under the 'Investments for the Future' programme.

(j) **Dr. David Katz** , an American physician and founding director of the Yale University Prevention Research Center.

(k) **Michael T. Osterholm**, a regents professor and director of the Center for Infectious Disease Research and Policy at the University of Minnesota.

(l) **Dr Peter Goetzsche** , a Professor of Clinical Research Design and Analysis at the University of Copenhagen and founder of the Cochrane Medical Collaboration.[49]

And the Plaintiffs state, and fact is, that the above-noted experts are not alone in their contrary views and criticisms, but merely examples of a much bigger body of experts who take the same views, which contradict and criticize the WHO and current measures adopted by Canada and British Columbia.

161. These experts have expressed, early on, in summary, for example, the following opinions:

(a) By **Dr. Sucharit Bhakdi**:

> "**[that The government's anti-COVID19 measures] are grotesque, absurd and very dangerous […] The life expectancy of millions is being shortened.** The horrifying impact on the world economy threatens the existence of countless people. The consequences on medical care are profound. Already services to patients in need are reduced, operations cancelled, practices empty, hospital personnel dwindling. All this will impact profoundly on our whole society. All these measures are leading to self-destruction and collective suicide based on nothing but a spook."

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[49] https://www.fort-russ.com/2020/03/coronavirus-skepticism-these-12-leading-medical-experts-contradict-the-official-government-media-narrative/
https://off-guardian.org/2020/03/24/12-experts-questioning-the-coronavirus-panic/?__cf_chl_jschl_tk__=337111ad6d6d902b24b4e099f5281c65e3e4b9f4-1585388282-0-Af0o_edKyUgbHvh1VcWNkI9pmmKmNDpIe3t8p8AzOfNSL3KMq2f_1tyTqyj4i1RIgmD_uDh8P8ulAs_zAhps_nKe8fMclO8scdWTV4Jf5xpZtzHt3Hg5mrz4twiZSnTJ3tojWZUi6Vu4pAcnuDnaZ4WVv7Da0oCcEh38A0GuO5trR0zZOfPrwpXW5P7QlRjcNju5ST6yX4Ev7A09GNLFQRibRI8X1HgEpCzf5fPIQtOchyiX9wWUG-oM4wIgZqVvKDyUdHNQO1ZpMAXQFtOaEb9VeapKfqawhowADQDFU00X9yL8VLExpR33YwWjprrD7_zYCdPsI6xlOAZ06Js3baIu9t35M7s2F9IrPgzUR0W5&fBritish Columbialid=IwAR0ZWy2bg8_Hioqtuj-5xuOP8zKS-ds2-OqPxNL3MArzYJbwwEhrKImvnkA

(b) By **Dr Wolfgang Wodarg** that:

> “what is missing right now is a rational way of looking at things. We should be asking questions like “How did you find out this virus was dangerous?”, “How was it before?”, “Didn’t we have the same thing last year?”, “Is it even something new?” That’s missing.”

(c) By **Dr Joel Kettner** that:

> “I have never seen anything like this. I’m not talking about the pandemic, because I’ve seen 30 of them, one every year. It is called influenza. And other respiratory illness viruses, we don’t always know what they are. But I’ve never seen this reaction, and I’m trying to understand why. . . I worry about the message to the public, about the fear of coming into contact with people, being in the same space as people, shaking their hands, having meetings with people. I worry about many, many consequences related to that. . . In Hubei, in the province of Hubei, where there has been the most cases and deaths by far, the actual number of cases reported is 1 per 1000 people and the actual rate of deaths reported is 1 per 20,000. So maybe that would help to put things into perspective.”

(d) **By Dr John Ioannidis** that:

> “Patients who have been tested for SARS-CoV-2 are disproportionately those with severe symptoms and bad outcomes. As most health systems have limited testing capacity, selection bias may even worsen in the near future. . . The one situation where an entire, closed population was tested was the Diamond Princess cruise ship and its quarantine passengers. The **case fatality rate there was 1.0%,** but this was a largely elderly population, in which the death rate from Covid-19 is much higher. . . .Could the Covid-19 case fatality rate be that low? No, some say, pointing to the high rate in elderly people. However, even some so-called mild or common-cold-type coronaviruses that have been known for decades can have case fatality rates as high as 8% when they infect elderly people in nursing homes. If we had not known about a new virus out there, and had not checked individuals with PCR tests, the number of total deaths due to

> "influenza-like illness" would not seem unusual this year. At most, we might have casually noted that flu this season seems to be a bit worse than average. . . ."A fiasco in the making? As the coronavirus pandemic takes hold, we are making decisions without reliable data", *Stat News*, 17th March 2020."

(e) **By Dr Yoram Lass** that:

> "Italy is known for its enormous morbidity in respiratory problems, more than three times any other European country. In the US about 40,000 people die in a regular flu season. . . .In every country, more people die from regular flu compared with we all forget: the swine flu in 2009. That was a virus that reached the world from Mexico and until today there is no vaccination against it. But what? At that time there was no Facebook or there maybe was but it was still in its infancy. The coronavirus, in contrast, is a virus with public relations. . . .Whoever thinks that governments end viruses is wrong. – Interview in *Globes*, March 22nd 2020."

(f) **By Dr Pietro Vernazza** that:

> "We have reliable figures from Italy and a work by epidemiologists, which has been published in the renowned science journal ‹Science›, which examined the spread in China. This makes it clear that around 85 percent of all infections have occurred without anyone noticing the infection. 90 percent of the deceased patients are verifiably over 70 years old, 50 percent over 80 years. . . .In Italy, one in ten people diagnosed die, according to the findings of the *Science* publication, that is statistically one of every 1,000 people infected. Each individual case is tragic, but often – similar to the flu season – it affects people who are at the end of their lives. . . . **If we close the schools, we will prevent the children from quickly becoming immune. . . .We should better integrate the scientific facts into the political decisions**. – Interview in *St. Galler Tagblatt*, 22nd March 2020 ."

(g) **By Frank Ulrich Montgomery** that:

> "I'm not a fan of lockdown. Anyone who imposes something like this must also say when and how to pick it up again. Since we have

> to assume that the virus will be with us for a long time, I wonder when we will return to normal? You can't keep schools and daycare centers closed until the end of the year. Because it will take at least that long until we have a vaccine. Italy has imposed a lockdown and has the opposite effect. They quickly reached their capacity limits, but did not slow down the virus spread within the lockdown. – Interview in *General Anzeiger*, 18th March 2020."

(h) **By Prof. Hendrik Streeck** that:

> "The new pathogen is not that dangerous, it is even less dangerous than Sars-1. The special thing is that Sars-CoV-2 replicates in the upper throat area and is therefore much more infectious because the virus jumps from throat to throat, so to speak. But that is also an advantage: Because Sars-1 replicates in the deep lungs, it is not so infectious, but it definitely gets on the lungs, which makes it more dangerous. . . .You also have to take into account that the Sars-CoV-2 deaths in Germany were exclusively old people. In Heinsberg, for example, a 78-year-old man with previous illnesses died of heart failure, and that without Sars-2 lung involvement. Since he was infected, he naturally appears in the Covid 19 statistics. But the question is whether he would not have died anyway, even without Sars-2. – Interview in *Frankfurter Allgemeine*, 16th March 2020".

(i) **By Dr Yanis Roussel** et. al. that:

> "The problem of SARS-CoV-2 is probably overestimated, as 2.6 million people die of respiratory infections each year compared with less than 4000 deaths for SARS-CoV-2 at the time of writing. . . .This study compared the mortality rate of SARS-CoV-2 in OECD countries (1.3%) with the mortality rate of common coronaviruses identified in AP-HM patients (0.8%) from 1 January 2013 to 2 March 2020. Chi-squared test was performed, and the P-value was 0.11 (not significant).…it should be noted that systematic studies of other coronaviruses (but not yet for SARS-CoV-2) have found that the percentage of asymptomatic carriers is equal to or even higher than the percentage of symptomatic patients. The same data for SARS-CoV-2 may soon be available, which will further reduce the relative risk associated with this specific pathology. – "SARS-CoV-2: fear versus data", *International Journal of Antimicrobial Agents*, 19th March 2020."

(j) **By Dr. David Katz** that:

> "I am deeply concerned that the social, economic and public health consequences of this near-total meltdown of normal life — schools and businesses closed, gatherings banned — **will be long-lasting and calamitous, possibly graver than the direct toll of the virus itself**. The stock market will bounce back in time, but many businesses never will. The unemployment, impoverishment and despair likely to result will be public health scourges of the first order. – "Is Our Fight Against Coronavirus Worse Than the Disease?", *New York Times* 20th March 2020."

(k) **By Michael T. Osterholm** that:

> "Consider the effect of shutting down offices, schools, transportation systems, restaurants, hotels, stores, theaters, concert halls, sporting events and other venues indefinitely and leaving all of their workers unemployed and on the public dole. The likely result would be not just a depression but a complete economic breakdown, with countless permanently lost jobs, long before a vaccine is ready or natural immunity takes hold. . . [T]he best alternative will probably **entail letting those at low risk for serious disease continue to work, keep business and manufacturing operating**, and "run" society, while at the same time advising higher-risk individuals to protect themselves through physical distancing and ramping up our health-care capacity as aggressively as possible. With this battle plan, we could gradually build up immunity without destroying the financial structure on which our lives are based.
> – "Facing covid-19 reality: A national lockdown is no"
>
> cure", *Washington Post* 21st March 2020

(l) **By Dr Peter Goetzsche** that:

> "Our main problem is that no one will ever get in trouble for measures that are too draconian. They will only get in trouble if they do too little. So, our politicians and those working with public health do much more than they should do. . . .No such draconian measures were applied during the 2009 influenza pandemic, and they obviously cannot be applied every winter, which is all year

> round, as it is always winter somewhere. We cannot close down the whole world permanently. . . .Should it turn out that the epidemic wanes before long, there will be a queue of people wanting to take credit for this. And we can be damned sure draconian measures will be applied again next time. But remember the joke about tigers. "Why do you blow the horn?" "To keep the tigers away." "But there are no tigers here." "There you see!"[50] "Corona: an epidemic of mass panic", blog post on *Deadly Medicines* 21st March 2020

162. Expert criticism has also been levelled by Canadian experts, including:

(a) **By Dr Denis Rancourt, Ph.D.,** expert in public health and Researcher,

In stating that:

> "Federal and provincial Canadian government responses to and communications about COVID-19 have been irresponsible.""The approach being followed by governments is reckless.""Justification for the early panic-response is not corroborated.""Faith in epidemic-modelling of catastrophe-scenarios and mitigation strategies is not justified."[51]

(b) **Dr. Richard Schabas,** Ontario's former Chief Medical Officer who is of the opinion that:

- "We have **fundamentally over-reacted and misjudged the magnitude of the problem**."
- "lockdown measures are unsustainable"
- "the virus isn't going anywhere"
- "In no country, including Italy, has the death toll come anywhere close to what we would expect in an average influenza year." (CBC News, March 22, 2020)[52]

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[50] Another 10 experts have been added to this link. Total is 22 experts.
https://www.europereloaded.com/twenty-two-experts-questioning-the-coronavirus-panic-videos-scientific-common-sense/

[51] http://ocla.ca/wp-content/uploads/2014/01/OCLA-Report-2020-1-Criticism-of-Government-Response-to-COVID19.pdf

[52] https://www.youtube.com/watch?v=sm9alyH8x
https://ca.news.yahoo.com/virus-isnt-going-anywhere-says-121720522.html

(c) Based on Dr. Richard Schabas' study of SARS and quarantine[53] Schabas states:

> "far more cases are out there than are being reported. This is because many cases have no symptoms and testing capacity has been limited. There have been about 100,000 cases reported to date, but, if we extrapolate from the number of reported deaths and **a presumed case-fatality rate of 0.5 per cent**, the real number is probably closer to two million – the vast majority mild or asymptomatic."
>
> " **the number of deaths was comparable to an average influenza season**. That's not nothing, but it's not catastrophic, either, and it isn't likely to overwhelm a competent health-care system. Not even close." "Quarantine belongs back in the Middle Ages. Save your masks for robbing banks. Stay calm and carry on. **Let's not make our attempted cures worse than the disease**."[54]

(d) **Dr Joel Kettner -** former Chief Public Health Officer for Manitoba province; professor of Community Health Sciences and Surgery at Manitoba University; Medical Director of the International Centre for Infectious Diseases. In a phone interview on CBC Radio he stated:

> "in 30 years of public health medicine **I have never seen anything like this**, anything anywhere near like this. I'm not talking about the pandemic, because I've seen 30 of them, one every year. It is called influenza. . . . But I've never seen this reaction, and I'm trying to understand why.
>
> . . . **the data they are getting is incomplete to really make sense of the size of the threat**. We are getting very crude numbers of cases and deaths, very little information about testing rates, contagious analysis, severity rates, who is being hospitalised, who is in intensive care, who is dying, what are the definitions to decide

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[53] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2094974/

[54] https://www.theglobeandmail.com/opinion/article-strictly-by-the-numbers-the-coronavirus-does-not-register-as-a-dire/

> if someone died of the coronavirus or just died with the coronavirus. There is so much important data that is very hard to get to guide the decisions on how serious a threat this is.
>
> The other part is **we actually do not have that much good evidence for the social distancing** methods. It was just a couple of review in the CDC emerging infectious disease journal, which showed that although some of them might work, we really don't know to what degree and the evidence is pretty weak.
> The third part is the pressure that is being put on public health doctors and public health leaders. And that **pressure is coming from various places**. The first place it came from was the Director-General of the World Health Organization (WHO) when he said *"This is a grave threat and a public enemy number one"*, I have never heard a Director-General of WHO use terms like that."[55]

163. Other pointed criticism and opposite views, early on, included:

(a) **Stanford University Team**—to the effect that the Evidence of Covid 19 mortality rate is low;[56]

(b) **By Thomas Stavola**, Rutgers University Law School Relaxation of Lockdown via Quarantine of Symptomatics and Digital Contact Tracing, Experts Agree, indicating that:

> **"**The latest scientific data indicates that mild and asymptomatic prevalence is much higher than previously thought, thus, **the true fatality rate is closer to 0.4%**, or possibly even lower. While SARS-CoV-2 can be severe in very small subset, these values indicate that the population-based severity burden is much lower

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[55] https://off-guardian.org/2020/03/17/listen-cbc-radio-cuts-off-expert-when-he-questions-covid19-narrative/?__cf_chl_jschl_tk__=d3faf8dfba5018289da87f791a612c2495a7f86d-1585163840-0-AcjXr346mVjSnluV8YDpGpd_VknFDStnK_liia4dphot9-E3ukKrgN7snq4BA4LggYPkDzLCQ8JXC7G-hqZtf0BZ0LIgFi5mB5Wv34UJsPHJy6UbROLM35V1nV98oiPR7t8pfCOhZ75WWrgS4NCn6vwzBMXALZw0UMU32u_sijPnsW53IpHqSEyCnDdx9dfpJokTen28kaf0ls4UoNQMtfCxCbBpmxmdeFwYj6XWo-XQXWC4rA57a_cbcLR54bfmC1imS1vPBIsHHqljjCg5N2joQ9spQJUCbF80INdWsmat8SOzlb2pDrtNdA9dCUd62LRszCWgTBrVxRFu7zjPABr3Jj0hvjtLIkniXq3AnMs1lCU0rIhPAGzHmXAsEvsRUw

[56] https://www.greenmedinfo.com/blog/stanford-team-finds-evidence-covid-19-mortality-rate-low-2-17-times-lower-whos-esta?utm_campaign=Daily%20Newsletter%3A%20Personal%20update%20%28VVNwqr%29&utm_medium=email&utm_source=Daily%20Newsletter&_ke=eyJrbF9lbWFpBritish ColumbiaI6ICJqb2huZnJvbW91dHdlc3RAZ21haWwuY29tIiwgImtsX2NvbXBhbnlfaWQiOiAiSzJ2WEF5In0%3D

> than initially considered months ago. Studies indicate that asymptomatic transmission is negligible[1]. Maria Van Kerkhove, who heads the World Health Organization's emerging diseases and zoonoses unit, stated that asymptomatic cases are definitely not a major driver of transmission."[57]

(c) **By Knut Wittkowski** - German epidemiologist. **Mass Isolation Preventing Herd Immunity** , and conluding that:

> "The lockdown prevents the normal progression of natural immunity that is key to protecting the wellbeing of the most vulnerable. The extended lockdown will increase the harm already done many fold including deaths.
>
> Dr. Wittkowski said we must protect and quarantine the frail, sick and very elderly 10% of our population, while allowing the other 90% to acquire the virus with mild to no symptoms, thereby gaining true NATURAL herd immunity. He estimated this to be a 4 week process.
>
> When people are allowed to go about their daily lives in a community setting, he argued, the elderly could eventually – sooner rather than later – come into contact with the rest of the population in "about four weeks" because the virus at this point would be "vanquished."
>
> ***"With all respiratory diseases, the only thing that stops the disease is 'herd immunity,'"*** [58]

(d) **By Martin Dubravec, MD -** Allergist/Clinical Immunologist Allergy and Asthma Specialists of Cadillac Cadillac, MI, conducting that:**The Answer is Herd Immunity**[59]**;**

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[57] https://medium.com/@tomstavola/latest-science-on-covid-19-and-digital-contract-tracing-f58ee55b3b9b

[58] https://www.aier.org/article/stand-up-for-your-rights-says-professor-knut-m-wittkowski/?fBritish Columbialid=IwAR2ZuYv6Cbcsjiln2UJHXOk84KOjbSOWoxceTSiaNZdl_eZuhadppi25PnE
https://ratical.org/PerspectivesOnPandemic-II.html

[59] https://aapsonline.org/coronavirus-covid-19-public-health-apocalypse-or-anti-american/

(e) **By Dr. Dubravec's** whose advice on how to end this epidemic is:

> "What can be done to end this epidemic? **The answer is herd immunity**. Let those who will not die nor become seriously ill from the disease get infected and immune to the disease. Don't close schools – open them up! Don't close universities – reopen them! Let those under the age of 65 with no significant health problems go to work. Their risk of death is very close to zero. They become the wall that stops the virus.
>
> **Our current strategy of isolating these healthy people from the virus: a. is not working** – the virus is still spreading and b. for those who theoretically may be shielded from the virus, they will get exposed later. **Our current strategy is actually leading to a prolonged COVID-19 season!** Herd immunity works and despite our current efforts to mess it up**, herd immunity will be the ultimate reason the virus dies down**. We should promote the concept, not try to stop it. Unlike the influenza epidemics of the past, this virus is not attacking young people. We can use herd immunity to our collective advantage."
>
> **The bottom line is that herd immunity is what will stop the virus from spreading. Not containment. Not a vaccine. Not staying locked in our homes.** It's time we had an honest conversation on how to move beyond containment.

(f) By **Professor Peter C. Gøtzsche** that: "The Coronavirus mass panic is not justified."[60]

(g) By the Wall Street Journal in "Rethinking the Coronavirus Shutdown", that:

> No society can safeguard public health for long at the cost of its economic health.[61]

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[60] https://www.deadlymedicines.dk/wp-content/uploads/G%C3%B8tzsche-The-Coronavirus-mass-panic-is-not-justified.pdf

[61] https://www.wsj.com/articles/rethinking-the-coronavirus-shutdown-11584659154

(h) **By the Professor Yitzhak Ben Israel** of Tel Aviv University, who plotted the rates of new coronavirus infections of the U.S., U.K., Sweden, Italy, Israel, Switzerland, France, Germany, and Spain, concluding that:

> "The numbers told a shocking story: irrespective of whether the country quarantined like Israel, or went about business as usual like Sweden, **coronavirus peaked and subsided in the exact same way**. The professor believes this evidence - **actual evidence and data, not the projections of some model - indicate that there is no need for either quarantines or economic closures."[62]**

(i) **By Professor Stefano Montanari** that: "The Virus Vaccine is a Scam"[63];

(j) **By Virologist Hendrick Streeck** that: "There is no danger of infecting someone else while shopping"[64];

(k) **By:**

- (i) **Sucharit Bakhdi:[65]**
- (ii) **John Ioannidis, Stanford:[66]**
- (iii) **John Lee:[67]**
- (iv) **Perspectives on the Pandemic | Professor Knut Wittkowski | Episode 2.[68]**

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[62] https://www.afa.net/the-stand/culture/2020/04/shutdowns-were-pointless-all-along/#.XpnwkkhQ_ZA.facebook

[63] https://europeansworldwide.wordpress.com/2020/04/02/the-virus-vaccine-is-a-scam/

[64] https://www.zuercher-presse.com/virologe-hendrick-streeck-gibt-keine-gefahr-beim-einkaufen-jemand-anderen-zu-infizieren/?cn-reloaded=1

[65] https://www.youtube.com/watch?v=JBB9bA-gXL4&fBritish Columbialid=IwAR1XMZJdTEpe-9woCk7YlMd5WShxUms_loYZYLKVBR8CQICkG-VjD63Z5SY

[66] https://www.youtube.com/watch?v=d6MZy-2fcBw&fBritish Columbialid=IwAR1LCsQoUVv3dmZzn_2Uwzl85XgFofld0tnn8iSMTMAODv5N9_Dwsi7f3K4

[67] https://www.spectator.co.uk/article/how-to-understand-and-report-figures-for-covid-19-deaths-/amp

[68] https://www.youtube.com/watch?v=lGC5sGdz4kg

(v) “Medical Doctor Blows C Vi Rus Scamdemic Wide Open”

Andrew Kaufman M D in (Nederlands ondertiteld);[69]

All indicating that the “pandemic” is **not** a pandemic and the modeling and measures unwarranted;

(l) **French researchers**: in COVID FEAR vs. DATA :

> "Under these [first world] conditions, there does not seem to be a significant difference between the mortality rate of SARS-CoV-2 in OECD countries and that of common coronaviruses " which are responsible for 10 to 20 percent of all respiratory infections, including colds, worldwide.”[70]

(m) In: Coronavirus COVID-19: Public Health Apocalypse or Panic, Hoax, and Anti-American?[71];

(n) In: Stanford doctor says Fauci doesn't have the evidence to back up his claims;[72]

(o) In: Questioning Conventional Wisdom in the COVID-19 Crisis, with **Dr. Jay Bhattacharya;**[73]

(p) **By Dr M. I. Adil**, Corona Virus is a Hoax;[74]

(q) In Resp therapist blowing the whistle on covid -19.[75]

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[69] https://www.youtube.com/watch?v=S8JBg9H725E

[70] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102597/?fBritish Columbialid=IwAR29vpTe-Dk-xoVzVRbuAgVhil1k0DcZkGqyYsak6lC-OByjZcBRP6cyjc

[71] https://aapsonline.org/cornoavirus-covid-19-public-health-apocalypse-or-panic-hoax-and-anti-american/

[72] https://www.youtube.com/watch?v=-UO3Wd5urg0

[73] https://www.youtube.com/watch?v=J04YzligPyU

[74] https://www.youtube.com/watch?v=y9WeIOX1UuQ&feature=youtu.be

[75] https://www.youtube.com/watch?v=R0aDAM5LzWA

164. Since the summer of 2020, to the present, the avalanche of the world "scientific" evidence and community of scientists and doctors continues to scream, which falls upon the deaf ears of the Defendants, that:

(a) Masks do **not** work to prevent the transmission of aerosol, airborne virus, in that:

  (i) masks do not slow or stop the spread of viruses;[76]

  (ii) in fact, masks may help viruses spread;[77]

  (iii) most robust studies have found little to no evidence for the effectiveness of cloth face masks in the general population;[78]

  (iv) when masks (especially cloth masks) are worn improperly and over extended periods they can actually cause disease and other serious health issues;[79]

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[76] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7707213/
https://www.aier.org/article/masking-children-tragic-unscientific-and-damaging/
https://www.aier.org/article/masking-a-careful-review-of-the-evidence/
https://www.aier.org/article/the-year-of-disguises/
https://www.smh.com.au/national/farce-mask-its-safe-for-only-20-minutes-20030427-gdgnyo.html
https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7707213/pdf/aim-olf-M206817.pdf

[77] https://eurjmedres.biomedcentral.com/articles/10.1186/s40001-020-00430-5

[78] https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article
https://www.cebm.net/covid-19/masking-lack-of-evidence-with-politics/
https://www.cidrap.umn.edu/news-perspective/2020/04/commentary-masks-all-covid-19-not-based-sound-data
https://www.nejm.org/doi/full/10.1056/NEJMp2006372
https://www.medrxiv.org/content/10.1101/2020.03.30.20047217v2
https://www.medrxiv.org/content/10.1101/2020.04.01.20049528v1
http://www.asahi.com/ajw/articles/13523664
https://bmjopen.bmj.com/content/5/4/e006577
https://www.nejm.org/doi/full/10.1056/NEJMp2006372

[79] https://www.technocracy.news/blaylock-face-masks-pose-serious-risks-to-the-healthy/

(v) breathing in the microscopic particles from synthetic masks can cause health problems including cancer similar to asbestos. Some masks have been recalled because they have been found to contain toxic materials dangerous to lungs;[80]

(vi) masks use leads to dry and irritated eyes, rashes, nosebleeds, pneumonia and other bacterial infections, damages to ear cartilages;[81]

(vii) Masks cause a rapid buildup of CO2 to levels, which are deemed unsafe by OSHA.[82]

(b) That "lock-downs" do not work, and in fact cause irreparable, devastating harm:

(i) a French study of 160 countries found no association between stringency of government lockdowns/restrictions and Covid-19 mortality;[83]

(ii) a peer-reviewed study, dated January 5, 2021 by eminent Stanford professors of medicine, infectious disease epidemiology and public health stated that the evidence:

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https://apps.who.int/iris/bitstream/handle/10665/332293/WHO-2019-nCov-IPC_Masks-2020.4-eng.pdf?sequence=1&isAllowed=y
https://bmjopen.bmj.com/content/5/4/e006577

[80] https://www.ecotextile.com/2021040127603/dyes-chemicals-news/exclusive-chemical-cocktail-found-in-face-masks.html
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7537728/
https://www.science.news/2021-01-15-long-term-mask-use-breeds-microbes-lung-cancer.html

[81] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7362770/
https://link.springer.com/article/10.1007/s00266-020-01833-9

[82] https://ohsonline.com/Articles/2016/04/01/Carbon-Dioxide-Detection-and-Indoor-Air-Quality-Control.aspx?Page=2

[83] https://www.frontiersin.org/articles/10.3389/fpubh.2020.604339/full

> "fails to find strong evidence supporting a role for more restrictive NPIs (Non-Pharmaceutical Interventions, such as lock downs) in control of Covid-19… We fail to find an additional benefit for stay-at-home orders and business closures";[84]

(iii) another medical research paper states:

> "This phenomenological study assesses the impacts of full lockdown strategies applied in Italy, France, Spain and United Kingdom, on the slowdown of the 2020 COVID-19 outbreak. Comparing the trajectory of the epidemic before and after the lockdown, **we find no evidence of any discontinuity in the growth rate, doubling time, and reproduction number trends";** [85]

(iv) a New Zealand study found that government mandated lockdowns

did not reduce Covid-19 deaths; [86]

(v) another medical research paper states:

> "closure of education facilities, prohibiting mass gatherings and closure of some non-essential businesses were associated with reduced incidence **whereas stay at home orders and closure of all non-businesses was not associated with any independent additional impact**."[87]

(vi) the Great Barrington Declaration signed thus far by 13,985 medical

& public health scientists, 42,531medical practitioners states:

> "As infectious disease epidemiologists and public health scientists we have grave concerns about the damaging physical and mental health impacts of the prevailing COVID-19 policies, and recommend an approach we call Focused Protection
>
> Coming from both the left and right, and around the world, we have devoted our careers to protecting people. **Current**

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[84] https://onlinelibrary.wiley.com/doi/10.1111/eci.13484

[85] https://www.medrxiv.org/content/10.1101/2020.04.24.20078717v1

[86] https://www.tandfonline.com/doi/full/10.1080/00779954.2020.1844786

[87] https://arxiv.org/pdf/2005.02090.pdf

lockdown policies are producing devastating effects on short and long-term public health. The results (to name a few) include lower childhood vaccination rates, worsening cardiovascular disease outcomes, fewer cancer screenings and deteriorating mental health – leading to greater excess mortality in years to come, with the working class and younger members of society carrying the heaviest burden. Keeping students out of school is a grave injustice.

Keeping these measures in place until a vaccine is available will cause irreparable damage, with the underprivileged disproportionately harmed.

Fortunately, our understanding of the virus is growing. We know that vulnerability to death from COVID-19 is more than a thousand-fold higher in the old and infirm than the young. Indeed, for children, COVID-19 is less dangerous than many other harms, including influenza.

As immunity builds in the population, the risk of infection to all – including the vulnerable – falls. We know that all populations will eventually reach herd immunity – i.e. the point at which the rate of new infections is stable – and that this can be assisted by (but is not dependent upon) a vaccine. Our goal should therefore be to minimize mortality and social harm until we reach herd immunity.

The most compassionate approach that balances the risks and benefits of reaching herd immunity, is to allow those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk. We call this Focused Protection.

Adopting measures to protect the vulnerable should be the central aim of public health responses to COVID-19. By way of example, nursing homes should use staff with acquired immunity and perform frequent PCR testing of other staff and all visitors. Staff rotation should be minimized. Retired people living at home should have groceries and other essentials delivered to their home. When possible, they should meet family members outside rather than inside. A comprehensive and detailed list of measures, including approaches to multi-generational

> households, can be implemented, and is well within the scope and capability of public health professionals.
>
> Those who are not vulnerable should immediately be allowed to resume life as normal. Simple hygiene measures, such as hand washing and staying home when sick should be practiced by everyone to reduce the herd immunity threshold. Schools and universities should be open for in-person teaching. Extracurricular activities, such as sports, should be resumed. Young low-risk adults should work normally, rather than from home. Restaurants and other businesses should open. Arts, music, sport and other cultural activities should resume. People who are more at risk may participate if they wish, while society as a whole enjoys the protection conferred upon the vulnerable by those who have built up herd immunity."

This Declaration was authored and signed in Great Barrington, United States, on October 4, 2020, by: **Dr. Martin Kulldorff,** professor of medicine at Harvard University, a biostatistician, and epidemiologist with expertise in detecting and monitoring infectious disease outbreaks and vaccine safety evaluations; **Dr. Sunetra Gupta**, professor at Oxford University, an epidemiologist with expertise in immunology, vaccine development, and mathematical modeling of infectious diseases; **Dr. Jay Bhattacharya,** professor at Stanford University Medical School, a physician, epidemiologist, health economist, and public health policy expert focusing on infectious diseases and vulnerable populations;[88]

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[88] https://gbdeclaration.org

(vii) neither the long-established pandemic preparedness reports for Canada nor the World Health Organization included lockdowns as an evidence-based non-pharmaceutical measure in response to a pandemic[89];

(viii) the research study, "Effect of school closures on mortality from coronavirus disease 2019: old and new predictions" concluded:

> "We confirm that adding school and university closures to case isolation, household quarantine, and social distancing of over 70s would lead to more deaths compared with the equivalent scenario without the closures of schools and universities;"[90]

(ix) the research paper: "A country level analysis measuring the impact of government actions, country preparedness and socioeconomic factors on COVID-19 mortality and related health outcomes" found:

> Rapid border closures, **full lockdowns**, and wide-spread testing **were not associated with COVID-19 mortality per million people;**"[91]

(x) a news article found that the COVID-linked hunger is tied to 10,000 excess child deaths each month;[92]

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[89] https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf
https://www.longwoods.com/articles/images/Canada_Pandemic_Influenza.pdf

[90] https://www.bmj.com/content/371/bmj.m3588

[91] https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30208-X/fulltext

[92] https://apnews.com/article/virus-outbreak-africa-ap-top-news-understanding-the-outbreak-hunger-5cbee9693c52728a3808f4e7b4965cbd

(xi) a research study found:

> "Substantial increases in the number of avoidable cancer deaths in England are to be expected as a result of diagnostic delays due to the COVID-19 pandemic in the UK;"[93]

(xii) as a result of COVID-19 measures there is significant collateral damage to the healthcare system with respect to issues such as delayed diagnosis[94], impacts on cancer patients,[95]impacts on disabled persons;[96] and further issues;

(xiii) COVID-19 lockdowns have imposed substantial economic costs on countries in Africa, and other countries around the world.[97]

(c) That the PCR testing, at over 35 cycles, is a fraudulent and useless manner to "test", calculate and count "cases" and "infections". A PCR test alone cannot indicate whether the virus in that person is either virulent or infectious. PCR tests require further culturing tests where the virus is injected into other cells and then monitored to see if it infects other cells. Peer-reviewed scientific journals from prestigious sources indicate that at 35 cycles, less than 3% of PCR confirmed "cases" of viral cultures are positive and therefore actually virulent and infectious.[98]

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[93] https://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(20)30388-0/fulltext
[94] https://www.sciencedirect.com/science/article/pii/S0923753420398252
[95] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7534993/
[96] https://pesquisa.bvsalud.org/controlecancer/resource/pt/mdl-32383576?src=similardocs
[97] https://ideas.repec.org/h/fpr/ifpric/133835.html

[98] Peer-Reviewed Medical Paper: https://academic.oup.com/cid/advance article/doi/10.1093/cid/ciaa1491/5912603; and

165. That alternative, recognized early treatments like HCQ and Ivermectin, exist, but the Defendants banned their use:

(a) the use of a five-day course of Ivermectin is associated with lower mortality in hospitalized patients with coronavirus disease.[99] There are 89 studies, 48 of which are peer reviewed, to date, which review the efficacy of ivermectin.[100]

(b) Hydroxychloroquine (HCQ) is effective both as a pre-exposure prophylaxis and as early post-exposure treatment, when administered in appropriate doses, especially when started within the first five days of symptom onset.[101] There are 285 studies with respect to the efficacy of using HCQ as a treatment, including 213 which are peer-reviewed.[102]

(c) Vitamin D deficiency is associated with higher risk of COVID-19, and vitamin D may be used to help treat COVID-19.[103]

166. That the Defendants, Trudeau, Tam, Henry, and other Public Health Officers have publicly stated and represented that the Covid-19 “vaccines” will **not** result in immunity nor protect against transmission from and to the vaccinated, and

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Peer-reviewed paper: https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30172-5/fulltext.

[99] https://www.sciencedirect.com/science/article/pii/S0012369220348984
https://www.sciencedirect.com/science/article/pii/S1201971220325066
https://www.sciencedirect.com/science/article/pii/S2589537020304648

[100] https://c19ivermectin.com

[101] https://www.sciencedirect.com/science/article/pii/S0924857920303423;
https://www.ejinme.com/article/S0953-6205(20)30335-6/fulltexthttps://www.medrxiv.org/content/10.1101/2020.08.20.20178772v1
https://www.amjmed.com/article/S0002-9343(20)30673-2/fulltext
https://c19study.com.

[102] https://c19study.com

[103] Database of all vitamin D COVID-19 studies. https://c19vitamind.com/

that, despite the fact that Trudeau has announced the procurement of "booster" Covid-19 vaccines up to and including, **2024**, the other measures will have to be maintained, all of which is irrational, unscientific, non-medical, and utterly illogical. The Plaintiffs state, and fact is, that such admissions by the Defendants render the proposal of a "Vaccine Passport", for any use, irrational, illogical, arbitrary, and contrary to ss.2,7 and 15 of the ***Charter***.

•COVID-Measures Worse than Virus

167. Early on, and into the summer of 2020, another thematic point of sound scientific and medical criticism is that the COVID - measures are worse than the virus as reflected in, **inter alia**, the following:

(a) One study suggests the ultimate changes in contact patterns triggered by social distancing measures **could end up having a negative effect on the population** and, in some cases, even worsen the outcome of the "epidemic".[104]

(b) **Cost of Coronavirus cure could be deadlier than the disease.[105],** by Carpay who is president of the Justice Centre for Constitutional Freedoms;

(c) **California ER Physicians:** Sheltering in Place Does More Harm than Good - Lowers Our Immune System.

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[104] J R Soc Interface. 2018 Aug; 15(145): 20180296.
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6127185/pdf/rsif20180296.pdf
https://www.greenmedinfo.com/blog/social-distancing-may-worsen-epidemic-outcomes

[105] https://www.jccf.ca/the-cost-of-the-coronavirus-cure-could-be-deadlier-than-the-disease/

(d) Doctors Dan Erickson and Artin Massihi of Accelerated Urgent Care in Kern County, California say the longer people stay inside, the more their immune system drops. The secondary effects, the child abuse, alcoholism, loss of revenue – all of these are, in our opinion, significantly more detrimental thing to society than a virus that has proven similar in nature to the seasonal flu that we have every year.[106]

(e) **Economic Consequences of Lockdown:**

> "Our leaders must reopen our country immediately. We will survive this virus. We will not survive this economic lockdown."[107]

168. With respect to treatment measures, the Defendants further ignored, and continue to ignore, the following expert criticism and opposition;

(a) **Ventilators are not working and may be increasing harm.** New evidence reveals there is no 'pneumonia' nor ARDS with CV 19. Ventilators are not only the wrong solution, but high pressure intubation can actually wind up causing more damage than without. Ventilators are not working and may be increasing harm. Over 80% of individuals put on ventilators are dying. [108]

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[106] https://vaccineimpact.com/2020/california-er-physicians-sheltering-in-place-does-more-harm-than-good-lowers-our-immune-system/
https://prepforthat.com/kern-county-california-doctors-coronavirus-end-shutdown/

[107] https://www.facebook.com/groups/221945012378955/

[108] https://web.archive.org/web/20200405061401/https://medium.com/@agaiziunas/covid-19-had-us-all-fooled-but-now-we-might-have-finally-found-its-secret-91182386efcb

(b) **Managing the Flow.** The truth for any new virus is that most people will be exposed to it. If one's goal is to NEVER get COVID-19, one would pretty much need to live on lockdown for the rest of his/her life. The ONLY reason for the lockdown is to manage the flow of people through our hospitals so that those who have acute symptoms will get the care they need to hopefully not die. Is the desire to manage the flow of people through our hospitals worth shutting down our economy? Given most hospitals are operating at 50% or less of capacity, have we not over managed the flow?

(c) **No Evidence Masks Work.** No RCT study with verified outcome shows a benefit for HCW or community members in households to wearing a mask or respirator. There is no such study. Likewise, no study exists that shows a benefit from a broad policy to wear masks in public. Furthermore, if there were any benefit to wearing a mask, because of the blocking power against droplets and aerosol particles, then there should be more benefit from wearing a respirator (N95) compared to a surgical mask, yet several large meta-analyses, and all the RCT, prove that there is no such relative benefit.

(d) **Ineffectiveness of Masks & Respirators -** D. G. Rancourt.[109]

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[109] https://www.researchgate.net/publication/340570735_Masks_Don't_Work_A_review_of_science_relevant_to_COVID-19_social_policy?fBritish Columbialid=IwAR3xOsnDOC2oRHau1k8F8_rA6CmfTvca6eZY1lS_BH0GRc5uHhKYPoWEmfk

(e) **Conflicting Advice About Face Masks to Prevent CV 19.** There is currently no evidence that wearing a mask (whether medical or other types) by healthy persons in the wider community setting, including universal community masking, can prevent them from infection with respiratory viruses, including COVID-19.[110]

(f) **The surgeon general said not to wear a mask.[111]**

(g) **Over 3 times the risk of contracting influenza like illness if cloth mask is used versus no mask at all;[112]**

(h) "Penetration of cloth masks by particles was almost 97% compared to medicalmaskswith44%";[113]

(i) **Report on surgical mask induced deoxygenation during major surgery"[114] ;**

(j) **Co-Factors:** Not everyone is at equal risk of dying from COVID 19. CV 19 has spread unevenly around the world, clustered in several hot pockets, while leaving other areas with scant outbreaks. What other factors are contributing to the COVID 19 virus mortality?;

(k) **Link Between Air Pollution and CV 19;[115]**

(l) **Underlying Disease and COVID- 19.[116]**

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[110] https://thevaccinereaction.org/2020/04/face-masks-to-prevent-covid-19-conflicting-facts-advice/#_edn5

[111] https://www.businessinsider.com/who-no-need-for-healthy-people-to-wear-face-masks-2020-4

[112] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4420971/

[113] https://www.sciencedaily.com/releases/2015/04/150422121724.htm

[114] https://www.ncbi.nlm.nih.gov/pubmed/18500410

[115] https://thevaccinereaction.org/2020/04/study-shows-link-between-fine-particle-air-pollution-and-covid-19-mortality/

169. The Plaintiffs state, and the fact is, that the evidence is that far many, more people have died as result of the "pandemic" measures themselves, than purportedly from the "COVID- deaths", even if one takes the deaths "caused" by COVID as a given, through the following consequences of the measures:

(a) Spikes in suicide rates resulting in intense clinical depression from the measures;

(b) Spikes in drug over-dose attributable to measures;

(c) Spikes in domestic violence and murder as a direct result of the measures;

(d) Deaths resulting from the cancellation of over 170,000 medical surgeries;

(e) Deaths from persons afraid to leave their homes to obtain medical diagnosis and treatments; and

(f) Sub-space spikes in starvation, given the UN World- Food Bank warning that 130 Million additional people will be on the brink of starvation by end of 2020 due to disruption of supply chains due to COVID Measures.

170. It is to be noted that the above-noted criticism was early on in the outbreak which criticism has now intensified both in volume and accuracy, that the COVOD-measures are unwarranted, extreme, and not based on science and medicine.

171. Another pointed area of disagreement and criticism, which continues, along with the above-noted, which the Defendants refuse to acknowledge, ignore, and not

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[116] https://thevaccinereaction.org/2020/04/covid-19-hospitalized-patients-and-underlying-chronic-disease/

respond to, is the questioning of this as a "pandemic" rather than a typical seasonal viral respiratory illness, as reflected, inter alia, by the following:

(a) **California has a 0.0003% Chance of Death from Covid 19**":

> **"**Initial models were woefully inadequate. They predicted millions of cases of death. Not of prevalence or incidence but deaths. This is not materializing. What is materializing in California is 12% positives... This equates to 4.7 million cases in California. This is the good news.... We have seen 1,227 deaths. California has 0.0003% chance of death from Covid-19. Is this enough to justify a lock-down?"
>
> **"COVID-19 Antibody Seroprevalence in Santa Clara County, California"**Conclusion: "The population prevalence of SARS-CoV-2 antibodies in Santa Clara County implies that the infection is much more widespread than indicated by the number of confirmed cases. Population prevalence estimates can now be used to calibrate epidemic and mortality projections." [117]

(b) The above research, in (a) above, is ground-breaking and provides foundational support for narratives such as :

(i) the initial models were incorrect;

(ii) conflicts of interest (Gates/Fauci/Democrats) contributed to an over-hyped response and failure to revisit despite availability of new data (confirmation bias);

(iii) we need to be rational here as the lock-down is hurting normal citizens - the 99% ;

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[117] https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v1

(iv) no evidence exists to justify forceful solutions like mandatory Covid-19 vaccinations, community immunity passwords, contact tracing, or increased domestic surveillance;

(v) we need to root out and remove all conflicts of interests in our public health institutions, both CDC and WHO; again

(vi) **Annual Influenza Deaths vs. CV 19 deaths.** It is claimed that 7 to 8,000+ Canadians die from season viral respiratory illness each year. The number of Canadians who have died from Covid-19 does not stray from annual season viral respiratory illness death total,[118] notwithstanding the inflated, false " covid-deaths";

(c) In 2009-2010, the world experienced the swine flu pandemic (H1N1). During that pandemic it is claimed that 203,000 people were killed world-wide by the virus. There was not a need to shut down our entire way of life in 2009. It is still unclear why this is the strategy being implemented today;

(d) The CDC has tracked the total number of Americans who die every week from pneumonia. For the last few weeks, that number has come in far lower than at the same moment in previous years. How could that be? **It seems that doctors are classifying conventional pneumonia deaths as COVID-19 deaths.** That would mean this epidemic is being credited for thousands of deaths that would have occurred if the virus never appeared here.

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[118] https://www.worldometers.info/coronavirus/?nsukey=8gR2B80EUvHgIg1gz%2FFrRbGWu%2BhOoChcVMEV2tcidO%2FquhcnKlUPJ6Oevxq86h8W7SYtAC%2FYsoVycvKvhtVZgT%2FvREx1TON%2British ColumbiaUTJ6uKZDsLJ4QDUYN0QG2n2ifAPsDuLBJZryuEWbYH8BsYmR4hwzToazvCLjqZsbV0YQAANZ46gHbo7Sf%2Beyzk1c3WND68j

(e) Number of influenza cases and deaths according to WHO every year.[119]

(f) Are the numbers of CV deaths accurate?[120]

(g) Montana physician **Dr. Annie Bukacek** discusses how COVID 19 death certificates are being manipulated;[121]

(h) **Italy: 99% who died from virus had other illness;[122]** The Key Points being that :

- The cases and deaths of this new disease COVID19 are being described as "flu-like symptoms with pneumonia" but **there is NO data that shows SARSCov2 is present in all of these cases/deaths.** Only coronavirus of which there are many strains.

- This is because **the PCR test is not reliable enough** to identify the new strain - laboratory testing is only identifying coronavirus. This is the flaw in the CDC/WHO theory of causality for this "new" disease "COVID19". They haven't provided any data about the presence of this new strain (SARSCov2) in COVID19 and it is known that many influenza viruses and bacteria cause "flu-like symptoms with pneumonia".

- Until you have evidence to prove the causality of COVID19 disease as being to SARsCov2 by showing that it is present in every case of the disease then there is no new disease. Koch's postulates need to be used to provide proof of causality.

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[119] http://www.euro.who.int/en/health-topics/communicable-diseases/influenza/seasonal-influenza/burden-of-influenza?fBritish Columbialid=IwAR0ZDNTwTXKGve_oJVmtZsGKFAl44JYSo6IAf4GkA47EYD8805b6FS-8Rkw

[120] https://www.ctvnews.ca/health/coronavirus/why-the-exact-death-toll-for-covid-19-may-never-be-known-1.4881619

[121] https://www.youtube.com/watch?v=CnmMNdiCz_s

[122] https://www.bloomberg.com/news/articles/2020-03-18/99-of-those-who-died-from-virus-had-other-illness-italy-says?utm_campaign=pol&utm_medium=bd&utm_source=applenews&fBritish Columbialid=IwAR0qN9k2HVrnAghrK-Wrl72J7oBoNY1vFAGY3dI-M7GWKirK6cfUeAI16yg

- **Mathematical Modeling Flawed**
  In March, UK epidemiologist Neil Ferguson from the Imperial College of London issued a mathematical "model" that predicted that as many as 500,000 in the UK would die from Covid-19. On March 24th Ferguson revised his modeling projections to read 20,000 deaths, and "likely far fewer." On April 2nd Ferguson revised it again to read 5,700 deaths. The problem was that many world leaders used Ferguson's original number to shut down most of the planet.[123]

(i) The Canadian government implemented the lockdown on the basis of Neil Ferguson's Imperial College mathematical modeling that was grossly flawed. Ferguson has drastically backtracked on his predictions which begs the question why is Canada now doubling down on the lockdown that will not be lifted until a vaccine is ready?

(j) **UK Decides CV 19 No Longer A 'High Consequence Infectious Disease'** As of March 19, 2020, COVID-19 is no longer considered to be a high consequence infectious diseases (HCID) in the UK.[124]

(k) High Consequence Infectious Disease Public Health England, have provided current information and regarding COVID-19 mortality rates as low. The Advisory Committee on Dangerous Pathogens (ACDP) in the UK and is also of the opinion that COVID-19 should no longer be classified as an HCID (High Consequence Infectious Disease).[125]

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[123] https://prepforthat.com/fear-mongering-covid-19-epidemiologist-says-he-was-wrong/

[124] https://prepforthat.com/uk-officials-covid-19-no-longer-high-consequence-infectious-disease/

(l) Our World in Data researchers announced this week that they had stopped relying on World Health Organization data for their models.[126]

(m) New Oxford study suggests millions have already built up coronavirus immunity.[127]

(n) Lack of Good Data. If you are going to do something as draconian as shut down an economy, you better be right, and you better have good data. The government has neither.[128]

(o) Dr Teresa Tam's incompetent virus response.[129]

(p) **British Columbia health officer Dr Bonnie Henry admits They did not use science to impose restrictions.**[130]

172. The measures have been also heavily criticized, on a legal basis, in Canada and abroad. Early on in the declaration, on March 26th, 2020 the UN Commissioner for Human Rights, Michelle Bachelet, took an opposite view to that of Dr. Teresa Tam, whose view is that it is appropriate to run rough-shod over these rights and worry about it later, where Bachelet early declared that:

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[125] https://www.gov.uk/topic/health-protection/infectious-diseases

[126] https://fee.org/articles/oxford-based-group-stops-using-who-data-for-coronavirus-reporting-citing-errors/?fBritish Columbialid=IwAR1okWvqn-qe7zvbHxoUY_U-4Nlqe6A8mOVwGqw4_N3qk9TXsfs_P6eEMJA

[127] https://news.yahoo.com/oxford-study-suggests-millions-people-221100162.html?soc_src=hl-viewer&soc_trk=fb

[128] https://www.foxnews.com/opinion/tucker-carlson-we-must-ask-the-experts-how-they-screwed-up-the-coronavirus-models-so-badly?fBritish Columbialid=IwAR0xrpFytibdv5JJLOR2fveTjvpj5b23tn7JFn2uemrXeu27GDFRpeuDLoI

[129] https://www.spencerfernando.com/2020/03/29/devastating-timeline-reveals-total-incompetence-of-theresa-tams-virus-response/

[130] https://www.youtube.com/watch?v=SY8fclCOG4c&feature=youtu.be&fBritish Columbialid=IwAR0BmcUm4qk7BB3VuJRqvaJpyuB0VfyfkvmVM6HLmF-u0KiKJbD_cdKQIls&app=desktop

> "Lockdowns, quarantines and other such measures to contain and combat the spread of COVID-19 should always be carried out in strict accordance with human rights standards and in a way that is necessary and proportionate to the evaluated risk."

173. Former UK Supreme Court Justice Lord Sumpton was an early opponent to the lock-down measures. In a BBC interview of May18th, 2020, he re-iterated and stated, **inter alia**, as follows:

> JS: because they seem to me to have no real purpose in continuing the lockdown other than to spare themselves public criticism. now one does understand why politicians don't want to be criticized but it's the mark of a statesman that you're prepared to stand up for the national interest and not simply to run away before public opinion. especially when you have in a sense created that public opinion yourself by frightening the daylights out of people over the over the last eight weeks and trying to persuade them that this is a much more virulent epidemic than it actually is.
>
> ….
>
> LS: what i'm advocating now is that the lockdown should become entirely voluntary. it is up to us, not the state, to decide what risks we are going to take with our own bodies. now, the traditional answer that people give to that is: "well, but by going out or in the streets and in shops and things you are infecting other people". but you don't have to take that risk you can voluntarily self-isolate. you don't have to go into the streets. you don't have to go to the shops. people who feel vulnerable can self-isolate, and the rest of us can then get on with our lives.
>
> ….
>
> we have never lived in a risk-free world and we're never going to live in a risk-free world.
>
> …
>
> we are entitled to take risks with our own lives especially when basically life is only worth living if you are prepared to engage in social activities. which inevitably involve risk. that is part of life.

174. The Plaintiffs state, and fact is, that the above-noted **scientific and medical expert opinions,** against and in severe criticism of the "pandemic" declaration, and its draconian and un-necessary measures, **are not exhaustive, but examples**. The Plaintiffs state, and fact is, that the Defendants have never acknowledged, addressed, spoken to, nor responded to these contrary expert views, and further state that the Defendants, including the mega-social media, such as YouTube, Facebook, Amazon, Google, Yahoo and like, as well as CBC, have intentionally suppressed, censored, belittled and removed the publication of any such contrary views, contrary to the principles and methodology of science and medicine, with the acquiescence and actual support of the Canadian Federal government, which government threatens to add criminal sanctions to assist these media for what they irrationally, arbitrarily and unscientifically deem "misinformation" , and further violate the Plaintiffs' rights to freedom of speech, expression, and the media, contrary to s.2 of the **Charter**, by the government's acts and omissions in making threats of criminalizing speech, and doing absolutely nothing, by omission, to regulate this type of "Stalinist censorship".

175. Since the summer of 2020, this factor of the measures being in force, and causing more devastation than the virus, has gone from severe to catastrophic as reflected by:

(a) There are more suicides because of the measures and purported deaths by Covid-19;

(b) There are more drug overdoses because of the measures and purported deaths by Covid-19;

(c) There is more starvation caused by the measures and purported deaths by Covid-19;

(d) There are far more deaths, from cancelled, necessary surgeries and fear to access medical treatment for fear of covid, than purportedly from Covid itself.

(e) There are devastating mental health disorders caused by the measures;

(f) Domestic violence, child, and sexual abuse have sky-rocketed;

(g) Small businesses and livelihoods, to the tune of millions, have been obliterated.

- **D/ THE SCIENCE & MEDICINE OF COVID-19**
- **Summary (Overview)**

176. The Plaintiffs state, and the fact is, that the World Health Organization, ("WHO"), our federal, provincial, and municipal governments, and the mainstream media, propagate that we are facing the biggest threat to humanity in our lifetime. This is false.

177. The fact is that, false and baseless predictions of wide-spread infection with high rates of mortality persuaded governments that unprecedented containment measures were necessary to save us from certain peril.

178. The fact is that, while there is more about the SARS-CoV-2(”COVID-19”) coronavirus that needs to be understood, the scientific and medical evidence

clearly demonstrates that the mathematical modeling used to justify extreme containment measures were invalid. Further, that the vast majority of the population is not at serious risk of complications or mortality as a result of exposure to COVID-19.

179. The fact is that, the mass and indiscriminate containment of citizens, the restriction of access to our economy, courts, parliament and livelihoods, medical and therapeutic care, and the imposition of physical distancing and other restrictions are measures that have never before been implemented nor tested, nor have a scientific or medical basis.

180. The fact is that, the impact of these measures on physical, emotional, psychological, and economic well-being is profoundly destructive, unwarranted, and clearly not sustainable.

181. The fact is that, these drastic isolation measures are not supported by scientific or medical evidence. There is considerable agreement in the scientific community that such drastic measures are not sustainable nor warranted or justified, and while these measures may delay viral spread, they are unlikely to impact overall morbidity.

182. The fact is that, this over-hyped COVID-19 pandemic narrative is creating unnecessary panic and being used to justify systemic governmental violations of the rights and freedoms that form the basis of our society, including our constitutional rights, sovereignty, privacy, rule of law, financial security, and even our very democracy.

183. The fact is that, it is clear that significant violations of the Plaintiffs' rights and freedoms are being perpetrated by the federal, provincial and municipal governments and health authorities.

184. The fact is that, as a result of all of the above, the Plaintiffs have suffered and continue to suffer, severe violations of their constitutional rights which are justified on any measurement, including s. 1 of the **Charter.**

- **The Covid-Measures Unscientific, Non-Medical, Ineffective, and Extreme**

185. From the on-set of the declared emergency to summer of 2020, the Plaintiffs state and the fact is, that the Measures implemented lack scientific and medical evidence to support containment measures in that:

(a) Mass and indiscriminate lockdown of the general population has not been previously attempted in modern history, and has no scientific nor medical basis. In fact, Dr. Bonnie Henry, BRITISH COLUMBIA Chief Medical Officer, has flatly stated that the measures are not based on science or medicine.

(b) A 2011 review of the literature to evaluate the effectiveness of social distancing measures such as school closures, travel restrictions, and restrictions on mass gatherings to address an influenza pandemic concluded that *"such drastic restrictions are not economically feasible and are predicted to delay viral spread but not impact overall morbidity."* [131]

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[131] Social Distancing as a Pandemic Influenza Prevention Measure
https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

(c) There are no realistic and contextual studies of the negative social, family, psychological, and individual health consequences of extended general population lockdowns, nor the impact on the national economy.

(d) The long-term impact of the broadly applied infringements of civil rights and freedoms is not known, including any permanent structural erosion of democracy itself due to increased authoritarianism and heightened regulatory or penal consequences for violating government directives.

(e) The measures enacted by the federal, provincial and municipal governments are unprecedented.

(f) The government has acted in diametrical opposition to the precautionary principle: *"Government shall not act with insufficient scientific knowledge, if the action has any likelihood of causing more harm than good".*

(g) Justification for the early panic response has not been corroborated. [132]

(h) Faith in epidemic-modeling and the resulting mitigation strategies are not justified.

(i) Physicians globally are expressing alarm over the exponentially growing negative health consequences of the national shutdown. [133] [134]

(j) Despite the importance given to physical distancing as a containment measure, there is a lack of scientific evidence on the effectiveness of such intervention on the long-term health of citizens. [135] [136]

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132 http://ocla.ca/wp-content/uploads/2014/01/OCLA-Report-2020-1-Criticism-of-Government-Response-to-COVID19.pdf

[133] https://www.scribd.com/document/462319362/A-Doctor-a-Day-Letter-Signed#from_embed

[134] https://www.forbes.com/sites/gracemarieturner/2020/05/22/600-physicians-say-lockdowns-are-a-mass-casualty-incident/#20248e5250fa

(k) There is no scientific evidence to substantiate the effectiveness of two meter ‘physical distancing’ as an intervention to reduce SARS-CoV-2 transmission and infection and to improve overall health. [137]

(l) Dr. Martin Dubravec, MD, a Clinical Immunologist states: *“The bottom line is that herd immunity is what will stop the virus from spreading. Not containment. Not a vaccine. Not staying locked in our homes. It’s time we had an honest conversation on how to move beyond containment.”* [138]

(m) A review of the scientific literature with regards to the use of masking concluded there is no scientific evidence to substantiate the effectiveness of masking of the general public to prevent viral infection and transmission. [139]

(n) Denis Rancourt, Ph.D. has identified the many unknowns regarding the potential harm from a broad public policy of masking. Rancourt concludes: “In an absence of knowledge, governments should not make policies that have a hypothetical potential to cause harm. The government has an onus barrier before it instigates a broad social-engineering intervention or allows corporations to exploit fear-based sentiments.” [140]

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[135] Benjamin E Berkman. Mitigating pandemic influenza: the ethics of implementing a school closure policy. Journal of Public Health Management and Practice: JPHMP, 14(4):372–378, August 2008. PMID: 18552649.

[136] https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

[137] https://www.zuercher-presse.com/virologe-hendrick-streeck-gibt-keine-gefahr-beim-einkaufen-jemand-anderen-zu-infizieren/?cn-reloaded=1

[138] https://aapsonline.org/coronavirus-covid-19-public-health-apocalypse-or-anti-american/

[139] https://www.researchgate.net/publication/340570735_Masks_Don't_Work_A_review_of_science_relevant_to_COVID-19_social_policy

[140] https://www.researchgate.net/publication/340570735_Masks_Don't_Work_A_review_of_science_relevant_to_COVID-19_social_policy

(o) A study of cloth masks cautions against the use of cloth masks. The study concludes: "As a precautionary measure, cloth masks should not be recommended." [141]

(p) According to Dr. Richard Schabas, former Chief Medical Officer for Ontario -*"Quarantine belongs back in the Middle Ages. Save your masks for robbing banks. Stay calm and carry on. Let's not make our attempted cures worse than the disease."* [142]

(q) On May 20, 2020, Dr. Teresa Tam, Canada's Chief Medical Officer, publicly advised the use of non-medical masks for the general public to provide an *"added layer of protection"* that could help prevent asymptomatic or pre-symptomatic Covid-19 patients from unknowingly infecting others. Dr. Tam's advice is not supported by scientific evidence. [143]

(r) It would appear that any advice/requirement to use masks is for a purpose/agenda other than the prevention of viral infection and transmission.

(s) A paper published on January 30, 2020 in *The New England Journal of Medicine* (*NEJM*) which appeared to confirm that individuals who are asymptomatic can transmit SARS-CoV-2 to others has subsequently proven to contain major flaws and errors.[144]

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[141] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4420971/

[142] https://www.theglobeandmail.com/opinion/article-strictly-by-the-numbers-the-coronavirus-does-not-register-as-a-dire/

[143] https://www.politico.com/news/2020/05/20/canada-non-medical-masks-provinces-reopen-271008

[144] https://www.sciencemag.org/news/2020/02/paper-non-symptomatic-patient-transmitting-coronavirus-wrong

(t) The imposition of mass and indiscriminate self-isolation measures prevents the development of natural immunity necessary to secure herd immunity and end the epidemic. [145]

(u) On April 6, 2020, German epidemiologist, Knut Wittkowski, released a statement warning that artificially suppressing the virus among low risk people like school children may *"increase the number of new infections"* as it keeps the virus circulating much longer than it normally would. [146]

(v) On March 24, 2020 global medical experts declared that efforts to contain the virus through self-isolation measures would negatively impact population immunity, maintain a high proportion of susceptible individuals in the population, prolong the outbreak putting more lives at risk, damage our economy and the mental stability and health of the more vulnerable. [147] [148]

(w) A review of recent literature pertaining to social distancing measures conducted by David Roth and Dr. Bonnie Henry of the British Columbia Centre for Disease Control concluded the following: a) widespread proactive school closures are likely not an effective prevention measure during an influenza pandemic; b) stringent travel restrictions and border control may briefly delay imminent pandemics, these approaches are neither economically nor socially feasible; and c) there is no recent evidence outlining the effectiveness of the prohibition of mass gatherings. [149]

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[145] https://www.aier.org/article/herd-immunity-is-misleading/

[146] Stand Up for Your Rights, says Bio-Statistician Knut M. Wittkowski. American Institute for Economic Research. April 6, 2020
https://www.aier.org/article/stand-up-for-your-rights-says-professor-knut-m-wittkowski/

[147] https://off-guardian.org/2020/03/24/12-experts-questioning-the-coronavirus-panic/

[148] https://www.europereloaded.com/twenty-two-experts-questioning-the-coronavirus-panic-videos-scientific-common-sense/

(x) According to a public statement issued by the British Columbia Ministry of Health: a) COVID-19 virus has a very low infection rate in children and youth; b) In British Columbia, less than 1% of children and youth tested have been COVID-19 positive; c) There is no conclusive evidence that children who are asymptomatic pose a risk to other children or to adults, and d) Schools and childcare facility closures have significant negative mental health and socioeconomic impacts on vulnerable children and youth. [150]

(y) According to a May 21, 2020 letter from Dr. Mark Lysyshyn, MD, Deputy Chief Medical Health Officer with Vancouver Coastal Health: *"Although children are often at increased risk for viral respiratory illnesses, that is not the case with COVID-19. Compared to adults, children are less likely to become infected with COVID-19, less likely to develop severe illness as a result of infection and less likely to transmit the infection to others."* Dr. Lysyshyn further states: *"Non-medical masks are not needed or recommended. Personal protective equipment such as medical masks and gloves are not recommended in the school environment."* [151]

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[149] https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

[150] https://www2.gov.British Columbia.ca/assets/gov/health/about-British Columbia-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-guidance-k-12-schools.pdf

[151] http://www.vch.ca/Documents/COVID-VCH-Schools-May-21-2020.pdf

(z) On May 21, 2020, British Columbia's Chief Health Officer, Dr. Bonnie Henry stated: *"We're encouraging people [to wear masks] as a mark of respect, as a mark of politeness, and paying attention to the welfare of others."* The recommendation to mask no longer is on the basis of effectiveness but instead is being promoted as a social grace. [152]

(aa) British Columbia's Chief Health Officer, Dr. Bonnie Henry, when addressing a question regarding the inconsistency among the provinces of Canada on COVID-19 restrictions placed on Canadians stated: *"None of this is based on science."* [153]

(bb) The reported number of deaths attributed to SARS-CoV-2 is demonstrably unreliable given the inclusion of "*presumptive*" deaths, and the failure of the medical establishment to differentiate between individuals dying ***from*** COVID 19 and those with co-morbidities dying ***with*** COVID 19. [154] [155]

(cc) The failure to differentiate between individuals dying *from* COVID 19 and those with co-morbidities dying *with* COVID 19 inflates the risk of mortality from SARS-CoV-2 and undermines confidence in any response strategy based on mortality statistics. [156]

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[152] https://www.straight.com/covid-19-pandemic/may-21-coronavirus-update-British Columbia-resistance-health-measures-regional-restrictions-gender-differences-second-wave

[153] https://www.youtube.com/watch?v=SY8fclCOG4c&feature=youtu.be&fBritish Columbialid=IwAR0BmcUm4qk7BB3VuJRqvaJpyuB0VfyfkvmVM6HLmF-u0KiKJbD_cdKQIls&app=desktop

[154] Why the exact death toll for COVID-19 may never be known. CTV News, April 3, 2020 https://www.ctvnews.ca/health/coronavirus/why-the-exact-death-toll-for-covid-19-may-never-be-known-1.4881619

[155] https://www.cpsBritish Columbia.ca/for-physicians/college-connector/2020-V08-02/04

[156] https://www.bloomberg.com/news/articles/2020-03-18/99-of-those-who-died-from-virus-had-other-illness-italy-says

(dd) Doctors globally are being pressured to issue death certificates that identify COVID 19 as the cause of death even when other co-morbidity issues are the more likely cause of death.

(ee) The presentation of mortality data, expressed as a percentage of deaths of *tested and confirmed cases*, is distorting the risk and creating undue panic. This data fails to include a significant percentage of the population who contracted the virus but were not tested nor confirmed and who recovered without medical intervention.

(ff) To date, the number of reported deaths attributed to SARS-CoV-2 is not out of "normal" range when compared to the annual mortality from influenza and pneumonia (seasonal viral respiratory illness) recorded through the last decade. [157] [158] [159]

(gg) According to Dr. Richard Schabas, former Chief Medical Officer of Ontario, strictly by the numbers, the coronavirus does not register as a dire global crisis.

(hh) No data has been provided by the Government of Canada nor British Columbia to indicate that the total mortality in Canada has increased substantially from previous years.

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[157] Strictly by the numbers, the coronavirus does not register as a dire global crisis. Richard Schabas. The Globe and Mail. March 9, 2020
https://www.theglobeandmail.com/opinion/article-strictly-by-the-numbers-the-coronavirus-does-not-register-as-a-dire/

[158] New Data Suggest the Coronavirus Isn't as Deadly as We Thought. WDJ/Opinion. April 17, 2020
https://www.greenmedinfo.com/blog/stanford-team-finds-evidence-covid-19-mortality-rate-low-2-17-times-lower-whos-esta
https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v2

[159] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102597/?fBritish Columbialid=IwAR29vpTe-Dk-_xoVzVRbuAgVhil1k0DcZkGqyYsak6lC-OByjZcBRP6cyjc

(ii) Mortality modeling by the World Health Organization, Imperial College of London, and the US Institute for Health Metrics and Evaluation have all been drastically "downgraded". Strategies and measures based on these original predictions are invalid.[160] [161]

(jj) As of March 19, 2020, the status of COVID-19 in the United Kingdom was downgraded. COVID-19 is no longer considered a high consequence infectious disease (HCID). The Advisory Committee on Dangerous Pathogens (ACDP) in the UK is also of the opinion that COVID-19 should no longer be classified as an HCID (High Consequence Infectious Disease). [162] [163]

(kk) **On March 26, 2020,** Dr. Anthony Fauci published an editorial in the *New England Journal of Medicine* stating that *"the overall clinical consequences of Covid-19 may ultimately be more akin to those of a severe seasonal influenza with a case fatality rate of perhaps 0.1%."* [164]

(ll) On April 9, 2020, Canadian public health officials stated: "In a best-case scenario, Canada's total COVID-19 deaths can range from 11,000 to 22,000." And "In the bad scenarios, deaths go well over 300,000." As of May 21, 2020, the total reported deaths from

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[160] How One Model Simulated 2.2 Million U.S. Deaths from COVID-19. Cato Institute. April 21, 2020 https://www.cato.org/blog/how-one-model-simulated-22-million-us-deaths-covid-19

[161] https://prepforthat.com/fear-mongering-covid-19-epidemiologist-says-he-was-wrong/

[162] https://www.gov.uk/topic/health-protection/infectious-diseases

[163] https://prepforthat.com/uk-officials-covid-19-no-longer-high-consequence-infectious-disease/

[164] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7121221/

COVID 19 in Canada was 6,145. As of July 2, 2020, the total deaths attributed to COVID 19 in Canada was 8,642. In 2018, the mortality rate of the 2018 influenza/pneumonia in Canada which was **23 per 100,000**. [165] In a population of 37.7 M, this equates to approximately 8,671 deaths. This is the mortality even though a vaccine exists for both influenza and pneumonia and there is a high uptake rate in the senior population.

(mm) The World Health Organization knew as early as February 28, 2020 that most people will have mild illness from SARS-CoV-2 infection and get better without needing any special care. [166]

(nn) The Canadian government has implemented a re-start strategy that continues to maintain the unsubstantiated narrative that the SARS-CoV-2 virus is extra-ordinarily dangerous and requires extra-ordinary social distancing measures never before implemented.

(oo) The re-start strategy recommended by the federal and various provincial governments is based on 'sector' rather than 'risk'. There is no evidence that a re-start based on sector has scientific merit.

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[165] https://www.statista.com/statistics/434445/death-rate-for-influenza-and-pneumonia-in-canada/

[166] WHO Director-General's opening remarks at the media briefing on COVID-19 - 28 February 2020 https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---28-february-2020

(pp) According to a number of infectious disease experts, hospital capacity, rather than the number of infections should be the metric of choice for relaxing restrictions. [167]

(qq) There is no evidence that harms caused by the mass and indiscriminate containment of citizens was calculated and considered in the modeling and strategic planning response to SARS-CoV-2. [168]

(rr) SARS (2003), Swine Flu/H1N1 (2009), and MERS (2012) were all considered pandemics by the World Health Organization. Each of these pandemics were effectively contained without lockdowns, economic ruin, violations of privacy, and the indefinite loss of the right to work and personal freedoms. SARS and MERS dissipated on their own naturally without any vaccine intervention. [169]

(ss) Academic studies of media coverage during the 2003 Canadian SARS outbreak concluded that the media coverage was excessive, sensationalist, and sometimes inaccurate. Government health agencies were criticized for lacking a unified message and communications strategy, resulting in confusion and panic about the disease.[170] These same criticisms hold even more true for media and government response to SARS-CoV-2.

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[167] https://nationalpost.com/opinion/opinion-we-are-infectious-disease-experts-its-time-to-lift-the-covid-19-lockdowns

[168] Rethinking the Coronavirus Shutdown. WSJ/Opinion. March 19, 2020
https://www.wsj.com/articles/rethinking-the-coronavirus-shutdown-11584659154

[169] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2094974/

(tt) The suspension of our civil liberties is not justified by the known risk posed by SARS-CoV-2.

(uu) In a statement released on March 24, 2020, professor Peter Gotzche states: *"The coronavirus mass panic is not justified."* The suspension of our right to liberty, to work, to travel, and to conduct commerce is not justified by the known risk posed by SARS-CoV-2.[171]

(vv) There is no independent human rights oversight committee to track human rights violations associated with SARS-CoV-2 response measures in Canada.

(ww) Communications about SARS-CoV-2 by the Government of Canada and mainstream media have been exaggerated, distorted, irresponsible, and appear to have been purposely designed to evoke fear and panic. The fear is out of proportion to the actual risk of mortality.

(xx) Governments and media have repeatedly failed to properly distinguish between the 'risk of infection' and 'the risk of mortality'. For the vast majority of the population the risk of mortality is extremely low.

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[170] https://www.thecanadianencyclopedia.ca/en/article/sars-severe-acute-respiratory-syndrome

[171] The Coronavirus mass panic is not justified. Professor Peter C. Gøtzsche24 March 2020 https://www.deadlymedicines.dk/wp-content/uploads/G%C3%B8tzsche-The-Coronavirus-mass-panic-is-not-justified.pdf

(yy) Prevalence of SARS-CoV-2 in the entire Canadian population is very low. Extreme social controls should never be used in low prevalence epidemics.

(zz) As presented by PHAC, the modelling techniques used to establish probabilities of the epidemic trends and thus "inform" policy decisions have no basis in evidence, are completely inflated, and essentially amount to statistical chicanery.

(aaa) Using total case numbers as though they represent the risk of being infected with SARS-CoV-2 is perception management. While these numbers may be of interest for epidemiological study, they have little bearing on the true risk facing citizens.

(bbb) Severity of SARS-CoV-2 is estimated by infection fatality rates. Infection fatality rates cannot be established until the total number of cases, both symptomatic and asymptomatic, in the entire population can be estimated.

(ccc) The Canadian government failed to perform a national random sample test to establish a SARS-CoV-2 baseline across the entire population to justify the restrictions and violations of rights and freedoms.

(ddd) Exaggerated claims and distorted messages have contributed to an atmosphere of fear and uncertainty that is destructive to the well-being of Canadians. It would appear that the real epidemic is an epidemic of fear.

(eee) The evoked fear and panic is so entrenched amongst a large proportion of Canadians that it is extremely difficult to reverse that message even when the scientific data does not support such panic.

(fff) As recent as May 22, 2020 Prime Minister Justin Trudeau told reporters that contact tracing needs to be ramped up across the county. Trudeau stated that he "strongly recommends" provinces use cell phone apps when they become available, and that this use would likely be mandated. Use of surveillance technologies to monitor citizens constitutes a clear violation of our right to privacy.

(ggg) As of May 24, 2020, the Prime Minister of Canada had not invoked the *Emergencies Act,* nor has he to date. Therefore, emergency measures announced by the Prime Minister and his public statements to Canadians to "just stay home" have no legal basis or authority, are an abuse of power, and is resulting in confusing, dangerous and unlawful messaging.

(hhh) The Prime Minister of Canada and British Columbia Premier John Horgan have repeatedly stated that *"life will not return to normal* *until a vaccine is found"*. It is irresponsible to base a return to normal upon a vaccine when there is no guarantee that an effective and safe vaccine can be developed.

(iii) There are significant risks to both individuals and to confidence in the health care system by accelerating the development of a SARS-CoV-2 vaccine by relaxing normal and prudent safety testing measures.

(jjj) Health Canada approved human trials of a SARS-CoV-2, under an Interim Order, of a SARS-CoV-2 vaccine (May 19, 2020) without clear evidence that prior animal testing to identify the potential risk of pathogenic priming (immune enhancement) has been conducted. Pathogenic priming has prevented the development of an effective and safe coronavirus vaccine to date.

(kkk) Dr. Peter Hotez of Baylor College (who has previously tried to develop a SARS vaccine) told a US Congressional Committee on March 5, 2020 that coronavirus vaccines have always had a "unique potential safety problem" — a "kind of paradoxical immune enhancement phenomenon." [172]

(lll) To impose through influence, mandate, or coercion an inadequately tested SARS-CoV-2 vaccine product upon all

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[172] https://www.c-span.org/video/?470035-1/house-science-space-technology-committee-hearing-coronavirus&start=1380

Canadians when 99% of the population is not at risk of mortality is reckless, irresponsible and immoral.

(mmm) A SARS-CoV-2 vaccine ought to be targeted at the less than 1% of the population that is at risk of mortality, rather than the more than 99% that is not at risk.

(nnn) There is no moral, medical or ethical justification to ignore prudent safety protocols and to suggest that the use of this yet to be developed medical product is necessary for life to return to normal.

(ooo) Dr. Allan S. Cunningham, a retired pediatrician, has raised the possibility that a potential contributor to the current coronavirus outbreak is the seasonal influenza vaccine. A randomized placebo-controlled trial in children showed that the influenza vaccine increased fivefold the risk of acute respiratory infections caused by a group of non influenza viruses, including coronaviruses. [173] [174]

(ppp) A study of US military personnel confirms that those who received an influenza vaccine had an increased susceptibility to coronavirus infection. [175]

(qqq) EU numbers show correlation between influenza vaccine and coronavirus deaths. The countries with highest death rates (Belgium, Spain, Italy, UK, France, Netherlands, Sweden, Ireland

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[173] https://www.bmj.com/content/368/bmj.m810/rr-0

[174] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3404712/

[175] https://www.sciencedirect.com/science/article/pii/S0264410X19313647

and USA) had all vaccinated at least half of their elderly population against influenza.[176]

(rrr) Canada continues to be one of only two G20 Nations which fails to compensate citizens who are injured and killed by government approved and recommended vaccine products. The other is Russia.

(sss) The unwillingness of the Government of Canada to provide compensation for vaccine injury, while at the same time imposing vaccine products upon its citizens, is unconscionable.

(ttt) To rely on a vaccine as the required strategy to returning life to normal is reckless, irresponsible and unwarranted.

(uuu) Jonathan Kimmelman, director of McGill University's biomedical ethics unit stated: "Outbreaks and national emergencies often create pressure to suspend rights, standards and/or normal rules of ethical conduct. Often our decision to do so seems unwise in retrospect."

(vvv) On June 8th, 2020 the WHO publicly announced that the risk of symptomatic spreading of the virus was "**very rare**". This statement removed by Facebook as "fake News", given its very early, prior contrary assessment, the WHO, the next day partially retracted this June 8th, 2020 statement by qualifying without details or explanation that modeling suggested Asymptomatic transmission is possibly as high as 40%: NO evidence or study was provided, nor the basis of the previous day's release. On July 4th, 2020 the WHO re-re paddled back to its original June 8th, 2020 position.

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[176] https://www.thegatewaypundit.com/2020/05/niall-mccrae-david-kurten-eu-numbers-show-correlation-flu-vaccine-coronavirus-deaths/

186. A posted report announcing the June 8th, 2020 WHO release, on Facebook, with respect that Asymptomatic transmission was very rare, which was immediately removed by Facebook as "Fake News" for, contradicting earlier WHO releases.

187. From the summer of 2020, to the present, the alarm and clarity that the Defendants have **not** been following the science, or medicine, has intensified, world-wide, and in Canada, while the Respondents continue to refuse to disclose the source and substance of whose and what science they are following, based on what?

188. British Columbia doctors have written Bonnie Henry, publicly, requesting she disclose and explain her "scientific" basis for the measures. She has consistently refused. In fact, doctor(s) doing so, or criticizing Covid-measures such as Dr. Stephen Malthouse, and other, have been pursued by their Regulatory College for simply asking questions of Bonnie Henry and the Covid measures. Directors from the College of Surgery and Physicians of British Columbia have issued, on the pain of discipline and removal of medical license, that no criticism of the official Public Health opinions, dictates, and treatment will be tolerated by the College.

189. This is not restricted to British Columbia. On April 20th, 2021 Ontario doctors demanded, of Ontario Premier Doug Ford, an open and public discussion and debate of his measures as they do not add up to science or medicine, like the measures in British Columbia.

- **E/ HYPER – INFLATED, DISTORDETED TOTAL NUMBER OF CV-19 "CASES" & "DEATHS"**

190. Since the on-set of the "emergency", and into the summer of 2020, the Plaintiffs state that the total number of Covid-19 cases is the basis for almost all of the Covid-19 data including deaths in those cases, recovery from those cases, hospitalizations and ICU admissions of those cases and total active cases.[177] Total case numbers are also used for other epidemiological metrics (e.g., virulence and transmission rates of Covid-19).

191. Yet the total case numbers are inflated by both RT-PRC testing and WHO coding definitions.

192. The Plaintiffs state that the WHO coding of cases allows 'virus not identified', i.e., probable cases to be counted as Covid-19 cases.[178] WHO coding also inflates death data numbers by requiring **all cases** where Covid-19 is "probable or confirmed" to be certified as a death due to Covid-19 regardless of

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[177] Public Health Agency of Canada, https://www.canada.ca/en/public- health/services/diseases/2019-novel-coronavirus-infection/health-professionals/national-case-definition.html"Confirmed:A person with laboratory confirmation of infection with the virus that causes COVID-19 performed at a community, hospital or reference laboratory (NML or a provincial public health laboratory) running a validated assay. This consists of detection of at least one specific gene target by a NAAT assay (e.g. real-time PCR or nucleic acid sequencing).

[178] WHO ICD-10 Coding https://www.who.int/classifications/icd/COVID-19-coding-icd10.pdf?ua=1]

comorbidities. Admonishing physicians to "always apply these instructions, whether they can be considered medically correct or not."[179]

193. RT-PCR was never intended as a diagnostic tool[180] and is not an antigen test[181].

194. The Plaintiffs state that the PCR tests are based on an arbitrary cycling number (Ct) that is not consistent among testing laboratories.[182] "Cycling too much could result in false positives as background fluorescence builds up in the PCR reaction." Tests can show positive for minute amounts of RNA that are not causing illness and for non-infectious fragments of RNA.[183] RT-PCR tests cannot prove the pathogenic nature of the RNA.

195. RT-PCR tests have a specificity of 80-85%.[184] This means 15-20% of the time a positive test does not indicate the presence of RNA of SARS-CoV-2, but of some other RNA source. RT-PCR testing is not reliable for SARS-CoV-2 testing.[185]

196. RT-PCR tests are more likely to be false positive than false negative.[186] In low prevalence countries like Canada: "Such [false positive] rates would have large

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[179] WHO Cause of Death Guidelines https://www.who.int/classifications/icd/Guidelines_Cause_of_Death_COVID-19-20200420-EN.pdf?ua=1

[180] Dr. Judy Mikowitz https://articles.mercola.com/sites/articles/archive/2020/05/03/is-the-new-coronavirus-created-in-a-lab.aspx "Epidemiology is not done with PCR. In fact, Kary Mullis who invented PCR, Nobel Laureate, and others, said PCR was never intended for diagnostic testing."

[181] Not an Antigen Test: Prof Eleanor Riley, Professor of Immunology and Infectious Disease, University of Edinburgh and Dr Colin Butter, Associate Professor and Programme Leader in Bioveterinary Science, University of Lincoln https://www.sciencemediacentre.org/expert-comment-on-different-types-of-testing-for-covid-19/

[182] Issues with the RT-PCR Coronavirus Test, David Crowe and Dr. Stephen Bustin, April 23, 2020 https://theinfectiousmyth.com/coronavirus/RT-PCR_Test_Issues.php]

[183] https://www.independent.co.uk/news/world/asia/coronavirus-south-korea-patients-infected-twice-test-a9491986.html

[184] RT-PCR Test 80–85% specificity per Dr. James Gill, Warwick Medical School, England https://www.sciencemediacentre.org/expert-comment-on-different-types-of-testing-for-covid-19/]

[185] Stability Issues of RT-PCR Testing of SARS-CoV-2, March 10, 2020 Abstract: https://pubmed.ncbi.nlm.nih.gov/32219885/
Full text: https://onlinelibrary.wiley.com/doi/full/10.1002/jmv.25786
"In our study, we found a potentially high false negative rate of RT-PCR testing for SARS-CoV-2 in hospitalized patients in Wuhan clinically diagnosed with COVID-19. Furthermore, the RT-PCR results showed a fluctuating trend. These may be caused by insufficient viral material in the specimen, laboratory error during sampling, or restrictions on sample transportation."]

impacts on test data when prevalence is low. Inclusion of such rates significantly alters four published analyses of population prevalence and asymptomatic ratio. The high false discovery rate that results, when prevalence is low, from false positive rates typical of RT-PCR assays of RNA viruses raises questions about the usefulness of mass testing…"[10]

197. The Plaintiffs state that the implications of false positive tests include the following: "There are myriad clinical and case management implications. Failure to appreciate the potential frequency of false positives and the consequent unreliability of positive test results across a range of scenarios could unnecessarily remove critical workers from service, expose uninfected individuals to greater risk of infection, delay or impede appropriate medical treatment, lead to inappropriate treatment, degrade patient care, waste personal protective equipment, waste human resources in unnecessary contact tracing, hinder the development of clinical improvements, and weaken clinical trials."[187]

198. A Chinese study[188] found, "In the close contacts of COVID-19 patients, nearly half or even more of the 'asymptomatic infected individuals' reported in the active nucleic acid test screening might be false positives."[189]

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[186] . 10 False positives in reverse transcription PCR testing for SARS-CoV-2 https://www.medrxiv.org/content/10.1101/2020.04.26.20080911v1.full.pdf]

[187] https://www.medrxiv.org/content/10.1101/2020.04.26.20080911v2 <https://www.medrxiv.org/content/10.1101/2020.04.26.20080911v2>_____________________

[188] Potential false-positive rate among the 'asymptomatic infected individuals' in close contacts of COVID-19 patients, March 23, 2020
http://html.rhhz.net/zhlxbx/017.htm
Full translation: https://theinfectiousmyth.com/articles/ZhuangFalsePositives.pdf

199. The Public Health Agency of Canada reports more than 1.4 million people have had PCR tests.[190] Considering the false positive rate, especially for contact tracing, this is not a good use of our resources (both dollars and testing staff).

200. As of June 15th, 2020 the COVID "statistics" are as follows:

(a) Population of Canada 2020--- 37,742,154;

(b) Total number of confirmed or probable cases as of June 15th -- 99,147;

(c) Therefore, 0.0026% of Canadians are testing positive;

(d) 0.00021% of Canadians are dying ''with'' or ''of COVID'' (there is no current differentiation between death "with" or "from" COVID statistically speaking). As of June 15,2020 the national death count from covid stands at 8,175, a completely inflated and distorted number, due to levels of gross mismanagement of patient care in institutions where outbreaks are reported, and death certificate mislabelling of dying ''with'' covid, as opposed to dying ''from'' covid. Meanwhile, the statistics (2018) for other causes of death, according to statistics Canada, in Canada were as follows:

(i) Suicides--- 3,811;
(ii) influenza and pneumonia (seasonal viral respiratory illness) --- 8,511*;

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189 https://www.reddit.com/r/COVID19/comments/fik54b/false_positives_among_asymptomatic/ <https://www.reddit.com/r/COVID19/comments/fik54b/false_positives_among_asymptomatic/>

[190] PHAC Daily Update, May 25: 1,454,966 total people tested https://www.canada.ca/content/dam/phac-aspc/documents/services/diseases/2019-novel-coronavirus-infection/surv-covid19-epi-update-eng.pdf

(iii) accidents (unintentional injuries) ---13,290;
(iv) medical error (including medications)--- 28,000;
(v) heart disease--- 53,134;
(vi) cancer--- 79,536.

201. The Plaintiffs state, and fact is that the US, UK, and Italy, through their public health officials have publicly admitted that a COVID death is tallied as such, simply where the COVID virus is found, **albeit** inactive, and regardless of whether the patient died from another **primary** cause of death, such as from cancer in palliative care. Thus a senior US Health official, on April 19th,2020, Dr. Ezike, Director of Public Health, put it this way:

> That means, that if you were in hospice and had already been given a few weeks to live, and then you also were found to have COVID, that would be counted as a COVID death.
>
> ‘’It means technically if you died of a clear alternate cause but you had COVID at the same time, its still listed as a COVID death.
>
> Everyone who is listed as a COVID death doesn’t mean that was the cause of the death, but they had COVID at the time of death.

The Plaintiffs state, and the fact is, that Canada uses the same system, mandated by the WHO, because the WHO collapsed three different ways of certifying and classifying death into one, in order to grossly inflate the number of deaths “attributable” to covid-19.

202. This includes someone like George Floyd who was killed (murdered) by four (4) Minneapolis police officers, who have been charged with murder, in that the official autopsy report stipulated that he had tested positive for COVID months

earlier. (Why George would be tested for COVID, in the circumstances, is beyond baffling).

203. The Plaintiffs state, and the fact is, that in many jurisdictions, such as New York City, a hospital is paid much more to deal with a "COVID-death", than a non-COVID death.

204. The Plaintiff states, and the facts is, that the false and faulty manner and method of determining a ''COVID-death'', is wholly and exclusively dictated by WHO guidelines and parroted by Chief Medical Officers in Canada, in furtherance of the WHO's false ''pandemic'', to instill baseless fears, in the WHO's non-medical agenda, at the control and instigation of Billionaire, Corporate, and Organizational Oligarchs, who actually control the agenda of the WHO, to effect their plan to install a New World (Economic) Order by means of economic shut-down and mandatory vaccinations and surveillance of the planet's population.

205. From the summer of 2020 to the present, the fraud, and fraudulent misuse of the PCR testing, which accounts for the "case-counts", and in turn the panic and justification for **ALL** Covid-measures continues, without the explanation to the public that:

(a) The inventor of the PCR test, Nobel-Prize winner Kary Mullis, made it clear that the PCR test **cannot** and **does not** detect any virus that it can diagnose **any** virus but is merely a screening investigative test and that, in order to verify the existence of a virus you must:

(i) Do a culture test to isolate and identify the virus; and

(ii) A concurrent blood-test to check for anti-bodies to verify that the virus is still infectious;

(b) The PCR test, when used at a threshold cycle of 35 or over, in the “positive” cases, 96.5% are false positives, which has been judicially excepted by three (3) courts, and currently British Columbia tests at between 43-45 cycles and which means that every time British Columbia announces a positive case count it needs to be reduced by 96.5%;

(c) That the PCR test will give a positive for all coronaviruses of which there are seven(7);

(d) That the PCR test will register and count as positive dead, **non**-infectious virus fragments;

(e) That dead, non-infectious virus fragments remain in the body for up to 80 days from the time the virus **ceases** to be infectious;

(f) That the positive “case(s) count(s)” has no relationship to the **death count.**

(g) In November 2020, a Portuguese court ruled that PCR tests are unreliable.[191]On December 14, 2020, the WHO admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positives.[192] On February 16th, 2021, BC Health

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[191] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[192] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem

Officer, Bonnie Henry, admitted PCR tests are unreliable.[193] On April 8th, 2021, the Austrian court ruled the PCR was unsuited for COVID testing.[194]On April 8th, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter".[195] 9 On May 8th, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason.[196] On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[197]

206. In fact, as of April 2021, the Canadian and British Columbia claim that approximately 23,000 Canadians have died "from" and "with" Covid which is a fraudulent and misrepresenting statistic in that this is over the equivalent of two (2) flu seasons which means that 11,500 purportedly died in 2019-2020 and another 11,500 purportedly died in the 2020-2021 flu season. Even accepting the questionable dying "with Covid", 11,500 is not significantly higher than the

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[193] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[194] https://greatgameindia.com/austria-court-pcr-test/

[195] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[196] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis

[197] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious

8,500-9,100 who died from complications of the annual influenza, every year, prior to Covid-19. Vis-à-vis the population, it still amounts to a mere ¼ of 1% (0.0027%) of the population. To call this a "pandemic" is to engage in fraud and fear-mongering. The Plaintiffs state, and the fact is that an extremely exponential more people have died as a direct result of the Covid measures themselves.

- **F/ GLOBAL POLITICAL, ECONOMIC AGENDA BEHIND UNWARRANTED MEASURES**

  - **The Non-Medical measures and Aims of The Declared Pandemic- The Global Agenda**

207. The Plaintiffs state, and the fact is that the WHO is not, nor ever has been, an objective, independent **medical** body, but is riddled with over-reaching socio-economic and political dictates of its funders who, inexplicably over and above the nation-states who fund-it, is heavily funded, and directed, through its "WHO Foundation", and **GAVI,** by international Billionaire Oligarchs, and Oligarch organizations such as Bill Gates, GAVI, the World Economic Forum ("WEF"). The Plaintiff states, and the fact is, that WHO vaccination programs, funded by the Bill Gates and Melinda Foundation, have been accused, by the governments of various sub-Saharan African countries, as well as Nicaragua, India, Mexico and Pakistan, the Philippines, of conducting unsafe, damaging vaccine experiments on their children. In India, the Courts are investigating these vaccination experiments on children. The WHO has recently, in the context of the COVID-19, been expelled from various countries for lack of confidence,

corruption, and attempted bribery of their officials, up to, and including, head(s) of state. The Plaintiffs further state, and fact is:

(a) There is a declared agenda to impose global mandatory vaccination, ID chipping, testing and immunity certification on all citizens. This global agenda has been in the works for decades; [198]

(b) Bill Gates, through his Foundation and Organization(s), is the largest private funder to the World Health Organization, is a leading proponent of keeping the economy locked down until a vaccine is developed. Gates is also a major advocate behind the contact tracing initiative. [199] Gates is a major investor in developing a SARS-CoV-2(COVID-19) vaccine and in tracking technology. Gates has a clear financial conflict of interest in advocating for a vaccine and contact tracing;

(c) Bill Gates has no medical or scientific training or credentials and holds no elected office. He should not be determining the fate of mankind. [200]

(d) The Gates Foundation (along with other partners) helped launch the Global Alliance for Vaccines and Immunization (GAVI). The foundation has given $4.1 billion to GAVI over the past 20 years;[201]

(e) These self-propelling agenda personally benefit Gates and other Billionaires, Corporations, and Organizations, particularly vaccines and computer and wireless technology, in his pharmaceutical (vaccine) holdings and agenda, as well as IT and internet holdings and concerns in that, overnight , a vast majority of socio-economic activity has been dislocated to a "virtual", "new normal" whereby everything from commerce, schools, Parliament, Courts, are converting to "virtual'', not to mention the electronic surveillance through cellphone applications for contract tracing;

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[198] https://childrenshealthdefense.org/news/a-timeline-pandemic-and-erosion-of-freedoms-have-been-decades-in-the-making/

[199] https://www.lifesitenews.com/news/bill-gates-life-wont-go-back-to-normal-until-population-widely-vaccinated

[200] https://childrenshealthdefense.org/news/government-corruption/gates-globalist-vaccine-agenda-a-win-win-for-pharma-and-mandatory-vaccination/

[201] https://www.vox.com/future-perfect/2020/4/14/21215592/bill-gates-coronavirus-vaccines-treatments-billionaires

(f) The Gates Foundation project to develop at-home testing evolved from a two-year-old research project from the University of Washington that was intended to track the spread of diseases like influenza. All told, the Gates Foundation has poured about $20 Million into the effort. A project funded by the Gates Foundation announced it would begin issuing at-home specimen collection kits for the novel coronavirus, COVID-19, according to a report in the Seattle Times;[202]

(g) Dr. Joel Kettner, former Chief Medical Officer revealed that pressure is being put on public health doctors and public health leaders by the Director-General of the World Health Organization (WHO) when he said, *"This is a grave threat and a public enemy number one"*. Kettner states – "I have never heard a Director-General of WHO use terms like that." [203];

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[202] https://www.seattletimes.com/seattle-news/health/gates-funded-program-will-soon-offer-home-testing-kits-for-new-coronavirus/

[203] https://off-guardian.org/2020/03/17/listen-cbc-radio-cuts-off-expert-when-he-questions-covid19-narrative/

(h) While these initiatives are presented as measures to address health, they significantly increase control by governments over their citizens, violate privacy, and are part of an agenda to impose vaccination by mandates and other forms of coercion;

(i) Contact tracing applications are being installed in cell phone software upgrades without the express knowledge or permission of consumers;

(j) The Centre for Disease Control in the United States is actively lobbying for increased masking and physical distancing measures, without substantive evidence to justify these measures., while in Canada compulsory masking has also emerged;

(k) Alan Dershowitz, a Harvard Law school professor has declared: *"If a safe vaccine is to be developed for Covid-19, I hope it's mandated, and I will defend it, and we'll argue that in the Supreme Court of the United States."* [204];

(l) Social media platforms such as Facebook, Pinterest, Instagram, Twitter, YouTube and others, under the direction of governments, are actively censoring information that challenges the SARS-CoV-2(COVID-19) pandemic narrative. Public debate on this topic is not being permitted, where Canada is no exception, and even worse, with the Canadian government threatening to enact **Criminal Code** provisions for those who utter or publish ''misinformation'' on COVID-19, including expert opinion;

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[204] https://www.forbes.com/sites/christopherrim/2020/05/20/more-than-stimulus-checks-how-covid-19-relief-might-include-mandated-vaccines/?fBritish Columbialid=IwAR2nrvg0WDTdv_KwjL_wedTNWBe3pxbqQeQAvQIK4m8OfSctLGFhAU9rGYE#1d19b0d57992

(m) The voices of highly credentialed and respected scientists and medical doctors have been censored by the government and media, preventing them from providing critical information from their decades long experience in dealing with infectious diseases and epidemics. Even our own public health experts' experience and advice, gathered over many decades has been ignored. This includes Dr. Joel Kettner, former Chief Medical Officer of Manitoba and Dr. Richard Schabas, former Chief Medical Officer of Ontario;

(n) Scientists have been involved in "gain-of-function" (GOF) research since 2002 that seeks to generate viruses *"with properties that do not exist in nature"* and to *"alter a pathogen to make it more transmissible (to humans) or deadly."* [205] [206];

(o) Rather than instruct people on how to improve their overall health or boost their immunity with healthy foods, quality supplements, and physical activity, governments are telling citizens that the only way to survive the coronavirus crisis is to rush the development of a vaccine and then inject all seven billion humans on the planet;

(p) Many scientists and doctors have expressed confidence in high dose Vitamin C, Vitamin D supplementation, and other generic, inexpensive, and readily available medications and treatments to assist recovery. To state that there is no cure to SARS-CoV-2 (COVID-19) is dishonest;

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[205] https://www.ncbi.nlm.nih.gov/books/NBK285579/

[206] https://www.sciencemag.org/news/2014/10/us-halts-funding-new-risky-virus-studies-calls-voluntary-moratorium

(q) The “no cure” agenda devolves directly from the pharmaceutical industry, which is receiving billions of dollars from governments to develop expensive and, so far, unproven as safe and effective “cures”. Yet safe, effective and inexpensive remedies that help with recovery from Covid-19 already exist;

(r) Research in 2005 demonstrated that Chloroquine is a potent inhibitor of SARS coronavirus infection and spread, thus negating the urgent need for a vaccine; [207]

(s) Some governments are actively restricting access to treatments that have been proven to alleviate the symptoms of SARS-CoV-2(COVID-19) including VITAMIN C and D, zinc, HCQ, GTH precursors, and oxygen treatments, including hyperbaric chambers;

(t) The decision by governments globally to institute social controls and severe containment measures will prolong the epidemic and guarantee successive waves of infection. As social controls are lifted, susceptible individuals previously cocooned from infection will become exposed. Successive waves of infection is a certainty as a result of severe containment measures that prevented the development of natural immunity;

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[207] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1232869/

(u) Prime Minister Trudeau and Premiers, including the Respondents, have stated that "life will not return to normal until we have a vaccine", parroting Bill Gates and Gates' mantra and agenda, and has failed to take "mandatory vaccination" off the table as a potential action of the government.[208] It would appear that the Prime Minister and Premier are not considering any alternative plan to ending this lockdown;

(v) The Government of Canada has not assumed legal and financial liability for any injury or death resulting from containment measures or the use of any vaccine;

(w) When a government uses its power to force ordinary citizens to give up their freedoms, that nation is in great danger of moral and economic collapse. [209]

208. The Plaintiffs state, and the fact is, that the non-medical aims and objectives to declare the "pandemic", for something it is not beyond one of many annual seasonal viral respiratory illnesses, was to, **inter alia,** effect the following non-medical agendas, by using the COVID- 19" as a cover and a pretext:

(a) To effect a massive bank and stock market bail-out needed because the banking system was poised to again collapse since the last collapse of 2008 in that the World debt had gone from $147 Trillion dollars in 2008 to $321 Trillion dollars in January, 2020 and that;

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[208] https://nationalpost.com/news/canada/coronavirus-live-updates-covid-19-covid19

[209] https://www.chp.ca/commentary/free-injections-or-mandatory-vaccinations

- (i) With 10 days of the declared pandemic European and North American banks were given $2.3 Trillion dollars and further amounts to hold up stuck markets and corporations, for a total of approximately $5 Trillion dollars, largely going un-noticed in the face of the "pandemic", with this number progressively climbing ;
- (ii) The shutting of virtually **all**, small independent businesses, with the bizarre, **but intended** consequence that a local, street-level clothing-store, or hardware store, or any store not selling food or medicine, is forced shut down but a Walmart or Costco could sell anything and everything in its stores because one section of the store sold food (an essential service);
- (iii) Other stores unable to sell, had to close with the consequence that all small hardware shops, and the like, were closed but the large corporations such as Home Depot, and the like, were equipped to take on-line orders and have drive-by pick up;

(b) The fact is that the pandemic pretense is there to establish a "new normal", of a New (Economic) World Order, with a concurrent neutering of the Democratic and Judicial institutions and an increase and dominance of the police state;

(c) A massive and concentrated push for mandatory vaccines of every human on the planet earth with concurrent electronic surveillance by means of proposed:

- (i) Vaccine “chips”, bracelets”, and “immunity passports”;
- (ii) Contract- tracing via cell-phones;
- (iii) Surveillance with the increased 5G capacity;

(d) The elimination of cash- currency and the installation of strictly digital currency to better-effect surveillance;

(e) The near-complete revamping of the educational system through “virtual” learning and closure of schools, particularly at the University levels.

209. The Plaintiffs state, and the fact is, that the benefactors of these goals and agendas are the global oligarchs who control and profit from vaccines and the technical infrastructure of information and communication such as Bill Gates, and his companies and Organizations, who pursues global vaccination and profits from a global shift to “virtual economy” along with the other corporate oligarchs and their “on-line” sale and distribution infrastructure of globalization, and by-passing of effective national governance of nation-states under their own respective Constitutions, including Canada.

210. The Plaintiffs state, and the facts is, that this agenda is well on its way to “virtualizing”, “corporatizing”, and “isolating” even Parliament and the Courts to an embarrassing and debilitating degree as reflected, ***inter alia*** by:

(a) Virtual Parliamentary Committees and sittings become the “new normal” because a declared “pandemic”, is available every year, with projected “2nd and 3rd waves;

(b) The Supreme Court of Canada, on June 3rd,2020 announced virtual, "Zoom" hearing of its appeals with its first virtual appeal hearing on or about June 10th, 2020;

(c) The Chief Justice of the Ontario Superior Court, Justice Justice Geoffrey Morawetz, embarrassingly declared, on May 29th, 2020 that :

> "there is no real return to full-scale, what I will call normal operations, to pre-March operations, until such time that there's a vaccine available".

Whether the Chief Justice is aware, or not aware, that he was echoing a mantra originated by Bill Gates, and an agenda Gates has been pursuing for decades, which serves Bill Gates and his associates, is unknown.

211. The Plaintiffs further state, and the fact is, that this agenda executed under the pretext of the COVID-19 has been long in the planning and making, as reflected and borne out by, **inter alia** the following facts and documents:

(a) (i) "decade of vaccines" declared by Bill Gates, and its funding with the full support of the Canadian government, under a Memorandum of Understanding in 2020 up to including PM Trudeau, and further, on or about May 18th, 2020, gifting Bill Gates another $800 Million dollars of Canadian Taxpayer dollars in addition to prior millions already gifted;

(ii) The public statements made by Bill Gates and others for mandatory vaccination of the globe, with vaccine-chips, chip-bracelets, smart-phone tracing, covid-testing, and surveillance of everyone;

(iii) The criminal vaccine experiments causing horrific damage to innocent children in India, Pakistan, Africa and other developing countries;

(b) The Rockefeller Foundation Report, issued on May 2010, and leaked, in which report a hypothetical scenario and hypothetical is laid out with the effect of " how to obtain global governance during a pandemic", and which report, posits an unknown virus escaping Wuhan, China;

(c) **The 2010** Canadian Film Board documentary in which Dr. Theresa Tam, an ex-WHO committee member, is featured and quoted to have stated, with respect to a potential pandemic;

Transcript (of Film Documentary):

1:25 – 1:32 - "Large epidemics and pandemics occur on a regular basis through-out history, and it will occur again. It definitely will."
57:00 - 58:00 - "If there are people who are non-compliant, there are definitely laws and public health powers that can quarantine people in mandatory settings."

"It's potential you could track people, put bracelets on their arms, have Police and other set-ups to ensure quarantine is undertaken."

"It is better to be pre-emptive and pre-cautionary and take the heat of people thinking you might be overreacting, get ahead of the curve, and then think about whether you've over-reacted later. It's such a serious situation that I think decisive early action is the key."

Narrator Colm Feore states: "Police checkpoints are set up on all the bridges and everyone leaving the city is required to show proof of vaccination. Those who refuse to cooperate are taken away to temporary detention centers."

1:22 – "What is certain is an epidemic or pandemic is coming."[210]

(d) Gates, through the Bill and Melinda Gates Foundation, between 2003 and 2017,vaccine program killing thousands of children and severely injuring 486,000-plus in India, Pakistan, and Africa in administrating vaccines, as exposed by Robert Kennedy Junior and his Defense of Children Foundation, and others, and the fact that in India the Courts are investigating this conduct, and an unsuccessful motion brought in the Italian Parliament to have Gates indicted and extradited for crimes against humanity , and further that developing nation states declaring that they have been "guinea pigs", mostly children, in furtherance of global vaccination;

(e) A study by Dr. Peter Aaby in Africa, **DTP Vaccine Increases Mortality 5-Fold, In Study Without Healthy User Bias** concluded: "**DTP was associated with 5-fold higher mortality than being unvaccinated.** *No prospective study has shown beneficial survival effects of DTP.* **All currently available evidence suggests that DTP vaccine may kill more children from other causes than it saves from diphtheria, tetanus or**

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[210] NFB Website: http://onf-nfb.gc.ca/en/our-collection/?idfilm=55974
Toronto Sun article: https://torontosun.com/news/national/warmington-tam-talked-of-tracking-bracelets-in-2010-epidemic-film

pertussis."[211] DTP while discontinued North America is still administered in the developing World.

(f) All the facts pleaded, in the above statement of claim with respect to Bill Gates, the Gates Foundation, GAVI, the WEF, Gates'entrenchment in vaccinating, mandatorily the entire planet, and his vaccine-chip pursuits with smart-phone surveillance, covid-testing, acquisition of 5G companies for maximum contact tracing and surveillance, his relationship with the WHO and its funding;

(g) A UN report, commissioned and released, in September, 2019, prepared by the "Global Preparedness Ministry Board", in which an "Apotyliptic Pandemic" is predicted killing as many as 80 million people;

(h) "Event 201", an exercise, simulating a pandemic, prior to October 18th, 2019, organized by Gates, GAVI, which included the "World Economic Forum", on invitation only;

(i) The Government of Canada's, minutely detailed 67- page Report, entitled" Government of Canada Response Plan COVID-19", final version 3.1", with previous versions unavailable, which could not have been researched and written a mere couple of weeks prior to the declaration of lock-downs and emergency in Canada;

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[211] http://vaccinepapers.org/high-mortality-dtp-vaccine/

(j) The heavily censored UK "Sage Report" of late-May, 2020;

(k) The International Lobby, spear-headed by Bill Gates and others as set out in the within Statement of Claim;

(l) The Suppressed German government 93-page, May, 2020, report which was eventually and recently leaked, which clearly and conclusively determined that the "pandemic" and measures are unjustified. The salient summary of which reads:

cs. KM4 – 51000/29#2

KM4 Analysis of Crisis Management (Brief Version)

Remarks: It is the task and aim of crisis management groups and any crisis management to recognize **extraordinary threats** and to fight them until the **normal state** is re-established/regained.
A normal state cannot therefore be a crisis.

Summary of the results of this analysis

1. In the past the crisis management did not (unfortunately against better institutional knowledge) build up adequate instruments for danger analysis. The situational reports, in which all information relevant for decision-making should be summarized in the continuing/current crisis, today still only cover a small excerpt of the looming spectrum of danger. An assessment of danger is in principle not possible on the basis of incomplete and inappropriate information. Without a correctly carried out assessment of danger, no appropriate and effective planning of measures is possible. The deficient methodology has an effect on a higher plane with each transformation; politics so far has had a strongly reduced chance to make factually correct decisions.

2. The observable effects of COVID-19 do not provide sufficient evidence that there is – in relation to the health consequences of all of society – any more than a **false alarm. At no point in time, it is suspected, was there a danger as a result of this new virus for the population (comparison is the usual death rate in Germany).** Those who die of corona are essentially those who statistically die this year, because they have arrived at the end of their lives and their weakened bodies cannot any longer fight coincidental everyday challenges (including the approximately 150 circulating viruses). **The danger of COVID-19 was overestimated. (In a quarter of a year worldwide no more than 250,000 deaths with COVID-19, as opposed to 1.5 million deaths during the 2017/18 influenza season). The danger is obviously no larger than that of many other viruses. We are dealing with a global false alarm which has been unrecognized over a longer period of time. - This analysis was reviewed by KM4 for scientific plausibility and does not fundamentally oppose the data and risk assessments provided by the RKI [Robert Koch Institute].**

3. A fundamental reason for not discovering the suspected false alarm is that the existing policies for the actions of the crisis management group and the crisis management during a pandemic do not contain appropriate instruments for detection which would automatically triger an alarm and the immediate cancellation/abandonment of measures, as soon as either a pandemic proves to be a false alarm or it is foreseeable that the collateral damage – and among these especially the parts that destroy human lives – threatens to become larger than the health effects of and especially the deadly potential of the illness under consideration.

4. In the meantime, the collateral damage is higher than the recognizable benefit. The basis of this assessment is not a comparison of material damages with damage to persons (human lives). Alone a comparison of deaths so far due to the virus with deaths due to the measures decreed by the state (both without certain data). Attached below is an overview-type summary of collateral health damages (incl. Deaths), reviewed by scientists as to plausibility.

5. The (completely useless) collateral damage of the corona crisis is, in the meantime, gigantic. A large part of this damage

will only manifest in the nearer and more distant future. This cannot be avoided anymore, only minimized.

6. Critical infrastructures are the lifelines necessary for the survival of modern societies. As a result of the protective measures, the current security of supply is no longer a given as it usually is (so far gradual reduction of the basic security of supply, which could result in a fallout in future challenging situations). The resilience of the highly complex and strongly interdependent complete system of critical infrastructure has been reduced. Our society lives, from now on, with increased vulnerability and a higher risk of failure of infrastructures necessary for life. This can have fatal consequences, if on the in the meantime reduced level of resilience of KRITIS a truly dangerous pandemic or other danger should occur.

Four weeks ago, UN-general Secretary Antonio Guterres of a fundamental risk. Guterres said (according to a report in the Tagesschau on April 4, 2020): "The weaknesses and insufficient preparation which are becoming apparent through this pandemic give insight into how a bioterrorist attack could look – and these weaknesses possibly increase a risk thereof." According to our analysis, in Germany a grave deficiency is the lack of an adequate system for the analysis and assessment of danger.

7. the protective measures decreed by the state, as well as the manifold societal activities and initiatives which, as initial protective measures cause the collateral damage, but have in the meantime lost any purpose, are largely still in effect. It is urgently recommended to abolish these immediately, to avert damage to the population – especially unnecessary additional deaths -, and to stabilize the situation around critical infrastructure, which is possibly becoming precarious.

8. The deficits and failures in crisis management consequently lead to communication of information that was not well-founded. (A reproach could be: The state showed itself to be one of the biggest fake-news-producers in the corona crisis).

From these insights it follows:

a) The proportionality of interference with the rights of eg. Citizens is currently not given, since the state did not carry out

> **an appropriate consideration with the consequences. The German constitutional court demands an appropriate balancing of measures with negative consequences. (PSPP judgement of May 5, 2020).**
>
> **b) The situational reports of the crisis management group BMI-BMG and the communications from the state to the provinces regarding the situation must there fore henceforth**
> **-conduct an appropriate analysis and assessment of dangerous**
> **-contain an additional section with meaningful, sound data regarding collateral damage (see remarks in the long version)**
> **-be freed of irrelevant data and information which are not required for the assessment of danger, because they make it difficult to see what is going on**
> **-an index should be formed and added at the beginning**
>
> **c) An appropriate analysis and assessment of danger is to be performed immediately. Otherwise the state could be liable for damages that have arisen.[212]**

212. The Plaintiffs further state, and fact is, that in a study issued by Stefan Homburg, Christof Kuhbandner, at the Leibniz University Hannover, Germany, **post-June 8th, 2020,** these authors soundly concluded in their study that the lock-down measures as modelled and executed were Not effective, globally comparing countries following the WHO protocols and countries that did not.[213]

213. The Plaintiffs state, and the fact is, that this agenda includes the "World Economic Forum ("WEF")". The Plaintiffs state and fact is that the WEF;

(a) Consistently promotes a "New Economic World Order" ,which is a vision in the process of being rolled out under the auspices of the

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[212] https://human-synthesis.ghost.io/2020/05/31/km4-analysis-of-crisis-management-short-ver/
<https://human-synthesis.ghost.io/2020/05/31/km4-analysis-of-crisis-management-short-ver

[213] http://diskussionspapiere.wiwi.uni-hannover.de/pdf_bib/dp-671.pdf

World Economic Forum, of which one of the main sponsors is **The Bill & Melinda Gates Foundation.**

(b) The World Economic Forum is the International Organization for Public-Private Cooperation. **The Forum engages the foremost political, business, cultural and other leaders of society to shape** global, regional and industry agendas.

(c) The World Economic Forum is committed “to the launch of the Great Reset - a project to bring the world's best minds together to seek a better, fairer, greener, healthier planet as we rebuild from the pandemic.” "The COVID-19 crisis has shown us that our old systems are not fit any more for the 21st century," said World Economic Forum Executive Chairman Klaus Schwab. "In short, we need a great reset."[214]

(d) Since its launch on March 11th, 2020, the Forum’s COVID Action Platform has brought together 1,667 stakeholders from 1,106 businesses and organizations to mitigate the risk and impact of the unprecedented global health emergency that is COVID-19. The platform is created with the support of the **World Health Organization.**[215]

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[214] https://www.weforum.org/agenda/2020/06/the-great-reset-this-weeks-world-vs-virus-podcast/

[215] https://cepi.net/about/whoweare/

(e) **The WEF sponsors have big plans**:"…the world must act jointly and swiftly to revamp all aspects of our societies and economies, from education to social contracts and working conditions. Every country, from the United States to China, must participate, and every industry, from oil and gas to tech, must be transformed. In short, we need a **"Great Reset" of capitalism." "The World Economic Forum is launching a new Davos Manifesto**, which states that companies should pay their fair share not taxes, show zero tolerance for corruption, uphold human rights throughout their global supply chains, and advocate for a competitive, level playing field." Klaus Schwab, Founder and Executive Chairman, World Economic Forum.[216]

(f) In 2017 Germany, India, Japan, Norway, the Bill & Melinda Gates Foundation, the Welcome Trust and the World Economic Forum founded the Coalition for Epidemic Preparedness Innovations (CEPI) to facilitate **focused support for vaccine development to combat major health epidemic/pandemic threats.** As an organization, the Forum has a track record of supporting efforts to contain epidemics. In 2017, at the Annual Meeting, the Coalition for Epidemic Preparedness Innovations (CEPI) was launched – bringing together experts from government, business, health, academia and civil society to accelerate the development of vaccines. CEPI is currently supporting the race to develop a vaccine against this strand of the coronavirus.[217]

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[216] https://www.weforum.org/the-davos-manifesto

(g) Event 201, the pandemic exercise in October 2019, was co-sponsored by the World Economic Forum and the Gates Foundation. [218]

(h) As early as 2016, the president of the WEF, announced his and the WEF's intentions that, "within 10 years", humans would be microchipped, including in the brain, to integrate with technology;

(i) In the Fall of 2020, the WEF commissioned a study written by two (2) McGill University professors, entitled: Transhumanism : How to make the Human Body an effective Information Platform" with volunteer, body-microchipped study groups;

214. Further with respect to global vaccination, in the context of Covid, the WEF has stated:

(a) That:

> "The COVID-19 crisis is affecting every facet of people's lives in every corner of the world. But tragedy need not be its only legacy. On the contrary, the pandemic represents a rare but narrow window of opportunity to reflect, reimagine, and reset our world to create a healthier, more equitable, and more prosperous future. Interactive diagram."[219]

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[217] https://cepi.net/about/whoweare/ https://apps.who.int/gpmb/assets/annual_report/GPMB_annualreport_2019.pdf pg 19

[218] https://www.centerforhealthsecurity.org/event201/

[219] https://www.weforum.org/agenda/2020/06/now-is-the-time-for-a-great-reset

(b) And that:

> “The changes that are underway today are not isolated to a particular country, industry, or issue. They are universal, and thus require a global response. Failing to adopt a new cooperative approach would be a tragedy for humankind. **To draft a blueprint for a shared global-governance architecture,** we must avoid becoming mired in the current moment of crisis management.
>
> Specifically, this task will require two things of the international community: wider engagement and heightened imagination. The engagement of all stakeholders in sustained dialogue will be crucial, as will the imagination to think systemically, and **beyond one’s own short-term institutional and national considerations.”**[220]

215. In early July, 2020, Trudeau announced the massive expenditure of post-COVID-19 infrastructure spending to re-align the economy, in concert with the WEF agenda, in tandem with private sector partnership whereby the anticipated privatization of public assets is a given. In September 2020, Trudeau announced his support for the “Great [2030] Reset”.

216. The Plaintiffs state, and the fact is, that:

(a) This agenda, is spear-headed by Bill Gates, and other Billionaire, Corporate, and Global Organizational Oligarchs, which include vaccine, Pharmaceutical, and Technology Oligarchs, through the WHO, GAVI, and the WEF, whom they fund and effectively direct and control;

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[220] https://intelligence.weforum.org/topics/a1G0X000006OLciUAG?tab=publications
https://www.weforum.org/agenda/2018/11/globalization-4-what-does-it-mean-how-it-will-benefit-everyone/

(b) National and Regional Leaders who are simply, knowingly and/ or unknowingly, as duped partners, partaking in this agenda by simply declaring a “pandemic”, “emergency”, and delegating decisions to their Chief medical officers who are simply following the dictates and guidelines without question nor concern for the world expert opinions against such measures, of the WHO;

(c) In effect there are less than a hand-full of people dictating the virtual fate of the planet whereby sovereign Parliaments, Courts, and Constitutions are by-passed;

(d) The “social media”, such as Google, Facebook, YouTube, Amazon owned and operated by the likes of Bill Gates, Mark Zukerberg, and, in Canada, the CBC, funded and controlled by the Federal Government, are knowingly playing in concert with this over-arching conspiracy, and in fact over-lapping conspiracies.

208. The Plaintiffs further state that through their conduct, communication, agreement, and functions of their intertwined respective public and private offices, the Defendants, knowingly and unknowingly, intentionally and unintentionally, as outlined, ***inter alia***, by the Supreme Court of Canada in the test set out in ***Hunt v. Carey*** and jurisprudence cited therein, have and to continue to:

(a) engage in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiffs, through the declaration of a false pandemic and implementation of coercive and damaging measures including the infliction of a violation of their constitutional rights as set out above in the within statement of claim; and/or

(b) to engage, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, is to cause injury to the Plaintiffs, through the declaration of a false pandemic and implementation of coercive and damaging measures including the infliction of a violation of their constitutional rights as set out above in the within statement of claim, that Defendants and officials and employees, should know, in the circumstances, that injury to the Plaintiffs , is likely to, and does result.

217. The Plaintiffs state, and the fact is, that Canada's , and Trudeau's, connection to Gates, Gates' foundation, and various companies , and the global vaccine industry, is **inter alia,** as follows:

(a) PM Trudeau has echoed Bill Gates' sentiments that mass mandatory vaccination of people is necessary for any sense of normalcy to return.

(b) Gates uses proxies to successfully lobby the Canadian Government.

(c) The Gates Foundation founded GAVI, the Global Vaccine Alliance in 1999 with $750 million and continues to run it and fund it. The Global Vaccine Alliance, is an organization devoted to pushing vaccinations on the public all across the world.

(d) GAVI hired a lobbying firm called Crestview Strategy, a public affairs agency. Their Mission Statement is: “We make, change, & mobilize opinion.”

(e) Canada has gifted Bill Gates, and his related Foundation and companies well over $1 Billion dollars in pursuit of his agenda, $800 Million recently by Justin Trudeau;

(f) Crestview has lobbied the Canadian Government on at least 19 occasions since2018 on various “health” matters, all on behalf of GAVI.

•Bill Gates- Vaccines, Pharmaceuticals & Technology

218. The Plaintiffs state, and the fact is, as set out in the within Statement of Claim, that Bill Gates companies, and associates, manifest a clear agenda, for himself and his associates in the vaccine, pharmaceutical and technology, industries, through the **de facto** control of the WHO, influencing and dictating its agenda, to:

(a) Effect a mandatory, global, vaccine policy and laws, which would net an approximately $1.3 Trillion per year, in which vaccine industry he is major proponent and investor;

(b) To effect surveillance, through his vaccination agenda, as outlined in their public statement, and the MIT developed smart-phone application to embed nanocrystal beneath the skin which can be read by a smart-phone through smart-phones, and 5-G capacity, in which industries Gates is a major stake-holder and investor;

(c) Using the above to "virtualize" and globalize the World economy , in which virtual and global New World (Economic) Order in which Gates further sits in the centre, along with the other Billionaire and corporate oligarchs;

(d) All of which is being effected and accelerated through the false pronouncement of a COVID-19 'pandemic'', and implementation of baseless and false, draconian measures.

219. The Plaintiffs state, and the fact is, that Bill Gates' statements, and conduct, in the above-noted facts, has been documented, as reflected in the within Statement of Claim.

- **The WHO / Gates/ Trudeau/Dr. Teresa Tam/ and Dr. Bonnie Henry**

220. The Plaintiffs state and fact is, that the connection and common agreement between Gates-Trudeau-Tam, in addition to their statements and actions in furthermore of that agreement as outlined above in the within Statement of Claim, is further manifested by the following:

(a) On April 9, 2020 just before Easter, Trudeau announced that:

> *"We will not be coming back to our former normal situation; we can't do that until we have developed a vaccine and that could take 12 to 18 months…..*

> *[and]….This will be the new normal until a vaccine is developed.”*[221]

(b) Trudeau’s statement is a script lifted straight from Bill Gates’ echoing almost word for word, the message Gates has been pushing since the coronavirus in North America earlier this winter. The April 9th **Highwire video clip at 2:07** captures Gates stating:

> “Things won’t go back to truly normal until we have a vaccine that we’ve gotten out basically to the entire world.”[222]

(c) Instead of following the recommendations of leading scientists, doctors and epidemiologists, Trudeau is foisting the Gates/WHO/ GAVI/ WEF globalist agenda which he knows or ought to know, will result in financial ruin for millions of Canadians including the Plaintiffs.

(d) Despite the prevailing global consensus on natural herd immunity, Bill Gates is determined however, to prevent natural immunity so he can mandate his new vaccine(s) for everyone. Noted scientist and journalist. Rosemary Frei, shows Bill Gates does not want people to acquire immunity to COVID-19. Rather, Bill Gates prefers that we suffer the ‘economic pain’ of lockdown in order to prevent us from acquiring natural immunity as Gates has stated:

> “We don’t want to have a lot of recovered people […] To be clear, we’re trying – through the shut-down in the United States – to not get to one percent of the population

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[221] https://nationalpost.com/news/canada/coronavirus-live-updates-covid-19covid19

[222] Blowing the Whistle on Covid-19, April 9, 2020: https://www.youtube.com/watch?v=5g4u1LJQ7_k

> infected. We're well below that today, but with exponentiation, you could get past that three million [people or approximately one percent of the U.S. population being infected with COVID-19 and the vast majority recovering]. I believe we will be able to avoid that with having this economic pain."[223]

(e) In her latest compelling article, **Covid-19 Meltdown and Pharmas' Big Money Win,** Barbara Loe Fisher delves into the many disturbing angles of this epic viral/political war unleashed on humanity, the havoc caused by the Gates & Fauci lockdown policy and the economic spinoffs spawned by the pandemic.[224]

(f) Covid-19 has sparked the hottest new market in town – vaccine development. A staggering number of coronavirus vaccines are under development right now with astronomical piles of money being thrown at it. Gates is in the thick of it along with Tony Fauci, director of the National Institute for Allergy and Infectious Diseases (NIAID). Both are on record stating they don't want people developing natural immunity, in stating:

> "Now, I hope we don't have so many people infected that we actually have that herd immunity, but I think it would have to be different than it is right now", says Fauci.[225]

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[223] Did Bill Gates Just Reveal the Reason for the Lockdowns: By Rosemary Frei, Off-Guardian, April 4, 2020 https://off-guardian.org/2020/04/04/did-bill-gates-just-reveal-the-reason-behind-the-lockdowns/?__cf_chl_jschl_tk__=8a31c96b7b831b06c6631d2d800e39e274fdb4c5-1593827339-0AbbQnElw4gYMqoe14KfV-9sVWpJ8_IO6ZguVbep6dVylwrKGMbqfHkxidxl_3uCK08NImuk8B5fJzKB4cL3viT1qQYvV8722SeZLNTHOWUovzpclffZQcDifxvg3QQ6jPmp ZkNGtNlwGs874a0MhuRY9_t7yNj8TyeXmeBXidqKFHOtCmuLJEmS9ZGcLDsNGb5WKidfnHO7DSzIQ110eNBgHMLXerbjPrKsESdGlhwd3LjoY6FiHbJu4U1bTEJMbsKQFlq5XIIOtoLGY2e7fThzjnbUBrcjpv76AL5aOYmAQAllCC3ttqOt_k21mLMgHNFafl2gWSlla4a2SUAI8IzoKXLcbkuTr0IpvKrbjkF8B4ij3p8MdQOK0DZHcW

[224] Covid-19 Meltdown and Pharma's Big Money Win: https://thevaccinereaction.org/2020/04/covid19-meltdown-and-pharmas-big-money-win/

[225] Covid-19 Meltdown and Pharma's Big Money Win: https://thevaccinereaction.org/2020/04/covid19-meltdown-and-pharmas-big-money-win/

(g) Natural immunity would disrupt Bill Gates expressed intension to "vaccinate everything that moves". In a video interview Gates says:

> "Eventually, what we'll have to have is
> certificates of who is a recovered person, who's a
> vaccinated person, because you don't want people moving
> around the world where you'll have some countries that
> won't have it under control…"[226]

(h) The Gates foundation has invested tens of $billions in vaccine development which includes a decades long vicious propaganda war against anyone questioning vaccine safety. Gates' *'decade of vaccines'* from 2010-20 captured the global media and social media giants that have demonized and ruthlessly censored the 'vaccine risk aware' movement comprised mostly of vaccine injured families trying to protect their children and the basic human right to informed consent and exemption rights. This has been documented by various publications, which explore the massive influence and control with which the Gates' empire manipulates global health and vaccine policies.[227]

(i) In one article Canadian medical journalist, Celeste McGovern investigates the upcoming vaccine and microchip technologies Gates is funding.[228]

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[226] 6 How we must respond to the coronavirus epidemic, Youtube video March 25, 2020:https://www.youtube.com/watch?v=Xe8fIjxicoo#t=33m45s

[227] Bill Gates search-Covid -19 Global Pandemic, Vaccine Impact News: https://vaccineimpact.com/?find=bill+gates

[228] Bill Gates and Intellectual Ventures Funds Microchip Implant Technology, By Celeste McGovern, April 14, 2020: https://www.greenmedinfo.com/blog/bill-gates-and-intellectual-ventures-funds-microchipimplant-vaccine technology1?utm_campaign=Daily%20Newsletter%3A%20Bill%20Gates%20and%20Intellectual%20Ventures%20Funds%20Microchip%20Implant%20Vaccine%20Technology%20%28TCCz3V%29&utm_medium=email&utm_source=Daily%20Newsletter&_ke=eyJrbF9lbWFpBritish ColumbiaI6ICJjLm1jZ292ZXJuQGhvdG1haWwuY29tIiwgImtsX2NvbXBhbnlfaWQiOiAiSzJ2WEF5In0%3D

(j) In another, Robert F. Kennedy Jr. exposes the Gates/WHO agenda listing their deadly vaccine experiments in the developing world. Kennedy explains:

> "In 2010, when Gates committed $10 billion to the WHO, he said "We must make this the decade of vaccines." A month later, Gates said in a TED Talk that new vaccines "could reduce population." And, four years later, in 2014, Kenya's Catholic Doctors Association accused the WHO of chemically sterilizing millions of unwilling Kenyan women with a "tetanus" vaccine campaign.[229]

(k) Another expose is that of Vera Sharav, a Holocaust survivor and founder of the Alliance for Human Research Protection. She examines how Gates' table top 'Event 201' pandemic exercise in October, 2019, set the stage for how the coronavirus pandemic would be handled. It predicted the pandemic would end ONLY after an effective vaccine had been brought to market. It is no coincidence that the coronavirus pandemic was unleashed just weeks after Gates' pandemic 'war games' rehearsal and is now playing out, as lockdown scenario threatens to continue until the new vaccine arrives?[230]

(l) Sharav also delves into Gates' vast business ventures related to enhancing pharmaceutical products and vaccines. His ID2020 is a digital ID program aimed at identifying 1 billion + people lacking identity documents. Also in development are several ID devices that people could be forced to have implanted into their body to identify their vaccine and birth-control status.[231]

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[229] Bill Gates' Globalist Agenda: A Win-Win for Pharma and Mandatory Vaccination by Robert F. Kennedy Jr. April 9, 2020, Children's Health Defense:https://childrenshealthdefense.org/news/governmentcorruption/gates-globalist-vaccine-agenda-a-win-win-for-pharma-and-mandatory-vaccination/

[230] Bill Gates & Intellectual Ventures Funds Microchip Implant Vaccine Technology by Celetes McGovern, April 14, 2020: https://www.greenmedinfo.com/blog/bill-gates-and-intellectual-ventures-fundsmicrochip-implant-vaccinetechnology1?utm_campaign=Daily%20Newsletter%3A%20Bill%20Gates%20and%20Intellectual%20Ventures%20Funds%20Microchip%20Implant%20Vaccine%20Technology%20%28TCCz3V%29&utm_medium=email&utm_source=Daily%20Newsletter&_ke=eyJrbF9lbWFpBritish ColumbiaI6ICJjLm1jZ292ZXJuQGhvdG1haWwuY29tIiwgImtsX2NvbXBhbnlfaWQiOiAiSzJ2WEF5In0%3D

221. With respect to the Defendants Trudeau and Tam, the Plaintiffs state, and the fact is that:

(a) Theresa Tam, Canada's chief public health officer and longtime loyal servant of the WHO, serves on multiple international committees and related organizations that dictate global health policies. Her main job is to make sure that Trudeau follows the WHO/Gates lockdown policy until the new Covid-19 vaccine arrives in 18 months.

(b) Molly Chan, author of a **probing analysis** of Dr. Tam's career thinks it's evident from her background that:

> "Theresa Tam works with the world's most powerful globalist entities that have tremendous say in how the world deals with disease and immunization. This power enables them to have a grip on the entire planet, and to decide which measures are put into place to control the behaviour of people in any event they choose to cause a panic over. With COVID-19, we have a perfect example of how the decisions of this small group of people can lead to global hysteria and unprecedented societal changes."[232]

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[231] Coronavirus provides dictators and oligarchs with a dream come true, By Vera Sharav, Alliance for Human Research Protection, March 26, 2020: https://ahrp.org/coronavirus-provides-oligarchs-with-adream-come-true/

[232] Dr. Theresa Tam, Queen of the Vaccine by Molly Chan, Civilian Intelligence Network, March 31, 2020: https://civilianintelligencenetwork.ca/2020/03/30/dr-teresa-tam-queen-of-the-vaccine/

(c) Molly Chan asks important questions on Tam's career and extensive influence:

> "Does this make Theresa Tam a puppet or master? How is it possible to not follow WHO recommendations, when you're the one making them? She is on powerful committees!"

(d) Considering the multiple numerous high-level positions Dr. Tam holds on the international stage, Tam's first loyalty is not to the wellbeing of Canadians , or the Plaintiffs, but to the globalist policies so generously funded by Gates and Big Pharma.

(e) Chan dubs Tam as the *'Queen of Vaccine'* and explains:

> "convened public health leaders and parents to collaborate on the effort to shut down any hint of anti-vaccine thought. Governments, including Canada and the U.S. are also working with social media companies to remove vaccine misinformation and promote scientific literacy. She wants to make sure that people are not allowed to publicly say anything against vaccinations, and establish them as just a normal part of life, no questions asked."[233]

(f) While flexing her expansive influences, it seems a 'no brainer' Theresa Tam has been instrumental in controlling the CBC's narrative about the need to snuff out *'vaccine hesitancy'* which includes the ruthless censorship of any voices that would question vaccine safety in mainstream media.

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[233] Dr. Theresa Tam, Queen of the Vaccine by Molly Chan, Civilian Intelligence Network, March 31, 2020: https://civilianintelligencenetwork.ca/2020/03/30/dr-teresa-tam-queen-of-the-vaccine/

(g) Tam is accused of **"total incompetence**" in having botched the Canadian response to the COVID-19 pandemic:

> "Tam has failed miserably, putting political correctness, and virtue-signalling lecturing ahead of doing her job. She couldn't grasp the situation in time, and when she grasped the seriousness of it was far too late to stop it."[234]

(h) The Toronto Sun's **cutting review** of Theresa Tam's incompetence says:

> "Our country is now run by 'healthcrats'. Dr. Theresa Tam is the Healthcrat who runs the federal government. **Her record on being wrong is spotless.**"[235]

(i) In a **recent interview** in Chatelaine magazine, Tam bashes vaccine resistors and accuses them of causing measles outbreaks. Her cryptic statement, ***"I always think we do a really good job, when no one knows what we're doing"***, reveals the federal health agency's lack of transparency and inability to provide crucial epidemiological data during this crisis.

222. Since the summer of 2020, to the present, this agenda has been made the clear by, but not limited to, the following:

(a) Admission and boasting by the likes of Gates and the WEF of what their plan is, including admission and promotion of the "2030 re-set" by Trudeau, as well as by the WEF stating that: "by 2030 you will own nothing, but you will be happy";

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[234] Devastating timeline reveals complete incompetence of Theresa Tam's Virus Response https://spencerfernando.com/2020/03/29/devastating-timeline-reveals-total-incompetence-of-theresatams-virus-response/

[235] The healthcrats cure is proving worse than the disease, Toronto Sun, April 10, 2020: https://torontosun.com/opinion/columnists/snobelen-the-healthcrats-cure-is-proving-worse-than-thedisease

(b) By the censorship of social and mainstream media of anything, and everyone critical of the Covid-measures;

(c) By the banning of alternative medical treatment and prosecution and persecution of Doctors who advocate alternative medical treatment to the awaited vaccine such as British Columbia doctors Stephen Malthouse, David Code, Dr. Dorle Kneifel, and Ontario doctors Dr. Patrick Phillips, Dr. Kulvinder Gill, Dr. Caroline Turek;

(d) By the economic devastation of independent businesses to the corresponding increased and doubling of profits by the billionaire oligarchs and corporate oligarchs;

(e) By the "emergency" approval of vaccines, that did not comply with the necessary animal and human trials without which approval normally could not ensue and whereby approval of such experimental medical vaccines could not only see approval if no existing alternative medical treatment available could assist or alleviate with respect to the virus, which explains why such medicine as HCQ, Ivermectin, etc… was banned for use for treating Covid-19;

• Dr. Bonnie HENRY – History and Conduct as British Columbia Chief Medical Officer – Ignoring the Science

223. Dr. Henry worked internationally with the WHO/UNICEF polio eradication program in Pakistan and with the WHO to control the Ebola outbreak in Uganda.[236]

224. Dr. Henry helped to establish the Canada Pandemic Influenza Plan, which contains recommendations for health-related activities during the spread of a virus.[237] Canada Pandemic Influenza Preparedness Task Group (CPIPTG) members: B Henry (Chair), Canada's pandemic vaccine strategy Acknowledgements.[238]

225. In 2012, Health Canada demanded that nurses who refused to take a vaccine would be mandated to wear a mask throughout the 6-month flu season; it was known as VOM (Vaccinate or Mask). The Ontario Nurses Union filed a grievance against St. Michael's Hospital's VOM policy. The result was a precedent setting win for nurses across the country. The arbitrator in the case ruled that wearing masks "was not supported by science and was most likely an attempt to drive up vaccination rates among staff."

226. Dr. Henry was one of the expert witnesses who was instrumental in overturning the mask mandate and testified in the 2015 case saying, "there's very scant

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[236] https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/biographies
[237] https://en.wikipedia.org/wiki/Bonnie_Henry
[238] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5764724/

evidence about the value of masks in preventing the transmission of influenza." Dr. Henry goes on to say that there is no data to support wearing masks and, "When we look at individual strains circulating and what's happening, I think we need it to be consistent with the fact that there was nothing that gave us support that providing a mask to everybody all the time was going to give us any additional benefit over putting in place the other measures that we have for the policy."

227. In December 2019, Dr. Henry supported the arbitrator's 2015 decision on behalf of British Columbia Nurses.

228. In May 2020, Dr. Henry unequivocally states, "there is no evidence that if you're not ill wearing a mask, particularly wearing a mask outside or out in public, that provides much protection or any benefit at all." Dr. Henry further admits that asymptomatic people do not spread the virus, "we have not seen anybody not showing any symptoms passing it on to anyone else."[239] **Henry also admits there is "no real science behind the decisions she is making."**[240]

229. Throughout 2020, Dr. Henry is on record repeatedly saying that masks are not effective and yet in March of 2021, Dr. Henry once again lies to the public claiming she has never said that masks do not work.[241]

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[239] https://rumble.com/vbdsmb-bonnie-henry-admits-no-evidence-masks-work-for-those-not-sick.html

[240] https://canucklaw.ca/wp-content/uploads/2020/07/COVID-19_-B.C.-health-officer-explains-50-vehicle-limit-for-events.mp4

[241] https://action4canada.com/masks/

230. Henry is duty bound to make decisions based on science and facts, and yet it is very evident that she intentionally ignored the information available to her on masking, asymptomatic spread, social distancing and lockdowns, and instead implemented the draconian measures that destroyed people's livelihoods and put the public in harm’s way on multiple levels.

231. On June 28, 2012, Dr. Henry worked for BCCDC Emergency - Management and Environmental Health and was a presenter at the Public Health Ethics and Pandemic Planning. Dr. Henry listed the goals of the CPIP (Canadian Pandemic Influenza Plan) and ensured that, were there a pandemic, the plan must account for minimizing serious and overall deaths and minimize societal disruption amongst Canadians. She also lists the risks to schoolchildren of closing schools, and the fact that children are at very low risk of contracting or transmitting viruses. However, Dr. Henry supports that government restrictions are acceptable, including forced quarantine and personal autonomy being effected by forced vaccinations. Dr. Henry, along with her fellow presenter, Dr. Unger, believe this is the right, moral and ethical thing to do.[242]

232. As a result of Dr. Henry's previous involvement with the CPIP, BCCDC, Dr Fauci, and the WHO, and as she currently holds the position of British Columbia's Chief Health Officer, there is reason to be concerned that Dr. Henry's actions are calculated and possibly pre-mediated based on the level of training

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[242] https://mediasite.phsa.ca/Mediasite/Showcase/bccdc/Presentation/e4823d251a8c40a38cdc80666f7d0fa71d

Dr. Henry has participated in. Of great concern is, Dr. Henry's willingness to openly and aggressively violate the public's "guaranteed" ***Charter*** Rights. Specifically, their right to bodily autonomy, security of the person, to be employed and provide for one's family, the freedom of mobility, the freedom of speech and to assemble, the freedom to access medical care and the right to live without being subjected to discrimination and hate.

233. To date, Dr. Bonnie Henry, along with the other British Columbia Defendants have engaged in illegal and unconstitutional actions as set out below:

234. To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[243]

235. The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus.[244] Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one

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[243] https://www.bitchute.com/video/nQgq0BxXfZ4f

[244] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

single molecule, then you can find it because that molecule is nearly in every single person."

236. In light of this warning, the current PCR test utilization, set at higher amplifications, as in British Columbia, for example is using it at cycles of 35+, is producing up to 97% false positives.[245] Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and fraudulent. An international consortium of life-science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2.[246]

237. In November 2020, a Portuguese court ruled that PCR tests are unreliable, and when run at 35 threshold cycles are or, produce a 96.5% false positive rate. British Columbia runs them at 43-45 cycles.[247]

238. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive.[248]

239. On February 16, 2021, **Dr. Henry herself admitted that PCR tests are unreliable, yet still continued to use them to identify cases.[249]**

240. On April 8, 2021, the Austrian court ruled the PCR test was unsuited for COVID testing.[250]

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[245] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[246] https://cormandrostenreview.com/report/
[247] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[248] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[249] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[250] https://greatgameindia.com/austria-court-pcr-test/

241. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter."[251]

242. On May 8, 2021, the Swedish Public Health Agency stopped PCR testing for the same reason.[252]

243. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard, testified under cross-examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[253]

244. On July 21, 2021 - Innova Medical Group Recalled Unauthorized SARS-CoV-2 Antigen Rapid Qualitative Test with Risk of False Test Results. The FDA has identified this as a Class I recall, the most serious type of recall. Use of these devices may cause serious injuries or death.[254]

245. On July 21, 2021 the CDC sent out a "Lab Alert revoking the emergency use authorization to RT-PCR for COVDI-19 testing and encourages laboratories to adopt a multiplexed method that can facilitate detection and differentiation of SARS-CoV-2 and influenza viruses". The CDC is admitting that the RT-PCR test

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[251] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[252] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[253] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

[254] https://www.fda.gov/medical-devices/medical-device-recalls/innova-medical-group-recalls-unauthorized-sars-cov-2-antigen rapid-qualitative-test-risk-false-test

'cannot' differentiate between SARS, influenza or the common flu. This is confirmation of what was stated in Section 7 and reported since the onset of the so-called pandemic.[255]

246. On July 21, 2021 an FDA document admits the “COVID” PCR test was developed without isolation Covid samples for test calibrations, effectively admitting it's testing something else. In the FDA document, it is clearly stated that ordinary seasonal flu genetic material was used as the testing marker in the PCR test kits. The authorities would have known that many people would test “positive” for it, thus allowing them to use these results to create the “covid” narrative.[256]

247. Prior to COVID-19, the definition of a case (in a medical sense) has been a patient with significant symptoms. With the implementation of the PCR test, cases are now being defined as someone who tests positive regardless of whether they have any symptoms or not.

248. Dr. Henry has been knowingly conflating positive PCR test result with the actual disease, thereby deliberately misleading the public into believing the infection is far more serious and widespread than it actually is. At no time in history have we ever encouraged asymptomatic people to get tested, yet Dr. Henry allowed this to happen to keep the case numbers high.

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[255] https://www.cdc.gov/csels/dls/locs/2021/07-21-2021-lab-alert-Changes_CDC_RT-PCR_SARS-CoV-2_Testing_1.html

[256] https://www.naturalnews.com/2021-08-01-fda-covid-pcr-test-fraud.html

249. The British Columbia government is reportedly decreasing the amplifications of the PCR test in order to lower the number of COVID-19 cases to deceive the public into believing that the decline in cases is a result of people being "vaccinated." The government is now testing the vaccinates at much lower threshold rates, but the **unvaccinated** at 43-45.

250. Dr. Henry has been instrumental in disseminating information to the public that is knowingly false, deceptive and/or misleading. To knowingly disseminate false information is a violation of the *Health Professions Act*.

251. It is evident that the government, with the recommendations and support of Dr. Henry, have imposed the emergency measures based on the fraudulent, unwarranted and unscientific use of the PCR test.

252. Based on this compelling and factual information, the emergency measures, as well as the use of the COVID-19 experimental injection ("vaccine"), were not, and are not required or recommended. In fact, warnings around the world are calling for the immediate halt of the experimental 'vaccines' due to the volume of extreme adverse reactions, including death.

253. Furthermore:

a) The Nuremberg Code,[257] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

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[257] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

b) All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[258] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

c) None of these treatments have been fully approved; only granted emergency use authorization by the Food and Drug Administration (FDA), which Health Canada[259] [260] [261] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

d) Most vaccines are trialed for at least 5-10 years,[262] and COVID-19 treatments have been in trials for less than a year.

e) No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and death in animal models.[263]

f) Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart,[264]

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[258] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[259] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[260] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[261] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[262] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[263] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[264] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19- vaccination/2494534/

> and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[265]

Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a peer reviewed scientifically published research study[266] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

254. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune

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[265] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[266] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%.[267] **In spite of these facts, the British Columbia government and Dr. Henry are pushing the experimental treatment , to be applied to minors, without parental consent, with the tragic outcome of a high incidence of injury and death.**

255. According to Health Canada's Summary Basis of Decision,[268] updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. **The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in pediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real- world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines." Furthermore:**

a) Under the Risk Management plan section of the Summary Basis of Decision, it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." **In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.**

b) The report specifically states, "**The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2, has been**

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[267] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[268] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

> **flagged as a potential safety concern that requires particular attention by the scientific community**, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)."[269]

In spite of this information, Dr. Henry, with the support of John Horgan, Adrian Dix and Mike Farnworth, has intentionally and consistently mislead the public by insisting the COVID injection is safe, and goes further to highly recommend the "vaccine" as safe for pregnant women, nursing infants and children.

256. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[270] Furthermore:

a) It is further reported that only one percent of vaccine injuries are reported to VAERS,[271] compounded by several months delay in uploading the adverse events to the VAERS database.[272]

b) On July 2, 2021, VAERS data release showed 438,441 reports of adverse events following COVID-19 injections, including 9,048 deaths and 41,015 serious injuries, between December 14, 2020, and July 2, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[273]

c) Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented

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[269] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[270] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/

[271] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[272] https://vaxoutcomes.com/thelatestreport/

[273] https://childrenshealthdefense.org/defender/cdc-vaers-deaths-reported-covid-vaccines/

> numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths, it's pulled off the market."[274]

257. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported. Historically, in Canada, only about 1% of adverse effects are actually reported.

258. Dr. Joss Reimer, medical lead for Manitoba's Vaccine Implementation Task Force, says that new vaccine recommendations from the National Advisory Committee on Immunization on mixing mRNA vaccines will be a form of trial and error. Reimer stated, "Well in some ways, during a pandemic everything we do is a big human experiment."[275] However, according to Health Canada's Summary Basis of Decision Pfizer and Moderna warn that the interchangeability of the injections is unknown and recommend first and second dose of the same shot. The World Health Organization also warns that mixing the vaccines is dangerous.

259. Safe and effective treatments, Hydroxychloroquine and Ivermectin, and preventive measures, Vitamin D and Zinc, exist for COVID-19, apart from the

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[274] https://johnbwellsnews.com/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths-by-leo-hohmann/

[275] https://www.ctvnews.ca/politics/manitoba-vaccine-lead-says-mixing-vaccines-is-part-of-pandemic-s-big-human-experiment-1.5457570?fbclid=IwAR0sYVZiRZgkhAjPn_9q3IRuFdBfTvWIi_nolNrhe69Aefzf8NxlKR_iXsI

experimental shots, yet the British Columbia government and Dr. Henry are prohibiting their use.[276] [277]

260. Messaging from the British Columbia government and Dr. Henry has placed pressure on the public to receive “vaccines” in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people’s ability to meet basic needs and care for themselves and their families.

261. The British Columbia government and Dr. Henry have incentivised the receiving of injections, measuring the public’s compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion, **and in fact criminal extortion**, as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and homecare system wherein family members are not permitted to visit their family members. This is likely to continue due to the unconscionable mandate to vaccinate healthy people. This, all in the face of the

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[276] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[277] https://www.ctvnews.ca/politics/manitoba-vaccine-lead-says-mixing-vaccines-is-part-of-pandemic-s-big-human-experiment-1.5457570?fbclid=IwAR0sYVZiRZgkhAjPn_9q3IRuFdBfTvWIi_nolNrhe69Aefzf8NxlKR_iXsI

fact that the Supreme Court of Canada has established that it is a s.7 ***Charter*** right to refuse **any** medical treatment without informed, **voluntary**, consent.

262. The elderly have been treated cruelly and inhumanely by forcing the harmful experimental injection on them and also withholding loved ones from being "permitted" to visit them. Many elderly people died alone with no one by their side in their final hours to comfort and console them. The isolation of the elderly has been comparable to convicted criminals in solitary confinement. The elderly have been isolated for up to a month at a time, and now going on 16 months. Criminals subjected to this kind of isolation were compelled to choose a lethal injection over being subjected to the intense feelings of separation from human contact. Therefore, it sadly comes as no surprise that the elderly are choosing euthanasia over further lockdowns.[278]

263. Over 80% of all deaths occurred in care-homes and were people over the age of 80. The majority had multiple existing comorbidities.

264. As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures[279] and, are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Children have experienced extreme depression and anxiety due to the COVID-19 measures and are at the highest scale of suicide ideation of all age

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[278] https://www.ctvnews.ca/health/facing-another-retirement-home-lockdown-90-year-old-chooses-medically-assisted-death-1.5197140

[279] https://action4canada.com/student-mask-covid-exemptions/

groups. The “pandemic” has taken a heavy toll on children's mental health.[280] [281] The “extra” suicides and drug over-doses undisputedly tied to Covid-measures constitutes criminal negligence causing death.

265. The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, “full” disclosure cannot be provided.

266. As a result of the British Columbia government and Dr. Henry's push to vaccinate the masses, ‘medically unqualified’ people such as politicians, teachers, and business owners, have also placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

267. Recommendations/mandates from the British Columbia government and Dr. Henry, that people take COVID-19 injections, are being made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners and world-renowned scientist and virologist, including the inventor of the mRNA technology, Dr. Robert Malone, who is calling for “an immediate

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[280] https://www.thestar.com/news/gta/2021/07/08/very-very-concerning-pandemic-taking-heavy-toll-on-childrens-mental-health-sick-kids-study-shows.html

[281] https://toronto.ctvnews.ca/most-ontario-youth-experienced-depression-during-pandemic-early-data-suggests-1.5501275

halt of the COVID-19 “vaccines” due to the severe adverse reactions; in particular, the extreme danger it poses to young people.”[282]

268. Researchers in Britain have also called on the government to halt their use of the coronavirus “vaccine” immediately after discovering potentially “toxic” side-effects.[283]

269. Dr. Vladimir Zev Zelenko, MD, called child vaccine mandates “coercive human experimentation,” calling for those responsible for such policies to be tried for “crimes against humanity.”

270. “According to the CDC, healthy kids 18 or younger have a 99.998% rate of recovery from COVID-19 WITHOUT any treatment,” Zelenko told America’s Frontline Doctors (AFLDS). “There is NO medical necessity for any vaccines. Especially, an experimental and unapproved mRNA injection that has shown to have many dangerous side effects.”

271. He continued: “Any government or individual that forces or mandates children to get this experimental injection is in direct violation of the Geneva convention’s prohibition against coercive human experimentation. These are criminals of the highest order and must be brought to justice for crimes against humanity.”[284]

272. On June 25, 2021, Spanish researchers are conducting studies of the mRNA vaccines and the preliminary analysis of vaccination vials confirms the presence

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[282] https://gospelnewsnetwork.org/2021/06/29/mrna-inventor-says-to-stop-covid-vaccines-now/

[283] https://www.oann.com/chinese-virus-vaccine-produces-toxic-effects-british-researchers-call-on-govt-to-halt-use-immediately/#

[284] https://americasfrontlinedoctors.org/frontlinenews/dr-zelenko-calls-child-vaccine-mandate-coercive-human-experimentation-crimes-against-humanity/

of graphene nanoparticles. Graphene oxide is a highly toxic substance. The discovery made here by La Quinta Columna is being referred to as a full-fledged attack of State bioterrorism, or at least with the complicity of governments to the entire world population, now constituting crimes against humanity.[285]

273. On July 3, 2021, CTV News is spewing propaganda to support the governments' objective to force the experimental injection on the healthy Canadians who choose to reject the injection. The propaganda further incites discrimination, unreasonable fear and intolerance (hate) towards the unvaccinated.[286]

274. The injections being heavily promoted by Dr Henry have not been through the strict protocol normally assigned to new drugs or treatments. They were only approved by the FDA to be used under emergency authorization. This FDA approval was the basis for the "interim" approval by Health Canada. One of the main criteria for that authorization was that there are no alternative treatments available. This is the reason why Dr. Henry has withheld crucial information regarding other proven treatments for COVID-19, such as Hydroxychloroquine and Ivermectin. If she admitted that there were other treatments, then that criterion would no longer be met and the injections would have to be pulled and subjected to more in-depth study to be able to justify their use.

275. Dr. Henry is using her position to promote this experimental genetic technology of unknown efficacy and safety. With the knowledge of Premier Horgan,

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[285] https://www.orwell.city/2021/06/covid-19-is-caused-by-graphene-oxide.html

[286] https://www.ctvnews.ca/health/coronavirus/unvaccinated-people-are-variant-factories-infectious-diseases-expert-says-1.5495359

Minister of Safety Mike Farnworth, and Minister of Health Adrian Dix, she is deliberately misleading the public causing further harm and death. Everyone who takes these injections has the right to informed consent regarding the nature of the authorization, and to know that by taking it they are themselves becoming the test subjects in the Phase III trials. She is abusing the trust and duty that people naturally have towards someone who presents themselves as a physician.

276. She is even going so far as to tell minors that they do not need parental consent when she is fully aware there is even less safety data to warrant risking the lives of children who are at extremely low risk from COVID-19.

277. Dr. Henry is on record recommending the "vaccine" for pregnant women. She is therefore responsible and duty bound to know the harms and alert people to them. She is using her trusted position to manipulate women into taking a harmful shot.

278. On April 26, 2021, Dr. Henry made a public announcement and claimed that when the vaccine was originally tested and introduced, there were some concerns about whether women who were pregnant should receive it, but then states, "now there is more substantial data supporting it is safe and effective in pregnancy" ... and adds, "A new study released last week showed protected antibodies are transmitted through breast milk to the infant as well."[287] [288] Dr. Bridle's report

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[287] https://globalnews.ca/news/7813885/b-c-encourages-pregnant-women-to-get-vaccinated-but-wont-move-them-up-the-list/

[288] https://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2021/75959a-eng.php

warned of infants with gastrointestinal bleeding. There are further reports of infant deaths associated with nursing mothers who had taken the shot.

279. Dr. Henry is once again outright lying because according to Health Canada's Summary Basis of Decision, **updated May 20, 2021**, it maintained what it had since the onset: that both the Moderna and Pfizer manufacturers identified that there are six areas of missing (limited/no clinical data) information. Listed as follows: **"use in paediatric (age 0-18)"**, **"use in pregnant and breastfeeding women**", "long-term safety", "long-term efficacy" including "real world use", "safety and immunogenicity in subjects with immune-suppression", and "concomitant administration of non-COVID vaccines."

280. **This is on Health Canada's website and was part of the Health Canada approval process, to which Dr. Henry has full access.**

281. In mid-June, the *New England Journal of Medicine* published a study called "Preliminary Findings of mRNA Covid-19 Vaccine Safety in Pregnant Persons" by Tom T. Shimabukuro and others from the Center of Disease Control's "v-safe COVID-10 Pregnancy Registry Team." The team wrote that there were "no obvious safety signals among pregnant [women] who received Covid-19 vaccines" even though it published a table which showed that **82% of women in the study who were injected with either the Pfizer or the Moderna vaccine during early pregnancy, lost their babies (miscarried).** [289]

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[289] https://www.breakingchristiannews.com/articles/display_art.html?ID=33214

282. On April 19, 2021, Dr. Henry uses the single death of an infant as more fodder to manipulate compliance of the masses. Dr. Henry says that the infant's tragic death "reminds us of the vicious nature of this virus." The reality was that this infant was already a patient at the British Columbia Children's Hospital for a pre-existing condition.[290]

283. The same article goes on to say that this was the very first death under the age of 30 in the entire province of British Columbia (population 5 million). More than a year (and two "waves") into the pandemic. That in itself highlights just how NOT dangerous this virus is to young people under the age 30.

284. In a news report on May 14, 2021, after numerous reports of adverse effects from the AstraZeneca injection, Dr. Henry continued to manipulate and coerce the public into taking the jab by only reporting on cases, **not deaths**, by PCR based cases. She further claims in her public announcement that youth are now at great risk for contracting COVID-19. Dr. Henry makes this claim with no evidence to substantiate it. Dr. Henry blatantly lies about youth getting COVID-19 saying, "especially young people are having severe disease with Covid-19." The facts are that young people are at nearly zero percent risk of contracting or transmitting this virus and if they do get it, they have mild symptoms.

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[290] https://web.archive.org/web/20210420021347/https://vancouversun.com/news/local-news/infant-dies-from-covid-19-at-b-c-childrens-hospital

285. Dr. Henry's May 14, 2021, news update included a Langley man, Mr. Mulldoon,[291] who was hospitalized and had to undergo surgery to remove six feet of his small intestines due to a severe reaction to the AstraZeneca shot. Dr. Henry sidestepped the issue and minimized the fact that this man's life has been permanently impacted by referring to his blood clot as “very rare.” Statistics prove otherwise.

286. The fact is, there can be no "informed" consent since this experimental "vaccine" is still in the trial phase. All the potential side-effects are unknown. Anyone involved in this experiment is equivalent to a lab rat, at this point.

287. When countries around the world, including several provinces in Canada, were banning AstraZeneca due to the serious adverse reactions including death, Dr. Henry is on record continuing to not only make it available to the public but promote it and claiming it is "perfectly safe.”

288. The duty of disclosure for informed consent is rooted in an individual’s right to bodily integrity and respect for patient autonomy. A patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, “A Reasonable Person Would Want to Know the Serious Risks, Even

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[291] https://www.msn.com/en-ca/news/canada/covid-19-bc-man-hospitalized-with-astrazeneca-vaccine-induced-blood-clot/ar-BB1gHW5y

if Remote." ***Hopp v Lepp, supra; Bryan v Hicks*, *1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30***.[292]

289. Vaccination is voluntary in Canada, yet, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts lockdowns have had on the health and well-being of the citizenry. Canadian law has long recognized that individuals have the right to control what happens to their bodies; law which is being directly infringed upon by these officials.

290. Dr. Henry has been instrumental in disseminating information to the public that is knowingly false, deceptive and/or misleading, resulting in egregious crimes against humanity, the division of families and society, abuse and mistreatment of our elderly and children, the destruction of our economy, employment and businesses, prohibiting medical care, and all of these things contributing to increased drug overdoses, suicide, depression, excess deaths and an overall breakdown of society.

291. Dr. Henry persists, in the face of mounting evidence, to misrepresent COVID-19 as a deadly condition when this condition produces only mild or no symptoms for the greatest percentage of the population (99.997%).

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[292] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

- **Dr. Bonnie HENRY – Vaccines and the WHO**

292. As per her Biography, Bonnie Henry has worked with the WHO and UNICEF Polio eradication program, as well as with the WHO to manage Uganda's Ebola outbreak[293].

293. Bonnie Henry was in Pakistan working with the WHO to purportedly eradicate polio in 2000. This through a vaccination program, without informed consent of the recipients, and this notwithstanding the fact that, according to the WHO, every Polio case since 1979 has been a result of the Polio vaccine itself and not naturally occurring. [294]

294. The Bill and Melinda Gates Foundation is a member, and funding organization of the WHO, specifically when it comes to the topic of developing vaccines, and delivering them to the "developing world"[295]

295. The Bill and Melinda Gates Foundation developed a highly comprehensive campaign to dispel "misinformation", and coerce Pakistani families to vaccinate their infants by implying that all infants should receive the vaccine unless there was a reason not to.[296]

296. The World Bank released a project appraisal document naming all of the sponsors on the project for a polio eradication project in Pakistan, that named the

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[293] Biographies - Province of British Columbia (gov.British Columbia.ca)

[294] Bonnie Henry – National Collaborating Centre for Infectious Diseases (nccid.ca)

[295] WHO | Bill & Melinda Gates Foundation

[296] Polio: Questions and Answers (immunize.org)

Bill and Melinda Gates Foundation as a sponsor, and the WHO as one of the major planning organizations on the project.[297]

297. As recently as May 2018, children have been not only experiencing injury, but also death at the hands of the Polio vaccine that has seen mass campaigns across even the most remote parts of their nation, including invasive door-to-door vaccination campaigns, since 1998, yet these deaths are often brushed aside. These massive injuries and deaths have been documented in South Asia (India and Pakistan) as well as Africa.[298]

298. Also per her biography, Bonnie Henry has been heavily involved, in the past, in the management of "mass gatherings" in Canada and abroad[299]. This included the Vancouver 2010 Olympic, and Paralympic Winter Games. Incidentally, Todd Dennett, former employee at the Bill and Melinda Gates foundation was appointed to be responsible for overseeing the medal ceremonies[300]. Todd Dennett was the manager of scheduling and trip operations at the Bill and Melinda Gates Foundation from March 2005-April 2008[301]. Todd Dennett is now the CEO and founder of Tiller Global, a company that boasts of a portfolio including having worked with: Bill and Melinda Gates Foundation, Microsoft, HIV Vaccine Trials Network[302].

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[297] World Bank Document
[298] Deaths of children after getting polio vaccine panic people - Pakistan - DAWN.COM
[299] Biographies - Province of British Columbia (gov.British Columbia.ca)
[300] Making the Olympic medal moment perfect: it's all in the details | The Seattle Times
[301] Todd Dennett | LinkedIn
[302] Portfolio – Tiller Global

299. The Plaintiffs state, and fact is, that administrating medical treatment without informed consent constitutes experimental medical treatment and contrary to the ***Nuremberg Code*** and ***Helsinki Declaration*** of 1960, still in vigor, and further and thus constitutes a crime against humanity under the ***Criminal Code*** of Canada.

300. On May 21st, 2021, Dr. Bonnie Henry, and her department announced the availability of the Covid vaccines for twelve (12) to seventeen (17) year olds, without the need for their parents consent, notwithstanding:

(a) That the Vaccines have **NOT** undergone required trial and safety protocols but were all made under an "emergency" basis;

(b) That there has **NOT** been a recorded death or life-threatening case of any twelve (12) to seventeen (17) year old in Canada;

(c) That twelve (12) to seventeen (17) year olds are not at risk of Covid-19;

(d) That, in the absence of informed consent, it constitutes medical experimentation and thus constituted a "crime against humanity" emanating from the Nuremberg trials, and principles following the medical experimentations by the Nazi regime and codified in Canada, as a Criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act;***

(e) And that on June 5th, 2021 Dr. Joss Reimer, Medical Lead for the Manitoba Vaccine Implementation Task Force, in asserting that the various vaccines can be mixed, publicly declared that the Covid-19 vaccinations are a "big human experiment";

(f) That many twelve (12) to seventeen (17) year olds do not possess the intellectual capacity to give informed consent;

(g) And by doing so Dr. Bonnie Henry, and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

- ## G/ CONSEQUENCES OF MEASURES TO THE PLAINTIFFS AND OTHER CITIZENS, AND VIOLATION OF CONSTITUTIONAL RIGHTS

301. The Plaintiffs state, and the facts is, that the impact of containment measures to Plaintiffs is, **inter alia** that:

(a) Mass containment measures negatively impacts the development of herd immunity, artificially prolongs the epidemic, extends the period of confinement, and contributes to maintaining a high proportion of susceptible individuals in the population.

(b) California emergency room physicians stated that *"sheltering in place does more harm than good and lowers our immune system."* [303]

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[303] https://vaccineimpact.com/2020/california-er-physicians-sheltering-in-place-does-more-harm-than-good-lowers-our-immune-system/

(c) The measures employed to achieve the objective of *"flattening the curve"* so as not to overwhelm the health care system were disproportionate to the objective. Our health care system has consistently operated at 40 – 50% **below** capacity since the introduction of these measures.

(d) The suspensions of rights to participate in community and in commerce has caused substantial and irreparable harm to the economy, livelihoods, communities, families, and the physical and psychological well-being of Canadians and the Plaintiffs. These include:

  (i) A dramatic increase in reports of domestic violence (30%).

  (ii) Over six million Canadians have applied for unemployment benefits and 7.8 million Canadians required emergency income support from the Federal government (as of May 2020).[304]

  (iii) The deepest and most rapid loss of jobs, savings and income in the history of Canada.[305]

  (iv) Numerous citizens have been forced into unemployment and poverty, the loss of their business, and bankruptcy.

  (v) Estimates of the Federal deficit resulting from their response to SARS-CoV-2 ranges up to $400 billion (May 2020).[306]

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[304] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[305] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[306] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

(vi) Leading Economic Indicators show the Canadian economy is now in "*freefall*". [307]

(vii) Illnesses and conditions not related to SARS-CoV-2 have gone untreated and undiagnosed.

(viii) Dramatic increase in number of individuals dying at home due to lack of medical care and for fear of visiting emergency wards despite the fact that most hospitals have capacity.

(ix) Denial of access to health care professionals including doctors, dentists, chiropractors, physiotherapists, naturopaths, homeopaths, physiotherapists, massage therapists, optometrist, and osteopaths.

(x) Denial of access to health care services including cancer treatments, elective surgeries, testing, diagnosing, and treatment.

(xi) Regulated health care practitioners, including chiropractors, Naturopaths, and Homeopaths have been directed to refrain from providing health care knowledge to individuals concerned about SARS-CoV-2. This is an unwarranted infringement on the right to therapeutic choice.

(xii) Dramatic Increase in mental health challenges including suicide.

(xiii) The significant potential for the traumatizing children due to the disproportionate fear of contracting a virus for which the risk of death is virtually zero.

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[307] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

(xiv) Significant increase in alcohol consumption and drug use.

(xv) Denial of access to healthy recreation including parks, beaches, camping, cottages, and activities as golf, tennis, swimming, etc.

(xvi) Denial of a public education for children.

(xvii) Denial of access to consumer goods and services.

(xviii) Individuals dying alone in hospital and extended care facilities without the support of family and friends. [308]

(xix) Fathers denied access to be present for the birth of their child.

(xx) Elderly parents in supportive care are denied access to the support of their family and friends.

(xxi) The effective closure of Courts of Law is unprecedented, illegal, unconstitutional, undemocratic, unnecessary, and impedes the ability of Canadians to hold our governments accountable.

(xxii) The effective closure of Parliaments is unprecedented, illegal, unconstitutional, undemocratic, unnecessary, and impedes the ability of Canadians, including the Plaintiffs, to hold governments accountable.

302. The Plaintiffs further state, and fact is, that:

(a) To combat COVID-19, “Canada’s federal government initially committed to measures totaling around $400 billion, of which about two-fifths constitutes direct spending.” Currently, the deficit for

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[308] https://globalnews.ca/news/6866586/British Columbia-woman-disability-dies-covid-19/

2019-2020 is expected to be well over $1.2 Trillion. This is seven times larger than the previous year's deficit. [309]

(b) There is no evidence that the impact of these negative consequences were calculated, much less fully considered in the government's response to SARS-CoV-2.

(c) John Carpay, president of the Justice Centre for Constitutional Freedoms in Canada has stated there is reason to conclude that the government's response to the virus is deadlier than the disease itself. [310]

(d) The cost of combatting SARS-CoV-2 is placed disproportionately on the young and blue collar and service workers who cannot work from home, as opposed to white collar workers who often can.

(e) The results from Sweden, and other countries that did not engage in mass and indiscriminate lockdowns, demonstrates that other more limited measures were equally effective in preventing the overwhelming of the health care system, and much more effective in avoiding severe economic and individual health consequences.

(f) The Ontario government took the "extraordinary step" to release a database to police with a list of everyone who has tested positive for COVID-19 in the province.[311]

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[309] https://www.huffingtonpost.ca/entry/canada-budget-deficit-covid19_ca_5e85f6British Columbiac5b60bbd735085f4

[310] https://www.jccf.ca/the-cost-of-the-coronavirus-cure-could-be-deadlier-than-the-disease/

[311] https://toronto.ctvnews.ca/mobile/ontario-takes-extraordinary-step-to-give-police-list-of-all-covid-19-patients-1.4910950?fBritish Columbialid=IwAR10jfu_5OYq5BPZJKMyyqiN2P47dK_wbZzFMqC8WEpFxiIhEFt81cGnfqc

303. Furthermore, while upon the declaration of the pandemic, based on a totally erroneous modeling, postulated that, as opposed to regular 650, 000 deaths every year form seasonal viral respiratory illness , world-wide, that 3.5 Million may or would die, the erroneous COVID implemented measures have proven to be more devastating than the "pandemic" at its posited worse in that:

(a) In Canada, as elsewhere, 170,000+ medical, surgical, operations are canceled, with the numbers climbing, as well as closure of other medical services at hospital, which have caused deaths;

(b) With the fear of lock-downs and self-isolation, patients have not accessed their doctor for diagnosis of medical problems;

(c) Documented spikes of domestic violence and suicides have been recorded;

(d) Inordinate spike in alcoholism, drug use, and clinical depression;

(e) Moreover, and most-shocking, the UN through an official of the World Food Bank, on April 22nd,2020, had published a document stating that, because of COVID-19 (measures)and the disruption of supply chain, it estimates that 13**0 Million "additional people" "**on the planet could be on the brink of **starvation by end of year 2020** which, begs the question: why is it justifiable to add 130 Million deaths to purportedly save 3.5 Million?

304. The Plaintiffs state, and the facts is, that the purported, and false, goals of the WHO measures and its purveyors, such as the Defendants, are a perpetual moving target, and purposely shift to an unattainable goals, in that:

(a) The initial rationale for the mass lockdown of Canadian society was to "flatten the curve" to avoid overwhelming health care services. It was never about preventing the coronavirus from spreading altogether, but rather to render its spread manageable.

(b) It appears now that the goal has changed. Government appears to have shifted the goal to preventing the virus from infecting any and all Canadians. If so, this ought to be made clear, as should the justification for the change. [312]

(c) Yoram Lass, the former director-general of Israel's Ministry of Health is of the opinion that "lockdown cannot change the final number of infected people. It can only change the *rate* of infection." [313]

(d) There are warnings of an imminent "second wave." But if the "first wave" has been flattened, planked or buried to the extent that in vast areas of the country very few people have been exposed to the virus at all, then the "second wave" is not really a second wave at all, but a delayed first wave.

(e) Minimizing the total spread of the coronavirus until a vaccine is available will be the most expensive goal in the history of human governance.

(f) There is no scientific evidence to substantiate that the elimination of the virus through self-isolation and physical distancing is achievable or medically indicated.

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[312] https://nationalpost.com/opinion/raymond-j-de-souza-on-covid-19-a-lockdown-without-a-clear-goal

[313] https://www.spiked-online.com/2020/05/22/nothing-can-justify-this-destruction-of-peoples-lives/#.XsgqiN6D0uQ.facebook

(g) According to four Canadian infectious disease experts, Neil Rau, Susan Richardson, Martha Fulford and Dominik Mertz - *"The virus is unlikely to disappear from Canada or the world any time soon"* and *"It is unlikely that zero infections can be achieved for COVID-19."* [314]

(h) There is no compelling reason to conclude that the general-population lockdown measures (first requested by the Trudeau government on 17 March) had a detectable effect in Canada. The lockdown measures may have been implemented after "peak prevalence" of actual infections, which renders mitigation measures entirely without effect.

(i) The Government of Canada has been slow to endorse the re-opening of the economy even as hospitals remain well below capacity – the metric that was initially used to justify the restrictions.

305. Since the summer of 2020, the above-noted consequences have exponentially multiplied, magnified, and chronically festered to the large point of deprivation and deaths, caused by the measures.

- **H/ THE COVID-19 VACCINE- "WE DO NOT GET BACK TO NORMAL UNTIL WE HAVE A VACCINE"**

306. From the on-set of the declared "emergency", the Plaintiffs state, and the fact was, that the narrative and mantra created and propagated by Bill Gates that "we do not get back to normal until we have a vaccine" has been accelerated by a

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[314] https://nationalpost.com/opinion/opinion-we-are-infectious-disease-experts-its-time-to-lift-the-covid-19-lockdowns

falsely declared “pandemic” to what has been a persistent push for **mandatory** vaccination of every human being on the planet, along with “global governance” as propagated by Bill Gates, Henry Kissinger, the Rockefeller Foundation, GAVI, the WEF, and their likes.

307. With respect to (mandatory) vaccines and the COVID-19, the Defendants, in addition to pushing the ultimate aim of mandatory vaccines, spear-headed by Bill Gates, and others, have also ignored and refuse to address the issues in the context of COVID-19, let alone vaccines at large, as reflected in, inter alia, the following:

(a) **Intention to Create Vaccine Dependency:** Is it ethical to deny children, young people and most of the population who are at low risk of mortality the opportunity to develop natural immunity when we know natural immunity is lifelong in most cases? Are we going to create another condition where we become ‘vaccine dependent’ or will we recognize the value of natural herd immunity? Advocates of the natural herd immunity model are of the opinion that rather than the mass isolation of billions of people, only the most at-risk people and their close associates should be isolated. The forced mass quarantine of an entire, mostly low-risk population is disproportionate and unnecessary. This is the position being utilized by Sweden.[315]

(b) **Will A COVID 19 Vaccine Be Safe?**

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[315] https://vaccinechoicecanada.com/in-the-news/will-a-covid-19-vaccine-save-us/

(i) **Dr. Anthony Fauci** – is the director of the National Institute of Allergy and Infectious Diseases in the United States. Fauci has stated: *"We need at least around a year and a half to make sure any new vaccine is safe and effective."* [1]

(ii) **Dr. Paul Offit** - Offit warns, *"Right now you could probably get everyone in this country to get this (CV) vaccine because they are so scared of this virus. I think we should keep remembering that most people who would be getting this vaccine are very unlikely to be killed by this virus."*

(iii) **Dr. Peter Hotez** - dean of the National School of Tropical Medicine at Baylor College of Medicine, told Reuters, *"I understand the importance of accelerating timelines for vaccines in general, but from everything I know, this is not the vaccine to be doing it with."*

(iv) **Pathogenic Priming[316];**

(c) **Jonathan Kimmelman**, a biomedical ethics professor at McGill University in Montreal, is watching how both scientific and ethical standards are maintained while the pandemic vaccine trials progress at breakneck speed.

> "My concern is that, in the fear and in the haste to develop a vaccine, we may be tempted to tolerate less than optimal

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[316] https://www.sciencedirect.com/science/article/pii/S2589909020300186?via%3Dihub=&amp=1

> science," Kimmelman said. "That to me seems unacceptable. The stakes are just as high right now in a pandemic as they are in non-pandemic settings. "To show how long the process can take, Kimmelman points to the example of the ongoing search for an effective HIV vaccine that began in the 1990s. Before healthy people worldwide receive a vaccine against SARS-CoV-2, the risk/benefit balance needs to tip in favor of the vaccine's efficacy in offering protection over the potential risks, he said. The balance still exists even in the face of a virus wreaking an incalculable toll on human health and society.” **[317]**

(d) CBC News March 24, 2020 reported by Amina Zafar;[318]

(e) Moderna's vaccine uses genetic material from the virus in the form of **nucleic acid.** That tells the human body how to make proteins that mimic viral proteins and this should provoke an immune response. Denis Leclerc, an infectious diseases researcher at Laval University in Quebec City, said the advantage of nucleic acid vaccines like Moderna's is that they're much faster to produce than other types. While relatively safe, **nucleic acid vaccines are generally not the preferred strategy**, Leclerc said, because they **don't have the same safety record** as the traditional approach.

(f) **Will a COVID 19 vaccine be effective? Ian Frazer** - Immunologist Ian Frazer has downplayed the role of a vaccine in overcoming the coronavirus pandemic, saying it may “not stop the spread of the virus in the community”. That’s if a vaccine can be developed at all. Frazer, a

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[317] https://www.cbc.ca/news/canada/coronavirus-covid19-april16-canada-world-1.5534020

[318] https://www.cbc.ca/news/health/covid-19-vaccine-research-1.5497697

University of Queensland scientist who was recognized as Australian of the Year in 2006 for his contribution to developing HPV vaccines, said a COVID-19 vaccine may not be the end-all to the current crisis. [319]

(g) **Role of Influenza Vaccination to Current Outbreak - Allan S. Cunningham**, Retired pediatrician The possibility that **seasonal flu shots are potential contributors** to the current outbreak. A randomized placebo-controlled trial in children showed that flu shots increased fivefold the risk of acute respiratory infections caused by a group of non influenza viruses, including coronaviruses.[320]

(h) **Mandatory Vaccination**

(i) **Diane Doucet** – Message to New Brunswick Committee on Law Amendments"Mandatory vaccination may soon be imposed on the entire population. Eventually, every person will have to decide between attending school, keeping their job, their home and their ability to participate in society and their so-called freedom to choose. People will also be at risk of losing their jobs if they speak out against mandatory vaccinations.

We are not talking about quarantining individuals infected by a disease. We are talking about the segregation of healthy children and adults from participating in society. Their crime is that they do not consent to handing over their bodies to the tyrannical will of a vaccine cartel which is accountable to no one.

The policy makers look down upon the citizenry with arrogance. We live in a system that views the common people as being too ignorant to decide what's best for themselves and their children. When corporations, health agencies and government institutions treat people like chattel and punish those who do not submit, you

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[319] https://7news.com.au/lifestyle/health-wellbeing/coronavirus-australia-immunologist-ian-frazer-expresses-doubt-around-role-of-vaccine-in-pandemic-c-983647

[320] https://www.bmj.com/content/368/bmj.m810/rr-0

> have slavery. If an institution can take it upon itself and do what it wants to people's bodies against their will, then you live in a slave system. We find ourselves here today, wondering how we managed to slip this low."

- **Microchipping /Immunity Passports/ Social Contact Vaccine Surveillance & 5G**

308. The Plaintiffs state that, and fact is, this global vaccination scheme which is being propelled and pushed by the Defendants, is with the concurrent aim of total and absolute surveillance of the Plaintiffs and all citizens.

309. In addition to the facts, pleaded with respect to Gates' vaccine-chip, nannocrystal "app" already developed, in late June, 2020, cell-phone companies, at the request of Justin Trudeau that the 30-Million eligible Canadians "voluntarily" load up "contract-tracing apps" now available from the phone-tech giants. These companies began dumping the apps on to customers without **informed** consent.

310. On June 30th, 2020, Canada announced that it was participating, to be included, as one of an initial fifteen (15) countries, to require "immunity passport", a cell-phone application disclosing medical vaccination history.[321] Canada is one of an initial fifteen (15) countries to enter into a contract to deploy "immunity passport" technology. The technology would utilize a cell-phone application to disclose medical vaccination history. [322]

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[321] https://www.mintpressnews.com/mass-tracking-covi-pass-immunity-passports-slated-roll-15-countries/269006/

[322] https://www.mintpressnews.com/mass-tracking-covi-pass-immunity-passports-slated-roll-15-countries/269006/

311. The Plaintiffs further state, and the fact is, that above and beyond what is set out above in the within Statement of Claim, mandatory vaccination, for any disease, let alone a **virus**, is a flagrant violation of the Plaintiffs' **Charter** , and written constitutional rights, under s. 2 and 7 of the **Charter,** to freedom of belief, conscience, religion, and life liberty and security of the person as a violation of physical and psychological integrity, where informed medical consent is absent in a mandatory scheme.

312. Furthermore, and more importantly, the Plaintiffs state that public officials, including the relevant Defendants, Trudeau, Tam, and Henry have warned that, despite the anticipated five (5) years of the Covid-19 "vaccines", the vaccines will **not** result in immunity: do not prevent transmission of the virus to and from the recipient: and that the other measures, lockdoans, maskins and useless PCR tests must be maintained indefinitely. This all begs the question: why then roll out an experimental "vaccine" by-passing the safety protocols?

Version April 29/21

- **Authorized COVID "Vaccines"**

313. Since the Summer of 2020, with respect to the Covid "vaccines", the events have unfolded as set out below.

314. There are four COVID-19 vaccines which have received emergency use authorization in Canada: [323]

(a) The **Pfizer-BioNTech** COVID-19 vaccine was authorized for use in Canada on December 9, 2020.

(b) The **Moderna** COVID-19 vaccine was authorized for use in Canada on December 23, 2020.

(c) The **AstraZeneca** COVID-19 vaccine was authorized for use in Canada on February 26, 2021.

(d) The **Janssen** COVID-19 vaccine was authorized for use in Canada on March 5, 2021.

(e) Merck, a major pharmaceutical company, which was developing two (2) potential vaccines, abandoned their development and publicly announced, that it is **more** effective for people to simply contract the virus and let the natural immune system deal with it.

Note: Health Canada authorized two manufacturers to produce this vaccine developed by AstraZeneca and Oxford University: AstraZeneca and Serum Institute of India (SII). NACI has not specifically reviewed evidence for the SII vaccine, but Health Canada has deemed SII and AstraZeneca vaccines to be comparable. Authorization of the SII COVID-19 vaccine (COVISHIELD) was based on its comparability to the AstraZeneca COVID-19 vaccine as determined by evaluation and direct comparison of manufacturing processes and controls and the quality characteristics of the two products. The results of this comparison by Health Canada determined that the two products were sufficiently similar and that the efficacy, immunogenicity and safety of COVISHIELD could be inferred from the non-clinical and clinical studies from the AstraZeneca COVID-19 vaccine.

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[323] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

315. These “vaccines” constitute experimental Medical Devices in that:

(a) Canadians have been led to believe that the COVID 19 vaccines have undergone robust clinical trials and have proven these products to be both safe and effective. That belief is simply untrue. In fact it is a bald and intentional lie.

(b) Those partaking in the COVID 19 vaccines are test subjects in ongoing clinical trials. [324]

(c) The COVID-19 vaccines have not received full Health Canada approval. They have only been granted ‘interim use’; i.e. ‘emergency use authorization’. This means that these medical products are considered ‘experimental’. Those partaking in these products are subjects in human clinical trials. In order to obtain emergency use, it must be established that no other recognized and approved medical treatment or drugs are available to mitigate, assist, or avert the disease which explains the banning and use of such drugs as HCQ, Ivermectin, Vitamin D, Zinc, and Magnesium in combination, treatments that have been proven effective.

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[324] https://off-guardian.org/2021/01/03/what-vaccine-trials

(d) These “vaccine” products are unlike any previous vaccine. The most significant difference with the Pfizer and Moderna vaccines is the introduction of ‘messenger RNA/DNA technology’. This technology has never before been injected into humans on a mass scale to function as a vaccine.

(e) The AstraZeneca and Janssen vaccines use a genetically modified virus to carry genes that encode SARS-CoV-2 spike proteins into the host cells. Once inside the cell, the spike protein genes are transcribed into mRNA in the nucleus and translated into proteins in the cytosol of the cell.

(f) The long-term consequences of injecting genetic technology into humans on a mass scale is, quite simply, unknown.

316. Safety Trials have not been completed with these vaccines and furthermore:

(a) None of the vaccines authorized for COVID-19 have completed Phase III clinical trials. Clinical trials are still ongoing.

(b) Phase III safety results will not be concluded until 2022 - 2024 depending upon the manufacturer.

(c) Long-term safety data does not exist for these products. [325]

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[325] https://www.fda.gov/media/144416/download

(d) The normal development timeline to determine the safety of a vaccine is 5 - 10 years. It is impossible to know the safety and efficacy of a new medical product in the few months these products have existed.

(e) It is also important that Canadians know that these ‘vaccines’ are unlike any previous vaccine.

(f) There are significant concerns related to the fast tracking of a COVID 19 vaccine, with safety being first and foremost.

(g) Vaccine manufacturers have been working on a coronavirus vaccine for more than fifty (50) years with no success.

(h) A coronavirus vaccine carries the risk of what is known as ‘pathogenic priming’ or ‘disease enhancement’, whereby instead of protecting against infection, the vaccine makes the disease worse in vaccinated individuals. [326]

(i) The mechanism that causes disease enhancement is not fully understood and has prevented the successful development of a coronavirus vaccine to date.

(j) Disease enhancement occurred with the dengue fever vaccine. Vaccines developed for other coronaviruses, SARS-1 and MERS, resulted in a high rate of death in test animals.

(k) Normal protocols to test the safety of vaccines include testing in animals prior to testing in human subjects.

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[326] https://www.reuters.com/article/us-health-coronavirus-vaccines-insight-idUSKBN20Y1GZ

(l) Animal testing prior to human trials is even more necessary for a coronavirus vaccine as all previous efforts to develop a coronavirus vaccine have failed because the vaccine caused an exaggerated immune response upon re-exposure to the virus. [327] Vaccinated animals suffered hyper-immune responses including inflammation throughout their bodies, especially in their lungs. Consequently, those vaccines were never approved.

(m) In the rush to develop a COVID vaccine, Health Canada has permitted vaccine makers to either bypass animal testing entirely or conduct animal testing concurrently with testing in humans.

(n) Dr. Peter Hotez, dean of the National School of Tropical Medicine, was involved in previous efforts to develop a SARS vaccine. On March 5, 2020, Hotez told a US Congressional Committee that coronavirus vaccines have always had a “unique safety problem” — a “kind of paradoxical immune enhancement phenomenon.” [328]

(o) Hotez has stated, "I understand the importance of accelerating timelines for vaccines in general, but from everything I know, this is not the vaccine to be doing it with."

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[327] childrenshealthdefense.org/defender/pfizer-COVID-vaccine-trial-pathogenic-priming/

[328] https://www.c-span.org/video/?470035-1/house-science-space-technology-committee-hearing-coronavirus&start=1380

(p) Vaccine manufacturers have yet to provide data that defines the vaccine's interaction with other vaccines or prescription medications. [329]

(q) COVID-19 vaccines have not been tested for their ability to cause cancer, induce organ damage, change genetic information, impact the fetus of a pregnant woman or to impair fertility.

(r) The product monograph for the AstraZeneca vaccine authorized for use in Canada states: [330] "It is unknown whether AstraZeneca COVID-19 Vaccine may impact fertility. No data are available." "The safety and efficacy of AstraZeneca COVID-19 Vaccine in pregnant women have not yet been established." "It is unknown if AstraZeneca COVID-19 Vaccine is excreted in human milk. A risk to the newborns/ infants cannot be excluded." "The safety and efficacy of AstraZeneca COVID-19 Vaccine in children and adolescents (under 18 years of age) have not yet been established. No data are available." "Currently, there is limited information from clinical trials on the efficacy of AstraZeneca COVID-19 Vaccine in individuals ≥65 years of age."

(s) William Haseltine, a former Harvard Medical School professor states that, "These protocols seem designed to get a drug on the market on a timeline arguably based more on politics than public health." [331]

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[329] COVID-vaccine.canada.ca/info/pdf/pfizer-biontech-COVID-19-vaccine-authorisation.pdf?fbclid=IwAR0vCv09_332PjR41OUBJOy1k1ESQg--_CbAqcGpk1ZWY71xBztuLDE05oE

[330] https://covid-vaccine.canada.ca/info/pdf/astrazeneca-covid-19-vaccine-pm-en.pdf

[331] https://www.washingtonpost.com/opinions/2020/09/22/beware-covid-19-vaccine-trials-designed-succeed-start/

317. The Plaintiffs further state, and the fact is, that these Vaccines include never before used mRNA genetic technology in that:

(a) The Pfizer and Moderna vaccines includes ingredients never before used in licenced vaccines, and function unlike any previous vaccine to date.

(b) These treatments are more accurately a medical device and includes synthetic genetic technology based on a computer generated *"spike glycoprotein antigen encoded by RNA and formulated in lipid nanoparticles".* [332]

(c) According to the Canadian National Advisory Committee on Immunization (NACI) – Recommendations on the Use of COVID-19 Vaccines: [333] **"**mRNA vaccines *that use messenger RNA (mRNA) platforms contain modified nucleotides that code for the SARS-CoV-2 spike protein. A lipid nanoparticle formulation delivers the mRNA into the recipient's cells. Once inside the cytoplasm of a cell, the mRNA provides instructions to the cell's protein production machinery to produce the trans-membrane spike protein antigen that becomes anchored on the cell's external surface."*

(d) The NACI claims – "*The mRNA does not enter the nucleus of the cell and does not interact with, or alter, human DNA." and "The mRNA, lipid nanoparticle, and spike protein are degraded or excreted within days to*

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[332] https://www.fda.gov/media/144416/download

[333] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

weeks from time of immunization." (page 17) Evidence to substantiate these claims have not been provided.

(e) The same document states: *"COVID-19 vaccines based on viral vector platforms use a modified virus to carry genes that encode SARS-CoV-2 spike proteins into the host cells. The vector virus is a type of adenovirus that has been modified to carry COVID-19 genes and to prevent replication. These modifications are intended to prevent the viral vector from causing disease (i.e., they are non-replicating). Once inside the cell, the SARS-CoV-2 spike protein genes are transcribed into mRNA in the nucleus and translated into proteins in the cytosol of the cell. The AstraZeneca vaccine uses a modified chimpanzee adenovirus vector (ChAd). "* (page 17) Again, evidence to substantiate these claims have not been provided.

(f) This technology has never before been injected into humans on a mass scale.

(g) The long-term consequences of injecting genetic technology into a human body is unknown.

(h) A white paper produced by Moderna states: "DNA vaccines have a risk of permanently changing a person's DNA." [334]

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[334] https://www.modernatx.com/sites/default/files/RNA_Vaccines_White_Paper_Moderna_050317_v8_4.pdf

(i) The Moderna White Paper also states: “As with all new vaccines, time is needed to establish the level and duration of immunogenicity and the safety profile of mRNA vaccines in larger, more diverse populations.”

(j) The potential exists for significant consequences, not only for the person receiving the vaccine, but for future generations as it is highly possible that the mRNA/DNA in the vaccine will combine with the recipient’s own DNA and be transmitted to their offspring.

(k) The mRNA vaccine uses the cell's own machinery to create a protein that is identical to the spike protein on the coronavirus. This protein is also found in the placenta and in sperm. If a constant immune response is initiated by the vaccine against this protein, it will likely attack these human tissues as well and prevent placentas and sperm from forming properly. This autoimmune cross-reactivity could cause infertility, miscarriages and birth defects.

(l) The mRNA in the Pfizer vaccine was sequenced from the 3rd iteration of the original WUHAN published Genome SARS-CoV-2 (MN908947.3). The WHO protocols Pfizer used to produce the mRNA do not appear to identify any nucleotide sequences that are unique to the SARS-CoV-2 virus. When questioned Pfizer confirmed: “The DNA template does not come directly from an isolated virus from an infected person.” [335]

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[335] https://off-guardian.org/2021/01/03/what-vaccine-trials

318. The Plaintiffs state, and the fact is, that: Vaccines manufacturers have been given total immunity from liability, in that:

(a) COVID-19 vaccine manufacturers have been granted total immunity from liability for any harm or injury caused by their products.

(b) Federal procurement minister Anita Anand justified the indemnity in the following statement - *"All countries, generally speaking, are faced with the issue of indemnification of companies, especially in cases of novel technologies like this."* [336]

(c) Ordinarily, a 'novel technology' would demand a higher level of oversight and accountability, not less.

(d) Without legal accountability, there is no financial incentive for manufacturers to make the safest vaccines possible, nor is there incentive to remove injurious vaccines from the marketplace.

(e) Legal and financial indemnity does not exist with any other product licensed for use in Canada.

(f) Experience in other countries reveals that eliminating or severely restricting manufacturer liability for injury or death result in an ever-expanding market of poorly tested vaccine products.

(g) A 2017 study investigated the consequences in the United States of removing litigation risk related to vaccines. The researchers concluded that vaccines that were licensed after legislation that pre-empted most product liability lawsuits are associated with a significantly higher incidence of adverse events than were vaccines that were licensed under a previous regime that permitted consumers to sue. [337]

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[336] https://globalnews.ca/news/7521148/coronavirus-vaccine-safety-liability-government-anand-pfizer/

319. The Plaintiffs further state, and the fact is, that there is **No Evidence** the Vaccine Prevents Infection or Transmission, and the Public Health officers warn of this very fact and further that:

(a) These medical devices have been declared ‘effective’ even though manufacturers have not demonstrated that their product prevents infection or transmission, nor whether the device will result in a reduction in severe illness, hospitalization, or death. [338] [339] [340]

(b) According to a report in the British Medical Journal, *“Hospital admissions and deaths from COVID-19 are simply too uncommon in the population being studied for an effective vaccine to demonstrate statistically significant differences in a trial of 30,000 people. The same is true of its ability to save lives or prevent transmission: the trials are not designed to find out.”* [341]

(c) Given these vaccines have not been proven to prevent infection or transmission, there is no evidence that they contribute to community protection/herd immunity.

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[337] https://link.springer.com/article/10.1007/s11151-017-9579-7

[338] https://blogs.bmj.com/bmj/2020/11/26/peter-doshi-pfizer-and-modernas-95-effective-vaccines-lets-be-cautious-and-first-see-the-full-data/

[339] https://www.nytimes.com/2020/09/22/opinion/covid-vaccine-coronavirus.html

[340] https://stopmedicaldiscrimination.org/home#af86c044-aed2-496d-92bb-e1d76dca284e

[341] www.bmj.com/content/371/bmj.m4037

(d) What is being reported by vaccine manufacturers is relative risk reduction, not absolute risk reduction The absolute risk reduction appears to be less than 1%.[342]

(e) On the Public Health Agency of Canada website, the National Advisory Committee on Immunization (NACI) "recommends that all individuals should continue to practice recommended public health measures for prevention and control of SARS-CoV-2 infection and transmission (wear a face covering, maintain physical distance, and avoid crowds) **regardless of vaccination with COVID-19 vaccines.**" (pg. 41) [343]

(f) According to the 'Recommendations on the use of COVID-19 vaccines' on the Government of Canada website - *"There is currently insufficient evidence on the duration of protection and on the efficacy of these vaccines in preventing death, hospitalization, asymptomatic infection and reducing transmission of SARS-CoV-2."* [344]

(g) According to the National Advisory Committee on Immunization – Recommendations on the Use of COVID-19 Vaccines: [345] *"Due to the availability of only short-term clinical trial data, the duration of*

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[342] https://blogs.bmj.com/bmj/2020/11/26/peter-doshi-pfizer-and-modernas-95-effective-vaccines-lets-be-cautious-and-first-see-the-full-data/

[343] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

[344] https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines.html#a2

[345] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

protection provided by COVID-19 vaccination is currently unknown." (page 18) and *"Efficacy against hospitalization was not assessed in the clinical trials of the mRNA vaccines, but evidence from the clinical trials involving the AstraZeneca vaccine is suggestive of a protective effect against hospitalization."* (page 20)

(h) The data from Phase 1, 2, and 3 clinical trials presented to the High Consequence Infectious Disease Working Group and NACI are unpublished and have not been made available for independent third party review and verification.

320. The Plaintiffs further state, and fact is, that the British Columbia Health Information is not Congruent with Vaccine Manufacturer Information in that:

(a) Information disseminated by BC Health and the BC Centre for Disease Control is not congruent with information taken directly from the Pfizer Emergency Use Authority request to the US FDA.

(b) The Pfizer Emergency Use Authorization request states the following: [346]

- **Under section 6.2 - Unknown Benefits/Data Gaps**:
- **Duration of protection**

It is not possible to assess sustained efficacy over a period longer than 2 months.

- **Effectiveness in certain populations at high-risk of severe COVID-19**

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[346] https://www.fda.gov/media/144416/download

The subset of certain groups such as immunocompromised individuals is too small to evaluate efficacy outcomes.

- **Effectiveness in individuals previously infected with SARS-CoV-2**

Available data are insufficient to make conclusions about benefit in individuals with prior SARS-CoV-2 infection.

- **Effectiveness in pediatric populations**

The representation of pediatric participants in the study population is too limited to adequately evaluate efficacy in pediatric age groups younger than 16 years.

- **Future vaccine effectiveness as influenced by characteristics of the pandemic, changes in the virus, and/or potential effects of co-infections**

The evolution of the pandemic characteristics . . . as well as potential changes in the virus infectivity, antigenically significant mutations to the S protein, and/or the effect of co-infections may potentially limit the generalizability of the efficacy conclusions over time.

- **Vaccine effectiveness against asymptomatic infection**

Data are limited to assess the effect of the vaccine against asymptomatic infection.

- **Vaccine effectiveness against long-term effects of COVID-19 disease**

At present it is not possible to assess whether the vaccine will have an impact on specific long-term sequelae of COVID-19 disease in individuals who are infected despite vaccination.

- **Vaccine effectiveness against mortality**

  A larger number of individuals at high risk of COVID-19 and higher attack rates would be needed to confirm efficacy of the vaccine against mortality.

- **Vaccine effectiveness against transmission of SARS-CoV-2**

  Data are limited to assess the effect of the vaccine against transmission of SARS-CoV-2 from individuals who are infected despite vaccination.

- **Under Section 6. 3 - Known Risks**:

The vaccine has been shown to elicit increased local and systemic adverse reactions as compared to those in the placebo arm.

Severe adverse reactions occurred in 0.0 - 4.6% of participants.

- **Under Section 6.4 - Unknown Risks/Data Gaps**:
- **Safety in certain subpopulations**

There are currently insufficient data to make conclusions about the safety of the vaccine in subpopulations such as children less than 16 years of age, pregnant and lactating individuals, and immunocompromised individuals.

- **Adverse reactions that are very uncommon or that require longer follow-up to be detected**

Use in large numbers of individuals may reveal additional, potentially less frequent and/or more serious adverse events not detected in the trial safety population.

- **Vaccine-enhanced disease**

Risk of vaccine-enhanced disease . . . remains unknown and needs to be evaluated further.

- **Under Section 7.0 - VRBPAC Meeting Summary:**
- **The Vaccines and Related Biological Products Advisory Committee** convened on December 10, 2020 to discuss potential implications of authorization of the Pfizer vaccine. The committee members acknowledged the following:
  - The importance of long-term safety data for the Pfizer-BioNTech COVID-19 Vaccine as it is made using a technology not used in previously licensed vaccines.
  - The lack of data on how the vaccine impacts asymptomatic infection and viral shedding.
  - FDA noted that the vaccine should not be administered to individuals with known history of a severe allergic reaction to any component of the vaccine.
  - Appropriate medical treatment used to manage immediate allergic reactions must be immediately available in the event an acute anaphylactic

- FDA explained that there are insufficient data to inform vaccine-associated risks in pregnancy.
- Committee members raised concerns about the limited conclusions about the prevention of severe disease based on the study endpoints.
- Potential benefits that could be further evaluated but are not necessary to support an EUA include: prevention of COVID-19 in individuals with previous SARS-CoV-2 infection, prevention of mortality and long-term complications of COVID-19, reduction in asymptomatic SARS-CoV-2 infection and reduction of SARS-CoV-2 transmission.
- Known risks include: common local and systemic adverse reactions, (notably injection site reactions, headache, fever, chills, myalgia, and fatigue), all of which are usually mild to moderate and lasting a few days, with higher frequency in younger vaccine recipients.
- Potential risks that should be further evaluated include: uncommon to rare clinically significant adverse reactions that may become apparent with more widespread use of the vaccine.
- Since the roll-out of the vaccine, the following immediate, and identifiable reactions have included: death, blood clots, heart attacks, and strokes, as well as various less drastic side effects,

while the long-term adverse reactions will be revealed with the passage of time and completion of the human trials expected to be completed 2023.

(c) On the Public Health Agency of Canada website, the National Advisory Committee on Immunization (NACI) states: [347]

   (i) "Currently, there is **insufficient evidence on the duration of protection of COVID-19 vaccines** and the effectiveness of COVID-19 vaccines in reducing transmission of SARS-CoV-2." (pg. 41)

   (ii) "The immune response to SARS-CoV-2, including duration of immunity, is not yet well understood. Reinfections with SARS-CoV-2 have been reported." (p. 41)

   (iii) "Currently, there is a lack of evidence on potential differences in vaccine efficacy or safety between those with and without prior evidence of SARS-CoV-2 infection." (p. 41)

   (iv) "Currently, there are no data on COVID-19 vaccination in individuals who are immunosuppressed."

   (v) "NACI recommends that a complete COVID-19 vaccine series may be offered to individuals who are immunosuppressed . . . if informed consent includes discussion about the limited evidence on the use of COVID-19 vaccines in this population.” (p. 42)

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[347] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

(vi) “It is currently unknown whether immunocompromised individuals will be able to mount an immune response to the authorized COVID-19 vaccines.” (p.43)

(vii) “Currently, there are no data on the safety and efficacy of COVID-19 vaccines in pregnancy or during breastfeeding. Pregnant or breastfeeding individuals were excluded from the mRNA and viral vector COVID-19 vaccine clinical trials.” (p. 45)

(viii) “Currently, there are no data to inform outcomes of inadvertent administration of COVID- 19 vaccine to pregnant individuals or their developing fetus in clinical trials.” (p. 45)

(ix) “There is currently no evidence to guide the time interval between the completion of the COVID-19 vaccine series and conception. In the face of scientific uncertainty, it may be prudent to delay pregnancy by 28 days or more after the administration of the complete two-dose vaccine series of a COVID-19 vaccine.” (p. 45)

(x) “NACI recommends that a complete vaccine series with a COVID-19 vaccine may be offered to individuals in the authorized age group who are breastfeeding . . . if informed consent includes discussion about the limited evidence on the use of COVID-19 vaccines in this population. “ (p. 45)

(xi) "As no immunological correlate of protection has been determined for SARS-CoV-2, these cellular responses cannot be interpreted as corresponding with vaccine protection." (p.50)

(xii) "There is limited data on the efficacy or effectiveness of mRNA vaccines against P.1 (variant of concern) and P.2 (variant of interest)." (p. 50)

(d) Information on the Health BC website states: "Vaccines are very safe. It is much safer to get the vaccine than to get COVID-19. Serious side effects due to the vaccines were not seen in the clinical trials." [348]

(e) The BC Center for Disease Control website states: "The vaccine will help reduce the spread of COVID-19 in B.C. Vaccines save lives by preventing disease, especially for people most likely to have severe illness or die. If enough people get vaccinated, it makes it difficult for the disease to spread." [349] This information is not consistent with manufacturer statements.

(f) These statements above in (d) and (e), are **not supported** by the data, the information provided by Pfizer and the Vaccines and Related Biological Products Advisory Committee, nor the National Advisory Committee on Immunization (NACI).

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[348] https://www.healthlinkbc.ca/healthlinkbc-files/covid-19-vaccines

[349] http://www.bccdc.ca/health-info/diseases-conditions/covid-19/covid-19-vaccine/vaccines-for-covid-19

(g) This distortion of the facts raises serious concerns of the integrity of Canadian regulatory agencies.

321. Furthermore, and more importantly, the Plaintiffs state that public officials, including the relevant Defendants, Trudeau, Tam, and Henry have warned that, despite the anticipated five (5) years of the Covid-19 "vaccines", the vaccines will not result in immunity: do not prevent transmission of the virus to and from the recipient: and that the other measures, lockdowns, masking, and useless PCR tests must be maintained indefinitely. This all begs the question: why then roll out an experimental "vaccine" by-passing the safety protocols?

322. The Plaintiffs state, and the fact is that under the circumstances "emergency" improperly and negligently deficient, untested "Vaccines" are Not Warranted for the following reasons:

(a) Many individuals who intend to be at the front of the line for a COVID-19 vaccine will do so because they believe COVID-19 is an illness with a high rate of mortality. This fear creates a sense of panic that compels people to accept a medical product with an unknown safety and efficacy profile.

(b) Our federal and provincial governments and the mainstream media persist in describing COVID-19 as a "deadly" condition. This is not true for the vast majority of the population.

(c) The risk of mortality is primarily to those over 80 years of age in poor health, residing in extended care facilities. LTC residents accounted for 81% of all reported COVID-19 deaths in Canada in 2020. [350]

(d) For the greatest percentage of the population under 70 years in good health, COVID-19 poses a very low risk and the use of an experimental product is not warranted.

(e) According to the CDC, the case survival rate of COVID-19 in patients ages 0 – 17 is 99.998%, 99.95% in patients 18 – 49 years, and 99.4% in patients 50 – 64 years. (as of March 19, 2021) [351]

(f) There is no evidence that the benefits of vaccination for COVID-19 outweigh the risks.

(g) What is also rarely acknowledged by our government, public health officers, and the corporate media is that safe and effective drugs and vitamin and mineral supplementation for the prevention and treatment of COVID-19 have been identified. [352] [353] [354] [355] [356] [357]

(h) Such treatments make illegal the use of an experimental product.

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[350] https://www.cihi.ca/sites/default/files/document/covid-19-rapid-response-long-term-care-snapshot-en.pdf?emktg_lang=en&emktg_order=1

[351] https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html

[352] https://www.americasfrontlinedoctors.org/covid-19/treatments

[353] www.youtube.com/watch?v=BLWQtT7dHGE

[354] https://anthraxvaccine.blogspot.com/2021/01/first-country-bans-ivermectin-lifesaver.html

[355] https://www.hsgac.senate.gov/imo/media/doc/Testimony-Kory-2020-12-08.pdf

[356] https://www.evms.edu/media/evms_public/departments/internal_medicine/Marik-Covid-Protocol-Summary.pdf

[357] https://covexit.com

(i) Canadians do not have access to treatments that have demonstrated effectiveness in treating COVID-19 including HCQ and Ivermectin.[358] [359] [360]

(j) The only Health Canada recommended treatment for COVID-19 is oxygen therapy and ventilation. [361]

(k) The province of British Columbia updated its COVID treatment guidelines on April 18, 2021 to include inhaled budesonide and colchicine for ambulatory outpatient and long-term care. [362]

323. The Plaintiffs state, and the fact is, that there has been No Individualized Risk-Benefit Analysis has been conducted by the Defendants, and further that:

(a) The arguments used to legalize and implement COVID-19 vaccination are political and ideological rather than evidence-based.

(b) In the rush to approve a COVID-19 vaccine a robust analysis of the risks vs benefits has not been conducted. Indeed, how does one conduct a risk-benefit analysis when both the risks and the benefits are unknown?

(c) Some researchers have described the use of a COVID-19 vaccine in the general population as *"the most reckless and brazen experiment in the history of humanity."*

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[358] https://www.americasfrontlinedoctors.org/covid-19/treatments

[359] https://covexit.com/first-ambulatory-treatment-recommended-for-covid-19-in-canada/

[360] https://covexit.com/wp-content/uploads/2021/04/Antimicrobial-Immunomodulatory-Therapy-adults.pdf

[361] https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/clinical-management-covid-19.html.

[362] https://covexit.com/first-ambulatory-treatment-recommended-for-covid-19-in-canada/

(d) Implementing an ‘everyone should be vaccinated’ policy assumes the risk-benefit is the same for everyone. This is simply not true and fails to take into consideration the established fact that the risk of COVID-19 varies greatly depending upon several known variables, most especially age and pre-existing conditions. These variables must be considered when assessing the risk and benefit of utilizing these medical devices.

(e) Deaths in the frail and elderly following COVID-19 vaccination have prompted health officials to recognize the need to assess individuals for their ‘fitness to be vaccinated’. [363]

(f) As of April 16, 2021, Canada has reported 3,738 vaccine related adverse reactions including 19 deaths which are under investigation. [364] As of April 16, 2021, VAERS reports 86,080 adverse events following COVID-19 vaccination, including 3,186 deaths. What is to be remembered is that, historically, VAERS reports about a small portion of all adverse effects and deaths actually reported. A mere 1% are reported.[365] [366]

(g) We ought to have robust evidence that the benefits of vaccination clearly outweigh the risks. This has not been demonstrated.

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[363] https://www.bmj.com/content/372/bmj.n167/rapid-responses

[364] https://health-infobase.canada.ca/covid-19/vaccine-safety/

[365] https://www.medalerts.org/vaersdb/findfield.php?TABLE=ON&GROUP1=CAT&EVENTS=ON&VAX=COVID19

[366] https://www.medalerts.org/vaersdb/findfield.php?TABLE=ON&GROUP1=AGE&EVENTS=ON&VAX=COVID19&DIED=Yes

(h) The reporting of vaccine injury is subjective, voluntary, and there are no consequences for failing to report vaccine injury.

(i) Physicians receive little to no training on how to recognize and diagnose vaccine injury, and open themselves up to criticism and reprimand if they do fill out the vaccine injury reports.

(j) A Harvard Pilgrim Health Care study found that less than 1% of vaccine adverse reactions were reported. [367]

(k) The real number of children and adults who experience vaccine injury is unknown. The Defendant government(s) are not tracking documents, nor reporting hospitalizations and deaths due to the Covid vaccines.

324. The Plaintiffs further state, and fact is, that with respect to the constitutionally established right to informed consent that:

(a) It is not possible to give informed consent when the results of the clinical trials are unknown.

(b) Informed consent is the most fundamental aspect of an ethical medical system and a free society.

(c) It is imperative that any individual contemplating getting a COVID-19 vaccine be fully aware that these vaccines have not completed the most basic testing to demonstrate either safety or efficacy and that they are participating in a medical trial.

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[367] https://healthit.ahrq.gov/sites/default/files/docs/publication/r18hs017045-lazarus-final-report-2011.pdf

(d) In a letter dated October 3, 2020, Dr. Michael Yeadon, a former Vice President of Pfizer stated – *"All vaccines against the SARS-CoV-2 virus are by definition novel. If any such vaccine is approved for use under any circumstances that are not EXPLICITLY experimental, I believe that recipients are being misled to a criminal extent."* [368]

(e) In a paper published in **The National Center for Biotechnology Information** entitled 'Informed consent disclosure to vaccine trial subjects of risk of COVID-19 vaccines worsening clinical disease', the authors state – *"COVID-19 vaccines designed to elicit neutralizing antibodies may sensitize vaccine recipients to more severe disease than if they were not vaccinated. The specific and significant COVID-19 risk of anti-body dependent enhancement (ADE) should have been and should be prominently and independently disclosed to research subjects currently in vaccine trials, as well as those being recruited for the trials and future patients after vaccine approval, in order to meet the medical ethics standard of patient comprehension for informed consent."* [369] [370]

325. The Plaintiffs further state, and the fact is that Health Canada Oversight has been and continues to be Insufficient in that:

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[368] https://coronaversation.wordpress.com/2020/11/11/dr-mike-yeadons-open-letter-regarding-sars-cov-2-vaccine/

[369] https://pubmed.ncbi.nlm.nih.gov/33113270/

[370] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7645850/pdf/IJCP-9999-e13795.pdf?fbclid=IwAR1U-vdWXpOG0SJb0VGR1KkmkqsioWKY8Ux-iOeWpyt0xxa7C5HwlhFBZnU

(a) Many Canadians assume Health Canada provides rigorous oversight and would not permit a vaccine to be introduced to the Canadian public without robust testing to ensure both safety and effectiveness. The fact is that Health Canada does not conduct its own clinical trials to determine the safety and efficacy of a vaccine. Instead, Health Canada relies on the data provided by the vaccine manufacturers.

(b) Vaccine manufacturers are not required to maintain a blinded, neutral placebo-control group, the gold standard for safety testing. This failure undermines the integrity of claims of vaccine safety. (page 53) [371]

(c) Vaccine producers such as Pfizer, Merck and GlaxoSmithKline have paid billions in criminal penalties and settlements for research fraud, faking drug safety studies, failing to report safety problems, bribery, kickbacks, and false advertising. [372] [373]

(d) Moderna has never before produced a vaccine.

(e) In 2009, Pfizer paid $2.3 billion to resolve criminal and civil allegations in what was then the largest health care fraud settlement in history. [374]

(f) The Vaccine Injury Compensation Program in the United States has paid out more than $4.4 B in compensation for vaccine injury and death since 1989. [375]

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[371] https://www.fda.gov/media/144416/download

[372] www.corp-research.org/merck

[373] https://www.theguardian.com/business/2012/jul/03/glaxosmithkline-fined-bribing-doctors-pharmaceuticals?CMP=share_btn_fb

[374] https://abcnews.go.com/Business/pfizer-fined-23-billion-illegal-marketing-off-label/story?id=8477617

(g) Canada is one of only two G20 Nations without a national vaccine injury compensation program.

(h) Canada is more than three decades behind other countries in acknowledging vaccine injury and providing financial compensation to those injured and killed by vaccination.

(i) While Prime Minister Trudeau promised a COVID vaccine injury compensation program in December 2020, the details of the program have yet to be revealed, and a vaccine injury compensation program has yet to be implemented.

(j) Vaccines are not benign medical products. Vaccination is an invasive medical procedure that delivers by injection complex biochemical drugs and now genetic modifying technology.

(k) Because of this complexity and uncertainty, the level of safety testing for a COVID-19 vaccine ought to be even more rigorous. But this is not the case. The safety testing of the COVID-19 vaccine is less rigorous and more incomplete as compared with other vaccines and pharmaceutical drugs.

(l) The consequences of rushing a novel and inadequately tested product can be serious, permanent, and even deadly. [376]

(m) Data following the administration of the Pfizer vaccine reveals that 2.8% of test subjects experienced a 'health impact' significant enough such that

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[375] https://crsreports.congress.gov/product/pdf/LSB/LSB10584

[376] https://hpv-vaccine-side-effects.com/covid-19-vaccine-side-effects-world-map/

they were *"unable to perform normal daily activities, unable to work, and required care from a health professional."* [377]

(n) If the entire Canadian population were to be vaccinated with the Pfizer vaccine, more than 900,000 people could experience a 'health impact' of this significance.

(o) There are significant conflicts of interest and a lack of transparency with COVID purchase contracts with the Government of Canada.

(p) Moderna's research and development partner is the National Institute of Allergy and Infectious Diseases (NIAID), directed by Dr Anthony Fauci. Moderna shares joint ownership of vaccine patent with NIAID scientists. [378] [379]

(q) NIAID and Dr. Fauci are financially conflicted when recommending this product.

(r) Health Canada lacks transparency by not releasing COVID purchase contract details or answering questions about leaked documents that raised questions about the integrity of the mRNA vaccines.[380]

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[377] https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-12/slides-12-19/05-COVID-Clark-508.pdf

[378] https://www.documentcloud.org/documents/6935295-NIH-Moderna-Confidential-Agreements.html

[379] https://www.statnews.com/pharmalot/2020/08/28/moderna-covid19-vaccine-coronavirus-patents-darpa/

[380] https://www.physiciansweekly.com/covid-19-ema-leaks-raise-concerns-over-vaccine-mrna-integrity/

- **Vaccines in General**

326. The Plaintiffs state, quite apart from the "Covid vaccines", which are not "vaccines" as medically and historically understood and medically defined, that with previous vaccines in general, the fact is that:

(a) it is undisputed that vaccines cause severe, permanent injury up to and including death in a certain percentage of those who are vaccinated, including physical, neurological, speech, and other disabilities;

(b) that, as a result of this reality, risk, and severe injury, certain North American jurisdictions, such as the USA, and Quebec, as well as all G-7 countries except Canada, have established compensation schemes for those injured and killed by vaccines;

(c) that British Columbia has no such compensation scheme;

(d) that there is no individual pre-screening, to attempt to pre-determine, which individual may have a propensity to be so injured, even in cases where older siblings, in the same family have been injured, no investigation is undertaken or weighed with respect to the risks of their younger siblings being vaccinated;

(e) the Plaintiffs state, and the fact is, that while peanuts and other nuts, as an absolute proposition, do not injure or kill, they do injure or kill those who are allergic to them. While schools have taken saturated and heightened steps to make their spaces "nut-free", the risks of vaccines to children, particularly those who are pre-disposed to injury and death from them, are completely ignored.

327. The individual, biological Plaintiffs state that compulsory vaccination, and or testing, schemes violates their rights, by act and omission. Mandatory vaccination removes the right to weigh the "risks" of vaccinating or not vaccinating, to allow for informed choice, in that vaccines can cause injury or death, is a violation of their rights as follows:

(a) an ***in limine*** compulsory vaccination scheme violates s.2(a) and (b) of the ***Charter*** in infringing the rights to freedom of conscience, religion, thought and belief, as well as infringing the rights to liberty and security of the person, in interfering with the physical and psychological integrity of the person and the right to make choices as to that integrity and autonomy, pursuant to s.7 of the ***Charter***;

(b) that the failure and omissions of the Defendants, their officials and delegees, in the vaccination scheme, to transparently and honestly present the risks of vaccination, pro and con, and the failure and omissions to make individual assessments to pre-determine and pre-screen those children who may have a propensity and pre-disposed to being vaccine injured, constitutes a violation of the same ***Charter*** cited above, in depriving the right to an informed consent before medical treatment through vaccine is compulsorily administered, by way of omission as set out by the Supreme Court of Canada in, ***inter alia, Vriend*** in unnecessarily exposing children and adults, to injury up to and including death, by an overly-broad, untailored, indiscriminate and blind vaccination scheme, notwithstanding the dire and pointed warnings in the manufacturers' own very inserts and warnings as to the risks.

328. The Plaintiffs state that the violations of their ss. 2(a) and (b) ***Charter*** rights are not justified under s.1 of the ***Charter*** and puts the Defendants to their onus of justifying the violations. The Plaintiffs further state that the violations of their s.7 ***Charter*** rights, as set out above in the statement of claim, are not in accordance with the tenets of fundamental justice in that the scheme and provisions suffer from overbreadth and that the protection of overbreadth in legislation has been recognized, by the Supreme Court of Canada, as a tenet of fundamental justice, and that further they cannot be saved under s.1 of the ***Charter,*** the onus of which lies with Defendants.

329. The Plaintiffs state that, with respect to facts pertinent to product safety testing, the facts and medical literature sets out that:

(a) Vaccines do not undergo the same level of safety testing as is required for all other drugs and medical products.

(b) None of the vaccines licensed for use in Canada have been tested for safety using long-term, double blind, placebo-controlled studies.

(c) Vaccine products licensed for use in Canada are not evaluated for safety using a neutral placebo, [381] a requirement for all other pharmaceutical products.

(d) Vaccines are an invasive medical intervention whose safety is determined primarily by the amount of injury or death reported *after* vaccination.

(e) Pre-licensing safety monitoring of childhood vaccines, prior to the vaccines being administered, is not long enough to reveal whether vaccines cause autoimmune, neurological or developmental disorders. [382]

(f) Studies designed to examine the long-term effects of the cumulative number of vaccines or other aspects of the vaccination schedule have not been conducted. [383]

(g) There are too few scientifically sound studies published in the medical literature to determine how many serious brain and immune system problems are or are not caused by vaccines. [384]

(h) The design and reporting of safety outcomes in MMR vaccine studies, both pre- and post-marketing, is largely inadequate. [385]

(i) Vaccines have not been tested for carcinogenicity, toxicity, genotoxicity, mutagenicity, ability to impair fertility, or for long-term adverse reactions.

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[381] https://www.icandecide.org/wp-content/uploads/2019/08/VaccineSafety-Version-1.0-October-2-2017-1.pdf

[382] https://icandev.wpengine.com/wp-content/uploads/2019/08/ICAN-Reply.pdf

[383] https://www.nap.edu/catalog/13563/the-childhood-immunization-schedule-and-safety-stakeholder-concerns-scientific-evidence.

[384] https://www.nvic.org/PDFs/IOM/2013researchgaps-IOMchildhoodimmunizationschedulea.aspx

[385] https://www.cochrane.org/CD004407/ARI_using-combined-vaccine-protection-children-against-measles-mumps-and-rubella

(j) Health Canada does not conduct its own independent clinical trials to determine vaccine safety and efficacy and instead relies on the data provided by the vaccine manufacturers.

(k) Studies comparing the overall health of vaccinated and unvaccinated children reveal that vaccinated children are significantly more likely to have neuro-developmental disorders and chronic illness. [386]

(l) There is evidence that vaccines are contaminated with unintended ingredients and that the health impact of injecting these ingredients is unknown. [387]

(m) Canada is the only G7 Nation without a national program to compensate those injured or killed by vaccination, and one(1) of two(2) G-20 Nations without a vaccine injury compensation program. The other nation being Russia.

(n) The United States Vaccine Injury Compensation Program has awarded more than $4.1 billion in compensation since 1989.

(o) The published medical literature recognizes that vaccines can cause permanent injury including death.

(p) The US government has acknowledged that vaccination can cause brain damage resulting in symptoms of autism in genetically susceptible children. [388]

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[386] https://antivakcina.org/files/MawsonStudyHealthOutcomes5.8.2017.pdf

[387] https://www.corvelva.it/it/speciale-corvelva/vaccinegate-en.html

(q) The US Centre for Disease Control (CDC) has acknowledged that every domestic case of polio that occurred after 1979 was caused by the vaccine strain of polio. [389]

(r) Vaccines include ingredients that are classified as poisons, carcinogens, toxins, neurotoxins, immune-and-nervous-system disruptors, allergens, fertility inhibitors, and sterilizing agents.

(s) Health Canada exposed children to cumulative levels of mercury and aluminum, in the incubation of the vaccines that exceeded the US FDA's safety guidelines.

330. The Plaintiffs state that, with respect to the facts pertinent to screening for susceptibility to vaccine injury, that:

(a) Pre-screening to identify individuals who may be at increased susceptibility to vaccine injury and death does not occur in Canada.

(b) Health Canada has not committed resources to identify those individuals who may have increased susceptibility to experience vaccine injury or death.

(c) Policies to administer vaccines to "Mature Minors", often without the knowledge and consent of the parents and without the informed consent of the "Mature Minor",, in schools and medical settings without the knowledge or consent of the parents has inadequate safety protocols to

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[388] https://www.jeremyrhammond.com/wp-content/uploads/2019/10/080226-Vaccine-Autism-Court-Document-Kirby-HuffPost.pdf.

[389] https://web.archive.org/web/20150103130229/http://www.cdc.gov/vaccines/vpd-vac/polio/dis-faqs.htm.

fully consider the personal and family medical history prior to vaccination.

(d) This failure to fully consider personal and family medical history puts these youth at increased risk of vaccine injury.

331. The Plaintiffs state that, with respect to the facts pertinent to monitoring of adverse effects of vaccination, that:

(a) Doctors and health care workers are not trained to recognize and diagnose vaccine injury.

(b) There are no legal consequences when medical professionals fail to report vaccine injury.

(c) Parents' observations of health and behavioral changes following vaccination are routinely ignored and denied by doctors and rarely captured in adverse events reporting systems.

(d) It is recognized that fewer than 1% of vaccine adverse reactions are reported. [390]

(e) British Columbia's AEFI reporting system has no better record than the national one nor reporting rates than other provinces. [391]

(f) The medical industry has failed to fully consider the combined toxicology of vaccine ingredients and the synergistic effect of combining vaccine ingredients.

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[390] https://healthit.ahrq.gov/sites/default/files/docs/publication/r18hs017045-lazarus-final-report-2011.pdf

[391] https://www.myhealthunit.ca/en/health-professionals-partners/resources/Health-Care-Professionals/adverse-events/Annual_Report_Vaccine_Safet.pdf

(g) Bonnie Henry has instructed people to mix vaccines for 1st and 2nd shot even though Moderna, for instance, has clearly stated that they do not known the effects of interchangeability and therefore only recommend first and second shot of the Moderna vaccine. Bonnie Henry has further advocated the immunization of twelve (12) to seventeen (17) year olds **without the consent of their parents.**

255. The Plaintiffs state that, with respect to the facts pertinent to safeguarding policy over patient health, that:

(a) The primary metric used by Health Canada to measure the success of the vaccine program appears to be how many vaccines are delivered.

(b) The goal of public health vaccine policy is to persuade parents to comply with the full vaccine schedule. [392]

(c) The pursuit of the goal of persuading parents to comply with vaccination recommendations is incompatible with the goal of allowing parents to possess the knowledge they need to exercise their right to informed consent, and act in their child's best interests.

(d) The right to informed consent has been recognized as one of the most fundamental ethics in medicine.

(e) Public health professionals routinely fail to inform citizens of their legal right to personal, religious and medical exemptions where they exist.

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[392] https://cic-cci.ca/

(f) Health Canada, with respect to vaccines, places public policy over individual health considerations.

(g) Government policy makers have refused to consider the fact that the risks of the target diseases are not the same for every child and that some children are at greater risk of being harmed by vaccines due to genetic or environmentally caused predispositions.

(h) Government policymakers ignore that the fact that for informed consent to happen, the risk-benefit analysis must be conducted for *each* vaccine and *individually for each child*.

(i) Antibody titre testing is rarely conducted in an effort to avoid unnecessary vaccination.

(j) An increasing number of parents are choosing not to vaccinate because they recognize that public health vaccine policy poses a serious threat to both their health and liberty.

256. The Plaintiffs state that, with respect to the facts pertinent to lack of accountability for vaccine Injury, that:

(a) Vaccine manufacturers and medical professionals are not held legally and financially accountable when vaccine injury and death occurs.

(b) A consequence of this legal immunity is that there is no legal or financial incentive for the vaccine industry to make their products safer, even when there is clear evidence that vaccines *can* be made safer.

(c) Systemic corruption within the medical establishment is well recognized within the scientific community. [393] [394]

(d) Conflicts of interest in biomedical research are "very common". [395]

257. The Plaintiffs state that, with respect to the facts pertinent to informed consent, that Consumers are rarely informed that:

(a) vaccines do not confer life-long immunity;

(b) not all vaccines eliminate susceptibility to infection;

(c) not all vaccines are designed to prevent the transmission of infection;

(d) most vaccines do not alter the safety of public spaces; [396]

(e) Health Canada has acknowledged that vaccines are voluntary in Canada and cannot be made mandatory due to the Canadian **Charter** of Rights and Freedoms;

(f) there is no scientific evidence that herd immunity can be achieved using vaccines due to the temporary nature of the immunity offered nor that vaccine herd immunity is more effective than natural herd immunity;

(g) vaccine can and do cause permanent injury and death;

(h) there is no scientific evidence that vaccines are primarily responsible for reduced mortality over the last century as is often claimed;

(i) the human body has an innate capability to fight off infections and heal itself;

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[393] https://www.nybooks.com/articles/2009/01/15/drug-companies-doctorsa-story-of-corruption/

[394] https://doi.org/10.1111/eci.12074

[395] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1182327/.

[396] https://childrenshealthdefense.org/news/why-you-cant-trust-the-cdc-on-vaccines/

(j) the pharmaceutical companies that produce almost all vaccines have been found guilty and paid billions of dollars in criminal penalties for research fraud, faking drug safety studies, failing to report safety problems, bribery, kickbacks and false advertising [397];

(k) Canadian children are among the most vaccinated children in the world

(l) there is no compensation available in Canada, except for Quebec, should vaccination result in injury or death;

(m) only two provinces in Canada (Ontario and New Brunswick) require exemptions to decline vaccination;

(n) recommended/required vaccines vary by province, by state, and by country.

258. Consumers are rarely provided with the product monograph (product information insert) by health care providers. Vaccines monographs warn of limitations to vaccine safety testing as well as recognized adverse events following vaccination which include severe and permanent injury and death.

259. Vaccine mandates violate the medical and legal ethic of informed consent.

260. Vaccine mandates violate *'The Universal Declaration of Bioethics and Human Rights'*, the *Nuremberg Code*, professional codes of ethics, and all provincial health Acts.

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[397] **GlaxoSmithKline Fined $3B After Bribing Doctors to Increase Drug Sales**. https://www.theguardian.com/business/2012/jul/03/glaxosmithkline-fined-bribing-doctors-pharmaceuticals?CMP=share_btn_fb
Merck: Corporate Rap Sheet
http://www.corp-research.org/merck

261. A review of the available literature of the vaccine education materials produced by the British Columbia government reveals that the risk of vaccine injury is discussed superficially, if at all, and that consumers are given insufficient information to make an informed decision.

262. A review of Public Health Agency of Canada recommended curriculum for school children reveals that education on the risk of vaccine injury is absent, as is education on the right to informed consent. [398]

263. The vaccine risk information provided to consumers varies by health region.

264. Vaccines are routinely administered to youth in medical clinics and school settings without the knowledge or consent of their parents.

265. Youth vaccinated in school-based clinics routinely report being intimidated into vaccination and being threatened with expulsion if they refuse vaccination.

266. Public health presents as if all vaccines carry the exact same risk/benefit assessment for all individuals.

267. Individual benefit versus individual risk of vaccination is rarely considered.

268. Indigenous people are required to receive vaccines other than those required for non-Indigenous people based on assumed risk, not upon medical evidence of risk.

269. On May 21st, 2021, Dr. Bonnie Henry, and her department announced the availability of the Covid vaccines for twelve (12) to seventeen (17) year olds, without the need for their parents consent, notwithstanding:

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[398] https://kidsboostimmunity.com/sites/default/files/reusable_files/kbi_British Columbia.pdf

(a) That the Vaccines have **NOT** undergone required trial and safety protocols but were all made under an “emergency” basis;

(b) Furthermore, Bonnie Henry is falsely claiming that the vaccine is safe and approved for children, despite Health Canada’s Summary Basis of Decision, updated May 20th, 2021, stating the trials have not proven that the Covid-19 treatments pevent infection or transmission, which trials will not be completed until 2023. The summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real world use”, and concomitant administration of non-Covid Vaccines”. The WHO, on June 20th, 2021 called for an immediate halt to the vaccination of children and adolescents.

(c) That there has **NOT** been a recorded death or life-threatening case of any twelve (12) to seventeen (17) year old in Canada;

(d) That twelve (12) to seventeen (17) year olds are not at risk of Covid-19;

(e) That, in the absence of informed consent, it constitutes medical experimentation and thus constituted a “crime against humanity” emanating from the Nuremberg trials, and principles following the medical experimentations by the Nazi regime and codified in Canada, as a Criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act;***

(f) And that on June 5th, 2021 Dr. Joss Reimer, Medical Lead for the Manitoba Vaccine Implementation Task Force, in asserting that the various vaccines can be mixed, publicly declared that the Covid-19 vaccinations are a "big human experiment";

(g) That many twelve (12) to seventeen (17) year olds do not possess the intellectual capacity to give informed consent, however the government of British Columbia has been encouraging youth to make appointments on their own, with friends, or with "trusted adults" by way of s.17 of the ***Infants Act***. This propaganda aimed at children violates the parent-child relationship under s.7 of the ***Charter***.[399]

(h) And by doing so Dr. Bonnie Henry, and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

- **I/ THE MEDIA**

270. From the time of the declaration of "emergency" to the present, the Plaintiffs state that the Defendant CBC, and other mainstream media, is purposely suppressing valid, sound, and sober criticism of recognized experts with respect to the measures that amount to censorship and violation of freedom of speech, expression and the media.

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[399] https://www2.gov.bc.ca/gov/content/covid-19/vaccine/youth

271. The Plaintiffs state, and the fact is, that CBC, a completely publicly- funded news service, and national broadcaster, paid for by Canadian taxpayers, has been to the Trudeau government, and has acted as, PRAVDA did for the Soviet Union in the cold-war, with respect to coverage of the COVID-"pandemic", "emergency", and its draconian measures.

272. The Plaintiffs state that CBC, as the nationally and publicly-funded broadcaster under the public broadcasting policy for the Canadian public, under the **Broadcast Act,** owes:

(a) a Fiduciary duty to the Plaintiffs and all citizens; and

(b) a duty in Negligence (negligent investigation) to the Plaintiffs and all citizens;

To be independent, fair, balanced, and objective in its coverage of the "pandemic", declared "emergency", and the measures undertaken, which duties it has breached causing damages to the Plaintiffs.

- **Negligence**

273. The Plaintiff states that the Defendant, CBC, as a publicly-funded mandate to publicly broadcast on behalf of Canadians, owes a common-law, and statutory duty of care to the Plaintiffs, to fairly, independently, objectively report, and engage in responsible journalism, on the news and current affairs, and the Plaintiffs further state that:

(a) the CBC breached that duty of care; and

(b) as a result of the breach of that duty of care, the Plaintiffs suffered damages.

274. The Plaintiff states and the fact is, this duty was breached by the CBC's negligent acts and omissions, including **inter alia**, the following:

(a) The daily broadcasting of Trudeau's press-conferences, with absolutely no questions about the scientific and medical evidence behind the measures, and their source;

(b) Whether contrary expert views exist, to the secret advice being followed;

(c) If opposite, expert opinion exist, what is the government's response to it?;

(d) The CBC further dumps, on a daily basis, the government numbers on COVID-positive rates, and death rates, without any investigation or scrutiny as to the basis of compiling those numbers, and who and how the parameters are determined in complying those numbers nor any contextual analysis as to what they mean;

(e) The CBC has done **no** independent investigation, nor asked any questions, on the scientific or medical basis of the COVID- measures but simply parrots the government line, and has not investigated, exposed, nor published the avalanche of Canadian and World experts who firmly hold an opposite view, and severe criticism of the measures, nor put those criticism to the Federal Defendants for response.

275. In short, the Plaintiffs state, and the fact is, that CBC has breached its duty of care to the Plaintiffs, and has not acted in a fair, independent, objective, and

responsible manner, but has acted in a manner more akin to a propagandistic state news agency serving a dictatorial regime.

276. The Plaintiffs state, and the fact is, that CBC has actually gone far beyond the above in that, in the rare instance CBC pretends to tackle an opposite view, CBC irresponsibly belittles, and in fact intentionally misleads, the Plaintiffs and viewers. For example, in a story published May 21st, 2020, written by CBC's Andrea Bellemere, Katie Nicholson and Jason Ho entitled **"How a debunked COVID-19 video kept spreading after Facebook and YouTube took it down",** these "reporters" falsely and intentionally distort with respect to the video in question entitled **"Plandemic"**. In the story they refer, with a picture, to a person CBC describes as: "featuring controversial virologist Judy Mikovitz". In the story, these three "reporters" choose to:

(a) Delete the fact that it is **Dr. Judy Mikovitz, Ph. D.**, is a **recognized expert in virology** who worked at the Centre for Disease Control (CDC) with Anthony Fauci, with whom she had serious disagreement which she documented in her book entitled **"Plague Corruption";**

(b) That she continues to work in, and be recognized as an expert in virology;

(c) The "reporters" do not give a hint as to by whom, when, on what medical basis her expert views were "debunked";

(d) Nor do the "reporters" investigate, nor pose any questions, about why it is appropriate to remove from Facebook, or YouTube, the views of a recognized, working World expert, of virology, with respect to issues of

COVID-19. This conduct by these "reporters" and CBC, is intentional at worst, and depraved and gross negligence at best.

- **Fiduciary Duty**

277. The Plaintiffs further state that the CBC further has a fiduciary relationship, and owed a corresponding fiduciary duty, to the Plaintiffs, as the national publicly-funded broadcaster to fairly, independently, objectively report, and engage in responsible journalism, on the news and current affairs for the following reasons:

(a) The Defendant CBC is in a position of power over the Plaintiffs, with respect to what it covers and reports; and was able to use this power so as to control and affect the Plaintiff's interests in their right to freedom of speech, expression, and the media for their national, publicly-funded broadcaster under the **Broadcast Act,** with respect to the covid - "pandemic', "emergency" and measures;.

(b) The Plaintiffs are in a corresponding position of vulnerability toward CBC in depending on CBC to put out fair, balanced, responsible, objective and responsible reports on the reality of the "pandemic", the declared "emergency" as well as measures undertaken;

(c) CBC impliedly and statutorily undertakes to so, to act in the best interests of the Plaintiffs', and the public, in its functions and work, in that:

    (i) the Defendant CBC performs a public function, to operate as Canada's national publicly-funded broadcaster under statute;

(ii) the Defendant CBC impliedly and statutorily undertakes to so to act in the best interests of the Plaintiffs'.

278. The Plaintiffs state that the Defendants breached this fiduciary duty as set out above in this Statement of Claim.

279. The Plaintiffs state, and the fact is, that CBC, Facebook, YouTube , Google, and other social media are viciously censoring, and removing any and all content that criticizes or takes issue with the WHO, and governments that follow WHO guidelines, with respect to covid-19, as purported "misinformation" contrary to "community standards" even when that content is posted by a recognized expert.

280. The Plaintiffs further state, and the fact is, that the Defendant Federal Crown is by way of act and omission, under **inter alia,** the **Broadcast Act** , and its Agencies such the CRTC, legislatively and administratively violating the Plaintiffs' rights under s. 2 of the **Charter,** to freedom of expression and the press in doing nothing to halt what has been described by members of the scientific community as " Stalinist censorship", by government, along with media the likes of CBC, Facebook, and YouTube. In fact, the Federal Crown goes further, in following suit with these social media censors, to propose criminal sanctions for posting such deemed and anointed "misinformation" by all, including experts.

281. On or about end of May, 2020 the UK " Scientific Advisory Group for Emergency (SAGE) –COVID-19 Response, in response to the unwarranted

measures of redaction, and removing, all criticism in respect of COVID-Measures, from the Report, of this government advisory body, the body responsible for their SAGE report referred to the government redaction as "Stalinist Censorship".

282. The Plaintiffs state, and the fact is, that CBC, Facebook, and YouTube, and other major social media, in their coverage of the COVID-19, have acted in the same fashion, by knowingly and intentionally suppressing and removing expert opinion not in line with the official dogma of the WHO, which is being blindly and deafly parroted and incanted by the Defendant governments (leaders) and their officials, to the detriment of the Plaintiffs and citizens at large, in violation of their constitutional rights.

- **J/ SUMMARY**

283. In summary, the Plaintiffs state that the COVID -19 Legislation, and Regulations By-Laws, and orders, violate, as follows, the Plaintiffs' statutory and constitutional rights in:

(a) That the conduct of Justin Trudeau, the British Columbia Premier John Horgan and the other Co-Defendants, constitute a dispensing of Parliament under the pretense of Royal prerogative contrary to the Plaintiffs' constitutional rights to a Parliament;

(b) That the declaration of an emergency by the Defendant John Horgan, in B.C, was **ultra vires** , and continues to be **ultra vires,** the **Act** in failing to meet the requisite criteria to declare an emergency;

(c) That the declared emergency, and measures implemented thereunder are:

  (i) Not based on any scientific or medical basis;

  (ii) Are ineffective , false, and extreme;

  (iii) Contravene ss. 2, 6, 7,8,9, and 15 of the **Charter ;**

  (iv) Contravene the same parallel unwritten constitutional rights, enshrined through the Pre-Amble of the **Constitution Act, 1867;**

  (v) Contravene the same rights found in international treaties, read in, as a minimal standard of protection, under s. 7 of the **Charter,** as ruled by the Supreme Court of Canada, in, **inter alia,** the **Hape** decision;

(d) That the "COVID- pandemic" was pre-planned, and executed, as a false pandemic, through the WHO, by Billionaire, Corporate, and Organizational Oligarchs the likes of Bill Gates, GAVI, the WHO, and their former and current associates such as Theresa Tam and Bonnie Henry, the WEF, and others, in order to install a New World (Economic) Order with:

  (i) **De facto** elimination of small businesses;

  (ii) Concentration of wealth and the power to control economic activity in large global corporations;

(iii) To disguise a massive bank and corporate bail-out;

(iv) To effect global, **mandatory** vaccination with chip technology, to effect total surveillance and testing of any and all citizens, including the Plaintiffs;

(v) To shift society, in all aspects into a virtual'' world at the control of these vaccine, pharmaceutical, technological, globalized oligarchs, whereby the Plaintiffs, and all others, cannot organize nor congregate.

(vi) To effectively immobilize resistance to the agenda by neutering Parliaments and the Courts, and by extension the Constitution and Constitutional Democracy and Sovereignty, in short to obtain "global governance".

284. The Plaintiffs rely on:

(a) the Statutory Schemes set out in the within statement of claim;

(b) The Pre-Amble to the **Constitution Act, 1867** and jurisprudence thereunder;

(c) ss. 2, 7,8,9, 15, and 24(1) of the ***Charter;***

(d) s. 52(1) of the ***Constitution Act, 1982;***

(d) the ***Common Law***;

(e) such further statutory or constitutional provisions as counsel may advise.

Part 2: RELIEF SOUGHT

285. Declarations that the "Covid-measures" and declaration of the "emergency" invoked by the Respondents:

(a) do not meet the prerequisite criteria of any "emergency" as prescribed by ss.9-10.2 nor ss.12-13 of the ***Emergency Program Act [RSBC 1996],*** nor is it within the jurisdictional purview s.52(2) of the ***Public Health Act, SBC [2008],*** and further contravenes s.3(1) and s.120(1) of the ***Public Health Act SBC [2008]***;

(b) that the invocation of the measures, dealing with health and public health, breach the Plaintiffs' right to consult and constitutional duty to consult, of the Respondents, both in procedure, and substance, with respect to broad sweeping public health measures both under administrative law, and the fundamental justice requirement under section 7 of the ***Charter*** as enunciated and ruled by the ***SCC***;

(c) that, in any event, if the pre-requisites of an "emergency" are met, as declared to be a national and international "emergency", the jurisdiction, and constitutional duty, to deal with this "national emergency", and its measures, is strictly with the Federal Parliament, under the ***Federal Emergencies Act*** and ***Quarantine Act,*** pursuant to s. 91(7) and (11) of the ***Constitution Act, 1867***, as well as under the "Peace, Order, and

Good Government ("POGG")" Power, under s.91 of the ***Constitution Act, 1867*** and not the jurisdiction of the provincial legislature;

(d) that quarantine is Federal jurisdiction and not within the jurisdiction of the Province;

(e) that "lock-downs", and "stay at home orders", and any curfews, in whole or in part, are forms of Martial law outside the Province's jurisdiction under s. 92 of the ***Constitution Act, 1867*** and, subject to constitutional review and constraints, matters of Federal jurisdiction under the POGG power and s. 91(7) of the ***Constitution Act, 1867;***

(f) that "lock-downs", in any event, and the arbitrary and irrational means by which businesses have been ordered closed and/or restricted constitute an unreasonable seizure contrary to s.8 of the ***Charter***;

286. As against the Crown (and Municipal) Defendants the Plaintiffs further claim:

(a) A Declaration that the purported order of the chief health officer, Dr. Bonnie Henry, dated April 30th, 2021, as well as June 30th, 2021, along with previous such orders, before and after June 30th, 2021 and any such duplicate future or extended orders, purportedly made under ss. 30, 31, 32 and 39(3) of the *Public Health Act,* S.B.C 2008 ("the Act"), are ***ultra vires*** that Act, and null and void, as an enveloping emergency order of national dimension; and the strict jurisdiction of the Federal Government under s.91 (7) and (11) as well as the "POGG" power of the ***Constitution Act, 1867***, which rests in the exclusive jurisdiction, subject to constitutional review and constraints, with the Federal Parliament.

(b) A further Declaration that ministerial order #M182 of April 30th, 2021, as well as the order of Bonnie Henry of June 30th, 2021, and the lockdown and travel restrictions are of no force and effect as constitutionally, Martial Law, pursuant to s.91(7) as well as the POGG Power;

287. A Declaration that the ***Public Health Act,*** and ss.30, 31, 32, and 39(3) of the *Act* is restricted to making orders of a local or regional scope and not of a completely provincial application in the context where the declared threat is not provincial in nature but national, and that the province is without jurisdiction to make such orders and measures as such orders and measures are the jurisdiction subject to constitutional review and constraints, of the ***Federal Parliament under the Emergencies Act,*** and under s. 91 under the POGG power, as well as ss.91(7) and (11) of the ***Constitution Act 1867***.

288. A Declaration that the Province, in any event, while maybe having jurisdiction with respect to some localized measures which coincidentally may have consequential impact on liberty, movement and association, has no constitutional jurisdiction to restrict or target the physical/psychological liberty, expression, association, and/ or assembly of every individual in the Province and that, if such

jurisdiction exists, subject to constitutional review and constraint, it rests with the Federal Parliament and government pursuant to the ***Federal Emergencies Act***.

289. A Declaration that the purported order, by Dr. Bonnie Henry, purportedly pursuant to s.52(2) of the ***Public Health Act,*** that "the transmission of the infectious agent SARS-CoV-2, based on high "case counts", based on a PCR test, is ***ultra vires*** the ***Act*** and ***non est factum***, in that:

- (a) It does not constitute a "regional event" but, by its purported terms constitutes a national and international event, and is *ultra vires* the authority of the British Columbia Parliament and government with jurisdiction, if any, subject to constitutional review and constraints, resting with the **Federal Parliament** under the ***Emergencies Act***;
- (b) The classification as such is not scientifically nor medically based;
- (c) The evidence is lacking and contrary to the scientific and medical evidence;
- (d) That "cases' do not equate to "deaths" and that the purported death rate is no higher than complications from the annual influenza;
- (e) That the distorted "case" counts are fraudulent, based on the fraudulent use generating cases of "PCR" test, which is a test that:
    - a) At best was designed as a "screening test" which requires a follow-up culture and blood test to ensure the detection of

an **infectious virus**, and was **never** designed, nor equipped to be a diagnostic test;

b) That is is fraudulently being used as a diagnostic test;

c) That the PCR test has scientifically been debunked, as well as judicially determined, based on the scientific evidence, that when used at a "threshold cycle" of thirty five (35) or higher, to cause between 82% to 96.5% "false positives";

d) That British Columbia tests at a threshold cycle of well over forty (40) "threshold cycles". In weekly meetings with Bonnie Henry, doctors reported that her second in comman gave instruction to turn up the PCR for the sole purpose of creating increased cases.

290. A Declaration that the order of April 23rd, and June 30th, 2021 and previous such orders, and subsequent such orders or extensions, in any event, violate the ***Constitution Acts, 1867, 1982***, as follows:

(a) That the restrictions on freedom of expression, conscience, association, and assembly, were recognized, and continue to apply, as unwritten constitutional rights, through the Pre-amble of the ***Constitutional Act, 1867***, and that the Province has absolutely no jurisdiction to curtail those rights, as set out by the Supreme Court of Canada, and that if such curtailment were to be effected, it rests, subject to constitutional review, and constraints, in the jurisdiction of the Federal Parliament;

(b) That these same rights, contained in ss. 2(a)(b), 7, 8, 9 and 15 of the ***Charter*** are also being violated by the Order(s) of Bonnie Henry and none of the violations are justified under a free and democratic society under s. 1 of the ***Charter*** that that:

  (i) The measures do not evidentiarily, scientifically, nor medically set out a valid legislative objective;

  (ii) Are not rational;

  (iii) Are not tailored to minimally to infringe the constitutional rights; and

  (iv) The measures' deleterious effects far outweigh the beneficial effects in that the number of deaths **caused by the measures** are at a ratio of deaths well above for every death purportedly attributed to COVID-19.

291. A Declaration that administrating medical treatment without informed consent constitutes experimental medical treatment and contrary to the ***Nuremberg Code*** and ***Helsinki Declaration*** of 1960, still in vigor, and further and thus constitutes a crime against humanity under the ***Criminal Code of Canada***.

292. A declaration that the offering, promoting, and administering of Covid-Vaccines, or any other medical treatment to twelve (12) to seventeen (17) year olds without the informed consent of the parent(s) constitutes:

(a) In the absence of informed consent, medical experimentation and thus further constitutes a "crime against humanity" emanating from the

Nuremberg trials and principles following the medical experimentations by the Nazi regime and codified in Canada, as a criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act***;

(b) And by doing so Dr. Bonnie Henry and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

(c) A Declaration that s.17 of the ***Infants Act [RSBC 1996] C. 223***, if it purports to grant (12) to (17) year olds, or children younger than (12), the ability to orally, or in writing, give informed, voluntary consent to any medical treatment, including vaccines, is of no force and effect as violating s.7 of the ***Charter*** in that:

  (i) It interferes with the parent-child relationship which has been recognized by the SCC, to be constitutionally protected by s.7 of the ***Charter***;

  (ii) It violates s.7 of the ***Charter*** with respect to the minor by violating the minor's physical and psychological integrity, in incurring a possible adverse reaction without the benefit of understanding the risk thereby vitiating the informed, voluntary consent required under s.7 of the ***Charter***;

  (iii)Given that the Covid vaccines have not been finally approved, with human trials not ending until the end of 2023 and the concession by Public Health officers that the "Covid Vaccines" are thus medically "experimental" it violates s.7 of the ***Charter*** by contravention of the ***Nuremberg Principles*** and ***Code***, as well as the ***Helsinki Declaration*** of 1960, both of which international instruments provide and are to be read in as the minimal protection under s.7 of the ***Charter*** as dictated by, ***inter alia***, by the ***SCC*** in the ***Hape*** decision; and

(iv) Violates s.15 of the ***Charter***, based on age, in not providing minors with the same constitutional protection of informed, voluntary consent provided and upheld under s.7 of the ***Charter***, that adults have.

293. A Declaration that the measures imposed by Dr. Bonnie Henry constitute a crime against humanity contrary to s.7 and 15 of the ***Charter*** in the unjustifiable deaths directly caused by her measures, including suicides, deaths from cancelled surgeries, drug over-doses, and depraved abuse of children, especially the physically and neurologically disabled, in that she knows that her measures are worse than the purported "Covid-deaths", and that Dr. Bonnie Henry has in fact been complicit in crimes against humanity in her dispersing and administered deadly and unsafe vaccines in India (Pakistan) in or about the year 2000. Bonnie Henry has further advocated the immunization of twelve (12) to seventeen (17) year olds without the consent of their parents.

294. A Declaration that the "COVID Measures" undertaken and orchestrated by Prime Minister Trudeau ("Trudeau"), Premier Horgan, the Federal Crown, Provincial Crown, and their named officials constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act,1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference.**

295. A Declaration that the ***Public Health Act, [SBC 2008]*** (the **"Act),** and in particular vesting an indefinite emergency power in the Premier and Lt.-Governor, and further that the "COVID Measures", undertaken and orchestrated by Premier John HORGAN ("Horgan") as well as Bonnie Henry, Mike Farnworth, Jennifer Whiteside, Adrian Dix, and the Provincial Crown, constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act, 1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference;**

296. A Declaration that the COVID Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, at the

blind and unquestioned dictates of the World Health Organization ("WHO") bureaucrats, in defiance and ignoring of the avalanche of scientific and medical evidence to the contrary, constitute a constitutional violation of the abdication of the duty to govern, as enunciated in, **inter alia**, the **Re Gray** and **Canada (Wheat Board)** v. **Hallett and Carey Ltd.** decisions of the Supreme Court of Canada;

297. A Declaration that, in the imposition of the COVID Measures, the Defendants have engaged in **ultra vires** and unconstitutional conduct and have acted in, abuse and excess of their authority;

298. A Declaration that the concept of "social distancing" is neither scientifically, nor medically based, and is an ineffective and a fictional concept, which has no scientific nor medical basis and hitherto unknown, with respect to a seasonal viral respiratory illness;

299. A Declaration that any **mandatory** vaccine scheme against any purported COVID-19, by way of **mandatory** vaccine, ***or any coercive or extortive measures to force the Plaintiffs to "choose" to*** vaccinate, **without informed, voluntary, consent**, such as the use of "vaccine passports" or any and all other coercive measures, is unconstitutional, and no force and effect in that:

    (a) It infringes s. 2 of the **Charter** in violating freedom of conscience, religion and thought;

(b) Infringes s. 7, life, liberty, and security of the person in violating physical and psychological integrity in denying the right to choose, based on informed, voluntary, medical consent;

(c) Breaches the same parallel rights recognized prior to the **Charter,** as written constitutional rights through the Pre-Amble to the **Constitution Act, 1867;**

(d) Breaches parallel international treaty rights to no medical treatment without informed consent, and right to bodily integrity, which international treaty rights are to be read in, as a minimal s. 7 **Charter** protection, as enunciated by the Supreme Court of Canada in, **inter alia** the **Hape** decision;

(e) And that, under no circumstances are mandatory vaccines, nor coerced compliance to vaccines, in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

300. A Declaration that:

a) Social distancing, self-isolation, and limits as to the number of persons who can physically congregate, and where they can congregate, violates the unwritten rights contained, and recognized pre-**Charter**, by the SCC, through the pre-amble to the ***Constitution Act, 1867*** and that the Province has no jurisdiction to do so under s.92 of the ***Constitution Act, 1867***, as ruled by the ***SCC***, with respect to rights to freedom of association, thought, belief, and religion in banning association, including religious gatherings, as well as violate s. 2 **Charter** and further restricting physical and psychological liberty and security of the person rights under s.7 of the **Charter,** and are not in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

b) That prohibitions and obstacles to protest against COVID Measures in British Columbia, are a violation of the constitutional rights to freedom of expression, conscience, belief , and association, assembly, and petition, under s. 2 of the **Charter,** and not demonstrably justified by s. 1, as well as a violation of these constitutional rights, recognized **prior to** the **Charter,** through the Pre-Amble to the **Constitution Act, 1867** and against international treaty rights protected by s. 7 of the **Charter;**

301. A Declaration that the arbitrary, irrational, and standard-less sweep of closing businesses and stores as "non-essential", and the manner of determining and executing those closures, and "lock-downs", constitutes unreasonable search and seizure contrary to s. 8 of the **Charter** and not demonstrably justified under s.1 of the **Charter;**

302. A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a **bona fide,** nor an actual "pandemic", and declaration of a **bona fide** pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs;

303. A Declaration that any and all COVID Measures coercively restraining and curtailing the physical and psychological integrity of the Plaintiffs, and any and all physical and psychological restraints, including but not restricted to:

  (a) “self-isolation”;

  (b) no gatherings of more than five (5) and later ten (10)persons, or any set number;

  (c) the shutting down of children’s playgrounds, daycares and schools;

  (d) “social distancing”;

  (e) the compelled wearing of face-masks;

  (f) prohibition and curtailment of freedom of assembly, including religious assembly, and petition;

  (g) the imposition of charges and fines for the purported breach thereof;

  (h) restriction of travel on public transport without compliance to physical distancing and masking;

  (i) restrictions on shopping without compliance to masking and physical distancing;

  (j) restrictions on attending restaurants and other food service establishments without compliance to masking, physical distancing, and providing name/address/contact information for contact tracing purposes.

  (k) Crossing into and leave British Columbia and any and all subdivisions within British Columbia;

Constitute a violation of ss. 2,6,7,8, 9, and ss. 15 of the **Charter** , to freedom of association, conscience religion, assembly, and express on under s. 2, liberty and security of the person in violating the physical and psychological integrity of the liberty and security of the person, not in accordance tenets of fundamental justice, contrary to s.6(mobility rights) and well as s. 7(liberty), and further breach of the rights against unreasonable search and seizure contrary to s. 8, arbitrary detention under s. 9 of the **Charter** , and not demonstrably justified under s. 1, as well as breach of the unwritten parallel rights, recognized as constitutional rights, through the Pre-Amble of the **Constitution Act, 1867** and affected by means of removing measures against the "Liberty of the Subject" by way of **habeas corpus** as well as constituting Martial Law measures outside the scope of the Province under s.92, and subject to constitutional constraints, the exclusive jurisdiction of the Federal Parliament under s.91 (POGG), s.91(7) and (11) and the ***Federal Emergencies Act R.S.C. 1985***, and ***Quarantine Act S.C. 2005***;

304. Further Declarations that:

(a) the thoughtless imposition of "social distancing" and self-isolation at home breaches s. 2 of the **Charter,** in denying the right to freedom of association and further breaches the right to physical and psychological integrity, under s. 7 of the **Charter** (liberty) in curtailing and restricting physical movement, which measures are wholly unjustified on any

scientific or medical basis, and which are not in accordance with the tenets of fundamental justice in being vague, and suffering from overbreadth, and which cannot be justified under s. 1 of the **Charter;**

(b) That the measures themselves, and the arbitrary detention, by enforcement officers, in enforcing these vague and over-broad, and often **ultra vires,** and contradictory “orders”, is a violation of the right against arbitrary detention under s. 9 of the **Charter** and that, in the course of such “enforcement” the search and seizure of private information, including medical information, from individuals, being charged with purported violations of such orders, constitutes a violation of ss.7 and 8 of the **Charter,** and that neither violation of s. 7 or 8 are in accordance with the tenets of fundamental justice nor justified under s. 1 of the **Charter;**

(c) That the use of “contact-tracing Apps” constitutes a violation of **s.** 8 of the **Charter**, and further violates ss. 7 and 8 of the **Charter** with respect to the constitutional rights to privacy, under both sections, and that such breaches are not in accordance with the tenets of fundamental justice, and are further not justified under s. 1 of the **Charter;**

(d) That the compelled use of face masks breaches, in restricting the right to breath, at the crux of life itself, and the liberty to choose how to breath, infringes s. 7 to the **Charter** liberty, security of the person and is not in

accordance with the tenets of fundamental justice and not justified by s. 1 of the **Charter;**

(e) That the above-noted infringements under s. 2,6, 7, 8, and 9, as well as the arbitrary decisions on what businesses to close, and which ones to be left open, constitutes a. 15 of the **Charter** violation based on:

   (i)Conscience, belief , and religion;
   (ii)Association, assembly and petition;
   (iii)Trade and profession;
   (iv)Mobility;

And further, that such measures are arbitrary, and discriminate before and under the law, contrary to s. 15 of the **Charter** (and not justified under s.1 of the **Charter**), and are further a violation of the unwritten constitutional right to equality recognized before the **Charter,** as unwritten constitutional rights through the Pre-Amble to the **Constitution Act, 1867** as emanating from the principles of Rule of Law, Constitutionalism, and Respect for Minorities as enunciated by the Supreme Court of Canada in **Quebec Secession Reference**;

305. A Declaration that the use of "vaccine passports" is a violation of ss. 2,7, and 15 of the ***Charter***, and that the use of "vaccine passports" and any and all other coercive measures to compel, as de facto mandatory, the constitutionally protected right to refuse medical procedure or treatment without informed consent, including vaccines further violates ss. 2, 7, and 15 of the ***Charter***, as

well as those mirrored unwritten rights established pre-***Charter*** under the ***Constitution Act, 1867***.

306. A Declaration that the Vaccine propaganda being pushed to twelve (12) to seventeen (17) year olds by the British Columbia government by way of s.17 of the ***Infants Act***, in fact, violates the child-parent relationship in s.7 of the ***Charter***.

307. A Declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to **de facto** put most small businesses and activities out of business;

308. A Declaration that:

    (a) the Defendant Federal Crown, and its agencies and officials, including but not restricted to the CRTC, have, by glaring acts and omissions, breached the rights of the Plaintiffs to freedom of speech, expression, and the press, by not taking any action to curtail what has been described by the UK scientific community as "Stalinist censorship", particularly the CBC in knowingly refusing to cover/or publish the valid and sound criticism of the COVID measures, by recognized experts;

    (b) a Declaration that the Federal Crown has in fact aided the suppressing and removing of "Facebook" and "YouTube" postings, even by experts, which in any way contradict or criticize the WHO and government measures as "misinformation" "contrary to community standards", by the federal Defendants threatening criminal sanction for such "misinformation";

thus violating s. 2 of the **Charter** by way of act, and omission, as delineated and ruled by the Supreme Court of Canada in, **inter alia**, **Vriend**.

309. A further Declaration that the failure, and in fact intentional choice, by the British Columbia Defendants, as well as Federal Defendants, to ensure that the Plaintiffs constitutional rights are not violated by those public officials purporting to enforce the Covid measures, as well as private agents purporting to enforce Covid measures, is not prevented and not legislated, and in fact such violations are encouraged, constitute violations of the Plaintiffs delineated by the Supreme Court of Canada in, ***inter alia, Vriend***.

310. A Declaration that the measures have a devastating impact on those with severe physical and neurological special needs, particularly children, and infringe s. 15 of the **Charter,** and are not justified under s. 1 of the **Charter**, and further violate the unwritten right to equality through the Pre-Amble to the **Constitution Act, 1867**, based on psychical and mental disability, and age;

311. A Declaration that the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are:

a) not scientifically, or medically, based;

b) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, **as a mere screening test,** of 3.5% accuracy;

c) that all measures of masking, social distancing, and school "lockdown" (closures) are a sole and direct result of the mounting, or "rising" "cases", being cases, which are 96.5% false positive;

d) that the PCR test, in and by itself, as used, cannot distinguish between dead (non-infectious) vs. live (infectious) virus fragments;

e) that (solitary confinement) isolation/quarantine of asymptomatic children, for any duration, is abusive, and constitutes violations under s.7 and 15, of the ***Constitution Act, 1982*** as violating the physical and psychological integrity, contrary to s. 7 of the ***Charter***, and further constitutes cruel and unusual treatment under s. 7 of the ***Charter***; and further violates s.7, by way of the International Law under the ***The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention")*** and the ***Convention on the Rights of the Child;*** and

f) that such treatment of children is particularly egregious with respect to children with special needs, suffering physical and neurological disabilities, in violating s.7 and s.15 of the ***Charter*** in that absolutely no particular or special provisions are made for them, to accommodate their disability(ies), with respect to the Covid measures.

312. A Declaration that the science, and preponderance of the scientific world community, is of the consensus that:

    a) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARS-CoV-2 which leads to COVID-19;

    b) that prolonged use of masks results, especially for children, in irreparable physical, neurological, psychological,language development, and social development harms, some of which are irreversible;

    c) that "lockdowns", quarantine and isolation are ineffective and cause more damage than they prevent;

    d) that Public Health officials, including the Defendants, as well as the WHO, have pronounced that the Covid "Vaccines" do **NOT** prevent transmission, in either direction, between vaccinated and non-vaccinated persons.

313. A Declaration that the mandatory use of masks, isolation and PCR testing, in the school context, violates children's constitutional rights under:

a) section 7 of the ***Charter*** in infringing their rights to physical and psychological safety, and integrity, as well as, medical procedure/treatment without informed consent;

b) section 7 in infringing their right to education, flowing from their right to education under the ***Education Act,*** and further under section 7 of the ***Charter*** as interpreted by the Canadian Courts, as well as under section 7 by way of the ***International Convention on the Rights of the Child*** as read in as a minimal protection under section 7 of the ***Charter,*** as enunciated, ***inter alia,*** by the Supreme Court of Canada in ***Baker***, ***Hape,*** and the Federal Court of Appeal in ***De Guzman***;

314. A Declaration that the notion of "asymptomatic" transmission, from children to adults, of an airborne respiratory virus, is "oxymoronic", without scientific, or medical basis, and hitherto scientifically and medically unknown;

315. A Declaration that masking, social distancing and testing in school settings, particularly elementary school(s), is unscientific, non-medical, unlawful, and unconstitutional and should be halted forthwith;

316. A Declaration that children do not pose a threat with respect to Covid-19, to their teachers;

317. A Declaration that teachers who do not wish to mask have the statutory and constitutional right not to mask.

318. A Declaration that the masking of children is unscientific, non-medical, physically, psychologically, neurologically, socially, and linguistically harmful to them and that the masking of children be prohibited, regardless and despite their parents' requests and/or directions, because as children have their own independent rights under the ***Education Act*** , s. 7 and 15 of the ***Charter,*** as well as s.7 of the ***Charter*** as read in, and through, the international law under the ***Convention on the rights of the Child;***

319. A Declaration that the mandatory vaccination of public service employees, or any citizens for that matter, without informed, voluntary, consent, is unconstitutional and of no force and effect as violating ss.2,7, and 15 as set out above in this statement of claim, in that compulsory medical treatment has been clearly ruled, by the Supreme Court of Canada, and other Appellate Courts, as violating s.7 of the ***Charter***.

320. A Declaration that **none** of the above ***Charter*** violations are saved by s.1 of the ***Charter***, as they fail to meet the test, thereunder, as enunciated in, inter alia, the ***Oakes*** decision, as the measures:

(a) Are not pursuant to valid statutory objective;

(b) The measures are not rational;

(c) The measures are not tailored for minimal impairment of the **Charter** rights;

(d) The measures dilatory effects far outweigh their beneficial effects;

321. Orders, in (the nature of) **Prohibition**, prohibiting the Respondent(s) from:

a) administering any PCR test that has above a 25 threshold cycle as a screening test only;

b) registering a "case", as "positive", based on a positive PCR screen test, without following up with a culture test to determine that it is the SARS-CoV-2 virus, as well as a further con-current blood test to determine antibody activity to verify that the virus is alive (infections) and not dead (not-infections), which procedure **constitutes** scientifically accepted method to isolate, identify, and confirm the presence of an infectious virus in a person;

c) "locking down" any school(s);

d) requiring any masking or face covering of **any children;**

e) Conducting classes and school by remote, online, distance learning over a computer which is not a statutory nor constitutionally acceptable alternative to in-person school learning, especially for children with physical and neurological disabilities and that the Respondents be prohibited from conducting remote classrooms outside the physical school setting;

f) requiring solitary confinement of children and barring contact with family members for any duration;

g) deeming of two “positive” PCR result(s) in a school as an “outbreak”, which is absurd ad nauseam, and constitutes a violation of s.7 of the ***Charter*** in fraudulently creating undue panic and fear.

322. Orders, in the nature of **mandamus,** requiring the Respondent Ministers to:

a) reveal the source and substantive advice received, from whom, based on what specific scientific and medical evidence for the measures imposed;

b) reveal all data with respect to what threshold cycle rate **all** PCR tests are administered;

c) provide a release of all data comparing “cases” and co-relating them to “all-cause mortality”, and the location(s) and ages of those purportedly dead “**from”** as opposed to “with”, Covid, as well as the demographic age groups of the deaths;

d) Order the re-attendance of the Applicant children to return to their school without masks, and without PCR testing, for in-person learning.

323. The Plaintiffs, with respect to enforcements measures, of police, by-law, and health officers further seek:

(a) A Declaration that a "reception, or "informal gathering", under s. 19 and 20 of ***Order of the Provincial Health Officer – Gatherings and Events (March 24th, 2021)***, or any such subsequent order(s), pursuant to the ***Public Health Act [SBC 2008],*** does **not** include a gathering whose obvious purpose is to assemble, associate and otherwise gather to exercise freedom of speech, expression and/or assembly and religion as constitutionally recognized under the ***Constitution Act, 1867*** as well as s.2 of the ***Charter;***

(b) A Declaration that, with respect to the masking:

  (i) that no police officer has the jurisdiction to apply the ***Trespass Act, [RSBC 2018] c. 3*** to a person who declares a legal exemption to a mask, and who enters a public place; and

  (ii) that owners of places of business who refuse to comply with lawful exemptions may be charged with an offence pursuant to the ***Emergency Program Act [RSBC 1996] c 111*** and ***Ministerial Orders*** and ***Regulations*** thereunder;

  (iii) that Police Officers are equally entitled to masking exemptions and to be free from coercion by their superiors to take a Covid vaccine, or PCR test contrary to their constitutional right to refuse based on informed consent;

(iv) That Police officers, like any other citizen, are constitutionally entitled, as ruled by the ***Supreme Court of Canada*** and ***Court of Appeal***, to refuse medical treatment without informed consent, including vaccines, and that Police officers should be free from coercion by superiors to be vaccinated;

(c) A Declaration that police, and/or a by-law, Provincial Offences, or Health Officer, with respect to an individual who fails and/or refuses to comply with any oral and written orders from any of the Provincial Respondents do not have the powers of arrest against that individual under Provincial ***Regulations*** such as those set out in Part 4, Division 6 of the ***Public Health Act SBC [2008]***, and the closing summation of Bonnie Henry's ***Orders***;

(d) That the bar of entry across "Provincial Borders", but for "essential travel" by residents/citizens coming from Alberta, as well as the **intra**-provincial travel bans without probable grounds of an offence being committed, which is a form of imposing Martial Law, without the jurisdiction to do so as per s.91(7) of the ***Constitution Act 1867***. It is also contrary s.7 of the **Charter (Liberty)**, for vagueness and over-breadth as well as s.6 of the **Charter**, and thus compels the Police officer to breach their oath to uphold the Constitution and further, that the RCMP has no jurisdiction to set up roadblocks at British Columbia's "borders" and refuse passage into British Columbia, as well as set out by the SCC, Pre-**Charter**, in ***inter alia* *Winner***;

(e) That the measures and enforcement of the measures under ***Ministerial Orders 172/2021 and 182/2021***, as set out above in subparagraph (d) constitutes Martial Law, Police State measures outside the scope of the Province's jurisdiction under s.92 of the ***Constitution Act, 1867,*** and are within, subject to constitutional restraints, the jurisdiction of the Federal Parliament under s.91(7) and (1) and the "Peace, Order, and Good Government "(POGG)" Power on s.91 of the ***Constitution Act, 1867***, and thus further compels the Police officer to breach their oath to uphold the Constitution;

(f) A Declaration that failure and/or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the ***Criminal Code*** or constitute "obstruct peace officer" contrary to s. 129 of the ***Criminal Code*** thus granting the power of arrest to a police officer in the enforcement of a regulatory and/or municipal by-law as enunciated by the ***SCC*** in ***R v. Sharma [1993] 1 S.C.R. 650***;

(g) A Declaration that the RCMP has no jurisdiction to enforce Provincial Health nor "emergency" measures in the Province of British Columbia;

(h) A Declaration that, in any event, the restriction of physical movement and travel bans based on "essential travel", is a violation of s.7 liberty and security of the person, not in accordance with fundamental justice as being void for vagueness, as well as overbreadth, and impossible to enforce, in that it is nearly impossible to ascertain, while respecting an individual's ***Charter*** right to remain silent, and right against arbitrary detention and questioning, to determine whether that person has, "on reasonable and probable grounds" committed an offence;

(i) A Declaration that a police constable or by-law officer cannot, by way of general, blanket order(s), from his/her administrative supervisors, be directed how, when and in what circumstance, to lay a charge against an individual and thus dictate the discretion of that Police officer;

(j) A Declaration that no politician should be directing nor commenting on how, whom or in what circumstances any police officer should enforce nor apply the applicable law;

(k) A Declaration that the Covid emergency measures violate a police constable's duty, as office-holder to Her Majesty the Queen, in that the enforcement of the provisions, and the enforcement provision(s) are of no force and effect and unconstitutional in in allowing, and being directed by superiors, to violate a citizen's constitutional rights under the ***Constitution Act 1867***, as well as the ***Charter***, as follows:

(i) Violation of freedom of expression, speech, association, assembly and religion contrary to those unwritten constitutional rights recognized by the Supreme Court of Canada through the Preamble to the ***Constitution Act, 1867,*** as well as s.2 of the ***Charter;***

(ii) Violation of the right to liberty and security of the person through the arbitrary and unreasonable detention, arrest, and interference with the physical liberty and movement of citizens, contrary to the Liberty of the Subject under ***Habeas Corpus***, as well as ss. 7, 9, and 10(c) of the ***Charter;***

(iii) Violation of the protection against unreasonable search and seizure contrary to s.8 of the ***Charter;***

(iv) Placing police officers in the potential violation, with respect to religious gatherings and services, of committing an offence contrary to s. 176 of the ***Criminal Code.***

323. Order(s), (in the nature of) **Prohibition** to:

(a) all police administrative supervisor(s) to cease and desist in interfering with a police constable's discretion as to how to apply and enforce the law, following the investigation by that individual police constable;

(b) all publicly elected politicians to cease and desist in interfering with a police constable's discretion as to how to apply and enforce the law, following the investigation by that individual police constable;

(c) all "public health officers" to cease and desist in interfering with a police constable's discretion as to how to apply and enforce the law, following the investigation by that individual police constable;

(d) All Police administrative superiors to cease and desist from coercive and illegal conduct, directions, and/or orders geared to denying masking exemptions of officers, PCR testing and vaccines contrary to the Police officer's constitutional rights to refuse any medical procedure and/or treatment with informed consent as enunciated and ruled by the ***Supreme Court of Canada***;

(e) All public officials, and the named Defendants, from implementing **any** mandatory vaccination measures, nor implementing any "Vaccine Passport" measures whatsoever.

324. The Plaintiffs seek the Declaratory and Prerogative/Injunctive relief set out in this Statement of Claim. In addition, the Plaintiffs seek damages, as set out below:

(a) With respect to **Action4Canada** damages in the amount of $1 Million for:

(i) A breach of s.2(a), (c), and (d) **Charter** rights to exercise freedoms of religion, peaceful assembly, and association via the limitations placed since the onset of the Covid-19 emergency measures.

(b) With respect to **Kimberly Woolman** Damages in the amount of $2 Million for:

  (i) a breach of their s.7 **Charter** right to not be subjected to cruel and unusual punishment, in that the Yucalta Lodge care home unconstitutionally separated them from visiting their elderly mother, and caring for her on a number of occasions in retaliation to their voicing opinions in relation to their mother Jaqueline Woolman's care, and further violation and interference with their s.7 protected right to the parent-child relationship;

  (ii) Violation of their s. 2(c) and (d) **Charter** right to association, in that the Yucalta Lodge care home prevented them from visiting their mother individually, and together, and monitored their association, and assembly on a number of occasions when they picked their mother up.

  (iii) Violation of their s.2(b) **Charter** fundamental freedom of thought, belief, opinion, and expression, in that the Yucalta Lodge care home prevented them from sharing an open dialogue with their mother in relation to the Covid-19 emergency measures in general, and the specific measures that the care home had put into place.

(c) With respect to the **Estate of Jaqueline Woolman** damages in the amount of $2 Million for violations of the deceased, during her lifetime, recoverable by the estate for:

(i) Violation, during the deceased's lifetime of her s.7 **Charter** right to not be subjected to cruel and unusual punishment. The Yucalta Lodge care home repeatedly breached this right by subjecting Jaqueline Woolman to abusive quarantining measures, as well as the cruel, and anxiety-inducing separation from her children that she was made to endure, and interference of the s.7 Charter protected right to the parent-child relationship;

(ii) For a breach of the deceased's s.15 **Charter** equality rights to not face discrimination, which the Yucalta Lodge care home breached by taking advantage of Jaqueline Woolman's mental, physical disability, as well as her age by ignoring her wishes.

(iii) damages for a breach of her s.2 (c) and (d) **Charter** fundamental freedoms to associate with her own children, and in particular, her two (2) daughters Kimberly and Michelle Woolman.

(iv) For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(d) With respect to **Jane Doe #1** damages in the amount of $200,000.00 for:

  (i) a breach of her s.7 **Charter** rights to life, liberty, and security of the person in that the Covid-19 emergency measures enacted by Bonnie Henry have resulted in her employer enforcing the use of masks on their premises, including forcing Jane to wear a mask while at work.

  (ii) The cause of anxiety and pain and suffering as a result.

(e) With respect to **Brian Edgar** damages in the amount of $200,000 for:

  (i) A breach of his s.7, 8, 9, and 10 **Charter** rights, as Brian, and his party were detained for questioning, and asked to produce identification documentation by the police after exiting a BC Ferries vessel, although their only allegedly suspicious behaviour had been associating with a group of people heading to the same event in Vancouver.

  (ii) A breach of his s.2 (c) and (d) **Charter** rights to associate, which the BC Ferries infringed upon by targeting Brian and his party for peacefully assembling, and associating with each other, and another group on the vessel that were all attending the same event in Vancouver on that given date.

(iii) A breach of his s.15 **Charter** right to be free from discrimination, which the BC Ferries staff infringed by specifically targeting Brian, and his party for the simple reason that they were attending a specific event in Vancouver on that given date.

(f) With respect to **Amy Muranetz** damages in the amount of $200,000 for:

(i) A breach of her s.7 ***Charter*** rights to life, liberty, and security of the person as she was stopped, and questioned about her mask prior to entering a BC Ferries vessel, and several times while aboard the vessel, by the BC Ferries staff.

(ii) A breach of her s.15 ***Charter*** right to be free from discrimination, which the BC Ferries staff infringed by specifically targeting her for not wearing a mask.

(iii) A breach of her s.8, 9 and 10 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. BC Ferries staff stopped, detained, and questioned Amy at length and leisure without reasonable explanation.

(iv) A breach of her s.6 ***Charter*** mobility rights, as Amy, was banned by BC Ferries staff indefinitely from travelling back home on the BC Ferries.

(v) A breach of her s.7 ***Charter*** right to be free from cruel and unusual treatment, and punishment. Amy was treated inhumanely by BC Ferries staff in that they continued to detain, and mistreat her while she experienced a Post-traumatic Stress Disorder ("PTSD") episode while under their watch. It was also an excessive punishment, for the BC Ferries staff to prevent Amy from returning home on the ferries, for simply exercising a medical masking exemption.

(vi) For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(g) With respect to **Jane Doe #2** damages in the amount of $2 Million for:

(i) A breach of her s.15 ***Charter*** right to be free from discrimination, which the Hospital staff infringed upon by specifically targeting her for not wearing a mask, and deciding to deny her imminent medical treatment based on such.

(ii) A breach of her s.7 ***Charter*** rights to life, liberty, and security of the person as she was stopped, and questioned about her lack of mask throughout her time at the hospital, and this took precedence over carrying out her imminent and necessary medical treatment.

(iii) A breach of her s.7 ***Charter*** right to be free from cruel and unusual treatment, and punishment. Jane was punished, and denied critical medical treatment for a life-threatening illness for exercising a valid, medical masking exemption.

(iv) For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations;

(v) For endangering her very life.

(h) With respect to **Valerie Ann Foley** damages in the amount of $2 Million for:

(i) A breach of her s.7 ***Charter*** rights to life, liberty, and security of the person as she was stopped, and questioned about her lack of mask, for which she carried a medical exemption.

(ii) A breach of her s.8, 9 and 10 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. The Vancouver Skytrain Transit Officer not only lacked the jurisdiction to do so, but went on to verbally, and physically harass, and viciously assault, and subsequently handcuff Valerie while failing to provide any reasonable explanation for the severity of his actions.

(iii) A breach of her s.7 ***Charter*** right to be free from cruel and unusual treatment, and punishment. Valerie was disproportionately treated, including being physically assaulted by the Vancouver Skytrain Transit Officer, for the alleged crime of being un-masked with a valid medical exemption.

(iv) For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(i) With respect to **Linda** and **Gary Morken** damages in the amount of $250,000 each for:

(i) A breach of their s.7 ***Charter*** rights to life, liberty, and security of the person as they were stopped, and questioned about their lack of masks, for which they carried valid medical exemptions.

(ii) A breach of Linda's s.8, 9 and 10 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. The store staff, and RCMP Officers failed to provide the explicit, and reasonable causes behind Linda's search, and detention.

(iii) A breach of both Linda, and Gary's s.15 ***Charter*** right to be free from discrimination, which the store staff, and RCMP Officers infringed upon by specifically targeting them for being unmasked, and going above and beyond the reasonable protocol that the situation had called for, simply for that reason;

(iv) Unlawful detention and confinement.

(j) With respect to **Pastor Randy Beatty** damages in the amount of $500,000 for:

(i) A breach of s.2 (a), (b), (c), and (d) rights for Randy to exercise his freedom of expression, religion, peaceful assembly, and association, as the result of emergency measures that not only limited his church services, but at times saw them close entirely, despite following strict safety protocols;

(ii) A breach of Randy's s.15 ***Charter*** right to be free from discrimination due to religious beliefs, and many Covid-19 measures discriminate upon religious peoples, including Christians to refrain from engaging with the measures and mandates due to their religious beliefs.

(k) With respect to **Ilona Zink** damages in the amount of $500,000 for:

(i) A breach of her s. 6(2)(b) ***Charter*** right to gain a livelihood, which becomes difficult and next-to-impossible when covid-19 mandates involve the closure of specific businesses, calling some essential, and others "non-essential";

(ii) Unreasonable seizure contrary to s.8 of the ***Charter***.

(l) With respect to **Federico Fuoco** damages in the amount of $750,000 for:

   (i) A breach of his s. 6(2)(b) ***Charter*** right to gain a livelihood, which becomes difficult when covid-19 mandates involve the closure of specific businesses, calling some essential, and others "non-essential".

   (ii) A breach of Federico's s.15 ***Charter*** right to be free from discrimination due to his beliefs, and his masking exemption, yet he was discriminated against by the city of Vancouver who denied him the attempt to open his restaurant safely, and served him with closure notices, and revocation of his licensing in relation to his business.

   (iii) For the slanderous, and baseless attacks on his business as the result of the rampant environment of division that has been created in British Columbia due to the Covid-19 emergency measures, and this has impacted not only public opinion on Federico, a well-known restauranteur in Vancouver, but also his restaurant business.

(m) With respect to **Fire Productions Limited**, and **F2 productions Incorporated**, damages in the amount of $750,000.00 for:

(i) Violation of s.8 of the ***Charter*** in the unreasonable seizure of the businesses as a result of "lock-downs";

(ii) Damages, to be calculated at trial, for loss of income as a result of the unconstitutional lock-downs and violations of s.8 of the ***Charter***.

(n) With respect to **Michael Martinz** damages in the amount of $250,000 for:

(i) A breach of his s.7 ***Charter*** rights to life, liberty, and security of the person as he was stopped, from passing through airport security, despite holding a Canadian passport so that he could be forced to take a PCR test, contrary to s.14(1) of the ***Quarantine Act***.

(ii) A breach of Michael's s.8, and 9 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, as he was stopped from leaving the airport, and detained for a lengthy time period as airport staff, and a nurse made attempts to force him to take the penetrative PCR test against his will and contrary to s.14(1) of the ***Quarantine Act***.

(o) With respect to **Makhan S. Parhar** damages in the amount of $250,000 for:

- (i) A breach of his s.7 ***Charter*** rights to life, liberty, and security of the person as he was stopped, from passing through airport security, despite holding a Canadian passport so that he could be forced to take a PCR test.
- (ii) A breach of Makhan’s s.8, 9, 10(c) and 11 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. For much of the time that Makhan was detained, his questions as to why were left unanswered.
- (iii) A breach of his s.7 ***Charter*** rights to be free from cruel and unusual treatment and punishment. Not only was Makhan placed in quarantine, but during his time detained in jail, he was denied vegetarian meals that he specifically requested.
- (iv) A breach of his s. 6 ***Charter*** mobility rights, as he was placed under quarantine restrictions.
- (v) For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(p) With respect to **North Delta Real Yoga Real Hot Yoga Limited** damages in the amount of $750,000 for:

  (i) Violation of s.8 of the ***Charter*** in the unreasonable seizure of the businesses as a result of "lock-downs";

  (ii) Damages, to be calculated at trial, for loss of income as a result of the unconstitutional lock-downs and violations of s.8 of the ***Charter***.

(q) With respect to **Melissa Anne Neubauer** damages in the amount of $250,000 for:

  (i) A breach of her s.15 ***Charter*** rights to be free from discrimination, as her employers discriminated against her for seeking a valid masking exemption, which they eventually denied. She is now seeking employment in another region entirely.

  (ii) A breach of the s.6(2)(b) ***Charter*** right to gain a livelihood in any province in Canada, and can not do so due to the discrimination she faced at the hands of her employer, as a result of the Covid-19 restrictions.

(r) With respect to **Jane Doe #3** damages in the amount of $750,000 for:

  (i) A breach of the s.15 ***Charter*** rights to be free from discrimination, and she felt that due to being unvaccinated, she was not able to comfortably carry out her work as a vital essential medical worker.

  (ii) A breach of the s.6(2)(b) ***Charter*** right to gain a livelihood in any province in Canada, due to the aforementioned reason, and the discrimination that she faced as a result thereof, having had to leave her place of work on a stress leave.

324. The Plaintiffs further seek such other or further monetary damages, to be calculated at trial, as counsel may advise and this Honourable Court grant.

325. The Plaintiffs further state that the damages they have suffered, as a result of the unlawful actions of both public and private actors, lie at the feet of the Crown Defendants in that they have chosen and/or failed to institute measures and enforcement to ensure that, in the execution of the “Covid measures”, the Plaintiffs/ rights under those measures were respected and enforced thus violating their statutory and constitutional rights by act and omission, for which the Crown is liable in damages.

326. As against the **CBC**:

(a) A Declaration that:

(i) The CBC, as the publicly- funded broadcaster under the **Broadcast Act,** owes a fiduciary duty to be fair, independent, impartial, objective, and responsible, in its news coverage and investigation of the "pandemic", and COVID- Measures, which fiduciary duty it has flagrantly and knowingly breached;

(ii) That the CBC, owing a duty of care to the Plaintiffs as the national, publicly - funded broadcaster, has been grossly negligent in its coverage and reporting on the COVID-19; and

(iii) That the CBC has knowingly and intentionally suppressed, censored, and unjustifiably belittled expert opinion opposed and critical of the WHO and government line on COVID, and thus propagated "misinformation" and "false news".

(b) Further as against the CBC, general damages in the amount of $10 Million dollars;

(c) Punitive damages in the amount of $10 Million dollars;

(d) Such further or other injunctive relief as counsel may advise and this Honorable Court grant.

327. The Plaintiffs further seek Costs of this action and such further and/or other Declaratory relief as counsel may advise and this Honorable Court entertain.

Part 3: LEGAL BASIS

327. That the "Covid-measures" and declaration of the "emergency" invoked by the Respondents:

(a) Do not meet the prerequisite criteria of any "emergency" as prescribed by ss.9-10.2 nor ss.12-13 of the ***Emergency Program Act [RSBC 1996],*** nor is it within the jurisdictional purview of s.52(2) of the ***Public Health Act, SBC [2008],*** and further contravenes s.3(1) and s.120(1) of the ***Public Health Act SBC [2008]***;

(b) Breach the Plaintiffs' right to consult and constitutional duty to consult, of the Respondents, both in procedure, and substance, with respect to broad sweeping public health measures both under administrative law, and the fundamental justice requirement under section 7 of the ***Charter*** as enunciated and ruled by the ***SCC***;

(c) If the pre-requisites of an "emergency" are met, as declared to be a national and international "emergency", the jurisdiction, and constitutional duty, to deal with this "national emergency", and its measures, is strictly with the Federal Parliament, under the ***Federal Emergencies Act*** and ***Quarantine Act,*** pursuant to

s. 91(7) and (11) of the ***Constitution Act, 1867***, as well as under the “Peace, Order, and Good Government (“POGG”)” Power, under s.91 of the ***Constitution Act, 1867*** and not the jurisdiction of the provincial legislature;

(d) That quarantine is Federal jurisdiction;

(e) That “lock-downs”, and “stay at home orders”, and any curfews, in whole or in part, are forms of Martial law outside the Province’s jurisdiction under s. 92 of the ***Constitution Act, 1867*** and, subject to constitutional review and constraints, matters of Federal jurisdiction under the POGG power and s. 91(7) of the ***Constitution Act, 1867***.

(f) that “lock-downs”, in any event, and the arbitrary and irrational means by which businesses have been ordered closed and/or restricted constitute an unreasonable seizure contrary to s.8 of the ***Charter***.

328. As against the Crown Defendants, and Officials:

(a) That the purported order of the chief health officer, Dr. Bonnie Henry, dated April 30th, 2021, as well as June 30th, 2021 along with previous such orders, before and after June 30th, 2021, and any such duplicate future or extended orders, purportedly made under ss. 30, 31, 32 and 39(3) of the *Public Health Act,* S.B.C 2008 ("the Act"), are ***ultra vires*** that Act, and null and void as an enveloping emergency order of national dimension; and the strict jurisdiction of the Federal Government under s.91 (7) and (11) as well as the "POGG" power of the ***Constitution Act, 1867***, which rests in the exclusive jurisdiction, subject to constitutional review and constraints, with the Federal Parliament.

(b) That Ministerial order #M182 of April 30th, 2021, as well as the order of Bonnie Henry on June 30th, 2021, and the lockdown and travel restrictions are of no force and effect as constitutionally, Martial Law, pursuant to s.91(7) as well as the POGG Power;

329. That the ***Public Health Act,*** and ss.30, 31, 32, and 39(3) of the *Act* is restricted to making orders of a local or regional scope and not of a completely provincial application in the content where the declared threat is not provincial in nature but national, and that the province is without jurisdiction to make such orders and measures as such orders and measures are the jurisdiction subject to constitutional review and constraints, of the ***Federal Parliament under the Emergencies Act,*** and under s. 91 under the POGG power, as well as ss.91(7) and (11) of the ***Constitution Act 1867***.

330. That the Province, in any event, while maybe having jurisdiction with respect to some localized measures which coincidentally may have consequential impact

on liberty, movement and association, has no constitutional jurisdiction to restrict or target the physical/psychological liberty, expression, association, and/ or assembly of every individual in the Province and that, if such jurisdiction exists, subject to constitutional review and constraint, it rests with the Federal Parliament and government pursuant to the ***Federal Emergencies Act***.

331. That the purported order, by Dr. Bonnie Henry, purportedly pursuant to s.52(2) of the ***Public Health Act,*** that "the transmission of the infectious agent SARS-CoV-2, based on high "case counts", based on a PCR test, is ***ultra vires*** the ***Act*** and ***non est factum***, in that:

(a) It does not constitute a "regional event" but, by its purported terms constitutes a national and international event, and is *ultra vires* the authority of the British Columbia Parliament and government with jurisdiction, if any, subject to constitutional review and constraints, resting with the **Federal Parliament** under the ***Emergencies Act***;

(b) The classification as such is not scientifically nor medically based;

(c) The evidence is lacking and contrary to the scientific and medical evidence;

(d) That “cases’ do not equate to “deaths” and that the purported death rate is no higher than complications from the annual influenza;

(e) That the distorted “case” counts are fraudulent, based on the fraudulent use generating cases of “PCR” test, which is a test that:

  (i) At best was designed as a “screening test” which requires a follow-up culture and blood test to ensure the detection of an **infectious virus**, and was **never** designed, nor equipped to be a diagnostic test;

  (ii) That is fraudulently being used as a diagnostic test;

  (iii)That the PCR test has scientifically been debunked, as well as judicially determined, based on the scientific evidence, that when used at a “threshold cycle” of thirty five (35) or higher, to cause between 82% to 96.5% “false positives”;

  (iv)That British Columbia tests at a threshold cycle of well over forty (40) “threshold cycles”. In weekly meetings with Bonnie Henry, doctors reported that her second in comman gave instruction to turn up the PCR for the sole purpose of creating increased cases.

332. That the order of April 23rd, 2021 and previous such orders, and subsequent such orders or extensions, in any event, violate the ***Constitution Acts, 1867, 1982***, as follows:

(a) That the restrictions on freedom of expression, conscience, association, and assembly, were recognized, and continue to apply, as unwritten constitutional rights, through the Pre-amble of the ***Constitutional Act, 1867***, and that the Province has absolutely no jurisdiction to curtail those rights, as set out by the Supreme Court of Canada, and that if such curtailment were to be effected, it rests, subject to constitutional review, and constraints, in the jurisdiction of the Federal Parliament;

(b) That these same rights, contained in ss. 2(a)(b), 7, 8, 9 and 15 of the ***Charter*** are also being violated by the Order(s) of Bonnie Henry and none of the violations are justified under a free and democratic society under s. 1 of the ***Charter*** that that:

  (i) The measures do not evidentiarily, scientifically, nor medically set out a valid legislative objective;

  (ii) Are not rational;

  (iii) Are not tailored to minimally infringe the constitutional rights; and

(iv) The measures' deleterious effects far outweigh the beneficial effects in that the number of deaths **caused by the measures** are at a ratio of 10-12 deaths for every death purportedly attributed to COVID-19.

333. That administrating medical treatment without informed consent constitutes experimental medical treatment and contrary to the ***Nuremberg Code*** and ***Helsinki Declaration*** of 1960, still in vigor, and further and thus constitutes a crime against humanity under the ***Criminal Code of Canada.***

325. The offering, promoting, and administering of Covid-Vaccines, or any other medical treatment to twelve (12) to seventeen (17) year olds without the informed consent of the parent(s) constitutes:

(d) In the absence of informed consent, medical experimentation and thus further constitutes a "crime against humanity" emanating from the Nuremberg trials and principles following the medical experimentations by the Nazi regime and codified in Canada, as a criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act***;

(e) And by doing so Dr. Bonnie Henry and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

(f) S.17 of the ***Infants Act [RSBC 1996] C. 223***, if it purports to grant (12) to (17) year olds, or children younger than (12), the ability to orally, or in writing, give informed, voluntary consent to any medical treatment, including vaccines, is of no force and effect as violating s.7 of the ***Charter*** in that:

  (i) It interferes with the parent-child relationship which has been recognized by the SCC, to be constitutionally protected by s.7 of the ***Charter***;

  (ii) It violates s.7 of the ***Charter*** with respect to the minor by violating the minor's physical and psychological integrity, in incurring a possible adverse reaction without the benefit of understanding the risk thereby vitiating the informed, voluntary consent required under s.7 of the ***Charter***;

(iii)Given that the Covid vaccines have not been finally approved, with human trials not ending until the end of 2023 and the concession by Public Health officers that the "Covid Vaccines" are thus medically "experimental" it violates s.7 of the ***Charter*** by contravention of the ***Nuremberg Principles*** and ***Code***, as well as the ***Helsinki Declaration*** of 1960, both of which international instruments provide and are to be read in as the minimal protection under s.7 of the ***Charter*** as dictated by, ***inter alia***, by the ***SCC*** in the ***Hape*** decision; and

(iv) Violates s.15 of the ***Charter***, based on age, in not providing minors with the same constitutional protection of informed, voluntary consent provided and upheld under s.7 of the ***Charter***, that adults have.

334. That the measures imposed by Dr. Bonnie Henry constitute a crime against humanity contrary to s.7 and 15 of the ***Charter*** in the unjustifiable deaths directly caused by her measures, including suicides, deaths from cancelled surgeries, drug over-doses, and depraved abuse of the elderly and children, especially the physically and neurologically disabled, in that she knows that her measures are worse than the purported "Covid-deaths", and that Dr. Bonnie Henry has in fact been complicit in crimes against humanity in her dispersing and administered deadly and unsafe vaccines in India (Pakistan) in or about the year 2000. Bonnie Henry has further advocated the immunization of twelve (12) to seventeen (17) year olds without the consent of their parents.

335. That the "COVID Measures" undertaken and orchestrated by Prime Minister Trudeau ("Trudeau"), Premier Horgan, the Federal Crown, Provincial Crown, and their named officials constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act,1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as

enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference.**

336. That the ***Public Health Act, [SBC 2008]*** (the **"Act),** and in particular vesting an indefinite emergency power in the Premier and Lt.-Governor, and further that the "COVID Measures", undertaken and orchestrated by Premier John HORGAN ("Horgan") as well as Bonnie Henry, Mike Farnworth, Jennifer Whiteside, Adrian Dix, and the Provincial Crown, constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act, 1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference;**

326. The COVID Measures Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, at the blind and unquestioned dictates of the World Health Organization ("WHO") bureaucrats, in defiance and ignoring of the avalanche of scientific and medical evidence to the contrary, constitute a constitutional violation of the abdication of the duty to govern, as enunciated in, **inter alia**, the **Re Gray** and **Canada (Wheat Board)** v. **Hallett and Carey Ltd.** decisions of the Supreme Court of Canada;

337. That in the imposition of the COVID Measures, the Defendants have engaged in **ultra vires** and unconstitutional conduct and have acted in, abuse and excess of their authority;

338. That the concept of "social distancing" is neither scientifically, nor medically based, and is an ineffective and a fictional concept, which has no scientific nor medical basis and hitherto unknown, with respect to a seasonal viral respiratory illness;

339. That any **mandatory** vaccine scheme against any purported COVID-19, by way of **mandatory** vaccine, ***or any coercive or extortive measures to force the Plaintiffs to "choose" to*** vaccinate, **without informed, voluntary consent**, such as the use of "vaccine passports" or any and all other coercive measures, is unconstitutional, and no force and effect in that:

(a) It infringes s. 2 of the **Charter** in violating freedom of conscience, religion and thought;

(b) Infringes s. 7, life, liberty, and security of the person in violating physical and psychological integrity in denying the right to choose, based on informed medical consent;

(c) Breaches the same parallel rights recognized prior to the **Charter,** as written constitutional rights through the Pre-Amble to the **Constitution Act, 1867;**

(d) Breaches parallel international treaty rights to no medical treatment without informed consent, and right to bodily integrity, which international treaty rights are to be read in, as a minimal s. 7 **Charter** protection, as enunciated by the Supreme Court of Canada in, **inter alia** the **Hape** decision;

(e) And that, under no circumstances are mandatory vaccines, nor coerced compliance to vaccines, in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

340. That:

a) Social distancing, self-isolation, and limits as to the number of persons who can physically congregate, and where they can congregate, violates the unwritten rights contained, and recognized pre-**Charter**, by the SCC, through the pre-amble to the ***Constitution Act, 1867*** and that the Province has no jurisdiction to do so under s.92 of the ***Constitution Act, 1867***, as ruled by the ***SCC***, with respect to rights to freedom of association, thought, belief, and religion in banning association, including religious gatherings, as well as violate s. 2 **Charte**and further restricting physical and psychological liberty and security of the person rights under s.7 of the **Charter,** and are not in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

b) That prohibitions and obstacles to protest against COVID Measures in British Columbia, are a violation of the constitutional rights to freedom of expression, conscience, belief , and association, assembly, and petition, under s. 2 of the **Charter,** and not demonstrably justified by s. 1, as well as a violation of these constitutional rights, recognized **prior to** the **Charter,** through the Pre-Amble to the **Constitution Act, 1867** and against international treaty rights protected by s. 7 of the **Charter;**

341. That the arbitrary, irrational, and standardless sweep of closing businesses and stores as "non-essential", and the manner of determining and executing those closures, and "lock-downs", constitutes unreasonable search and seizure contrary to s. 8 of the **Charter** and not demonstrably justified under s.1 of the **Charter;**

342. That the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a **bona fide,** nor an actual "pandemic", and declaration of a **bona fide** pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs;

343. That any and all COVID Measures coercively restraining and curtailing the physical and psychological integrity of the Plaintiffs, and any and all physical and psychological restraints, including but not restricted to:

(a) "self-isolation";

(b) no gatherings of more than five (5) and later ten (10) persons, or any set number;

(c) the shutting down of children's playgrounds, daycares and schools;

(d) "social distancing";

(e) the compelled wearing of face-masks;

(f) prohibition and curtailment of freedom of assembly, including religious assembly, and petition;

(g) the imposition of charges and fines for the purported breach thereof;

(h) restriction of travel on public transport without compliance to physical distancing and masking;

(i) restrictions on shopping without compliance to masking and physical distancing;

(j) restrictions on attending restaurants and other food service establishments without compliance to masking, physical distancing, and providing name/address/contact information for contact tracing purposes.

(k) Crossing into and leave British Columbia and any and all subdivisions within British Columbia;

Constitute a violation of ss. 2,6,7,8, 9, and ss. 15 of the **Charter** , to freedom of association, conscience religion, assembly, and express on under s. 2, liberty and security of the person in violating the physical and psychological integrity of the liberty and security of the person, not in accordance tenets of fundamental justice, contrary to s.6(mobility rights) and well as s. 7(liberty), and further breach of the rights against unreasonable search and seizure contrary to s. 8, arbitrary detention under s. 9 of the **Charter** , and not demonstrably justified under s. 1, as well as breach of the unwritten parallel rights, recognized as constitutional rights, through the Pre-Amble of the **Constitution Act, 1867** and affected by means of removing measures against the "Liberty of the Subject" by way of **habeas corpus** as well as constituting Martial Law measures outside the scope of the Province under s.92, and subject to constitutional constraints, the exclusive jurisdiction of the Federal Parliament under s.91 (POGG), s.91(7) and (11) and the ***Federal Emergencies Act R.S.C. 1985***, and ***Quarantine Act S.C. 2005***;

344. That:

   (a) The thoughtless imposition of "social distancing" and self-isolation at home breaches s. 2 of the **Charter,** in denying the right to freedom of association and further breaches the right to physical and psychological integrity, under s. 7 of the **Charter** (liberty) in curtailing and restricting physical movement, which measures are wholly unjustified on any

scientific or medical basis, and which are not in accordance with the tenets of fundamental justice in being vague, and suffering from overbreadth, and which cannot be justified under s. 1 of the **Charter;**

(b) The measures themselves, and the arbitrary detention, by enforcement officers, in enforcing these vague and over-broad, and often **ultra vires,** and contradictory "orders", is a violation of the right against arbitrary detention under s. 9 of the **Charter** and that, in the course of such "enforcement" the search and seizure of private information, including medical information, from individuals, being charged with purported violations of such orders, constitutes a violation of ss.7 and 8 of the **Charter,** and that neither violation of s. 7 or 8 are in accordance with the tenets of fundamental justice nor justified under s. 1 of the **Charter;**

(c) The use of "contact-tracing Apps" constitutes a violation of **s.** 8 of the **Charter**, and further violates ss. 7 and 8 of the **Charter** with respect to the constitutional rights to privacy, under both sections, and that such breaches are not in accordance with the tenets of fundamental justice, and are further not justified under s. 1 of the **Charter;**

(a) The compelled use of face masks breaches, in restricting the right to breath, at the crux of life itself, and the liberty to choose how to breath, infringes s. 7 to the **Charter** liberty, security of the person and is not in

accordance with the tenets of fundamental justice and not justified by s. 1 of the **Charter;**

(b) The above-noted infringements under s. 2,6, 7, 8, and 9, as well as the arbitrary decisions on what businesses to close, and which ones to be left open, constitutes a. 15 of the **Charter** violation based on:

(i) Conscience, belief, and religion;

(ii) Association, assembly and petition;

(iii) Trade and profession;

(iv) Mobility;

And further that such measures are arbitrary, and discriminate before and under the law, contrary to s. 15 of the **Charter** (and not justified under s.1 of the **Charter**), and are further a violation of the unwritten constitutional right to equality recognized before the **Charter,** as unwritten constitutional rights through the Pre-Amble to the **Constitution Act, 1867** as emanating from the principles of Rule of Law, Constitutionalism, and Respect for Minorities as enunciated by the Supreme Court of Canada in **Quebec Secession Reference**.

345. That the use of "vaccine passports" is a violation of ss. 2,7, and 15 of the ***Charter***, and that the use of "vaccine passports" and any and all other coercive measures to compel, as de facto mandatory, the constitutionally protected right to

refuse medical procedure or treatment without informed consent, including vaccines further violates ss. 2, 7, and 15 of the ***Charter***, as well as those mirrored unwritten rights established pre-***Charter*** under the ***Constitution Act, 1867***.

346. The Vaccine propaganda being pushed to twelve (12) to seventeen (17) year olds by the British Columbia government by way of s.17 of the ***Infants Act***, in fact, violates the child-parent relationship in s.7 of the ***Charter***.

347. That the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to **de facto** put most small businesses and activities out of business;

348. That:

    (a) The Defendant Federal Crown, and its agencies and officials, including but not restricted to the CRTC, have, by glaring acts and omissions, breached the rights of the Plaintiffs to freedom of speech, expression, and the press, by not taking any action to curtail what has been described by the UK scientific community as "Stalinist censorship", particularly the CBC in knowingly refusing to cover/or publish the valid and sound criticism of the COVID measures, by recognized experts;

(b) The Federal Crown has in fact aided the suppressing and removing of "Facebook" and "YouTube" postings, even by experts, which in any way contradict or criticize the WHO and government measures as "misinformation" "contrary to community standards", by the federal Defendants threatening criminal sanction for such "misinformation";

thus violating s. 2 of the **Charter** by way of act, and omission, as delineated and ruled by the Supreme Court of Canada in, **inter alia**, **Vriend**;

349. That the failure and in fact intentional choice by the British Columbia Defendants, as well as Federal Defendants, to ensure that the Plaintiffs constitutional rights are not violated by those public officials purporting to enforce the Covid measures, as well as private agents purporting to enforce Covid measures, is not prevented and not legislated, and in fact such violations are encouraged, constitute violations of the Plaintiffs delineated by the Supreme Court of Canada in, ***inter alia, Vriend***.

350. That the measures have a devastating impact on those with severe physical and neurological special needs, particularly children, and infringe s. 15 of the **Charter,** and are not justified under s. 1 of the **Charter**, and further violate the unwritten right to equality through the Pre-Amble to the **Constitution Act, 1867**, based on psychical and mental disability, and age;

351. That the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are:

(i) not scientifically, or medically, based;

(ii) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, **as a mere screening test,** of 3.5% accuracy;

(iii) All measures of masking, social distancing, and school "lockdown" (closures) are a sole and direct result of the mounting, or "rising" "cases", being cases, which are 96.5% false positive;

(iv) The PCR test, in and by itself, as used, cannot distinguish between dead (non-infectious) vs. live (infectious) virus fragments;

(v) The (solitary confinement) isolation/quarantine of asymptomatic children, for any duration, is abusive, and constitutes violations under s.7 and 15, of the ***Constitution Act, 1982*** as violating the physical and psychological integrity, contrary to s. 7 of the ***Charter***, and further constitutes cruel and unusual treatment under s. 7 of the ***Charter***; and further violates s.7, by way of the International Law under the ***The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention")*** and the ***Convention on the Rights of the Child;*** and

(vi) is particularly egregious with respect to children with special needs, suffering physical and neurological disabilities, in violating s.7 and s.15 of the ***Charter*** in that absolutely no particular or special provisions are made for them, to accommodate their disability(ies), with respect to the Covid measures;

352. That the science, and preponderance of the scientific world community, is of the consensus that:

(i) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARS-CoV-2 which leads to COVID-19;

(ii) that prolonged use of masks results, especially for children, in irreparable physical, neurological, psychological, language development, and social development harms, some of which are irreversible;

(iii) that "lockdowns", quarantine and isolation are ineffective and cause more damage than they prevent;

(iv) that Public Health officials, including the Defendants, as well as the WHO, have pronounced that the Covid "Vaccines" do NOT prevent transmission, in either direction, between vaccinated and non-vaccinated persons.

353. That the mandatory use of masks, isolation and PCR testing, in the school context, violates children's constitutional rights under:

(i) section 7 of the ***Charter*** in infringing their rights to physical and psychological safety, and integrity, as well as, medical procedure/treatment without informed consent;

(ii) section 7 in infringing their right to education, flowing from their right to education under the ***Education Act,*** and further under section 7 of the ***Charter*** as interpreted by the Canadian Courts, as well as under section 7 by way of the ***International Convention on the Rights of the Child*** as read in as a minimal protection under section 7 of the ***Charter,*** as enunciated, ***inter alia,*** by the Supreme Court of

Canada in ***Baker***, ***Hape,*** and the Federal Court of Appeal in ***De Guzman***;

354. That the notion of "asymptomatic" transmission, from children to adults, of an airborne respiratory virus, is "oxymoronic", without scientific, or medical basis, and hitherto scientifically and medically unknown.

355. That masking, social distancing and testing in school settings, particularly elementary school(s), is unscientific, non-medical, unlawful, and unconstitutional and should be halted forthwith.

356. That children do not pose a threat with respect to Covid-19, to their teachers;

357. That teachers who do not wish to mask have the statutory and constitutional right not to mask;

358. That the masking of children is unscientific, non-medical, physically, psychologically, neurologically, socially, and linguistically harmful to them and that the masking of children be prohibited, regardless and despite their parents' requests and/or directions, because as children have their own independent rights under the ***Education Act*** , s. 7 and 15 of the ***Charter,*** as well as s.7 of the ***Charter*** as read in, and through, the international law under the ***Convention on the rights of the Child;***

359. that the mandatory vaccination of public service employees, or any citizens for that matter, without informed, voluntary, consent, is unconstitutional and of no

force and effect as violating ss.2,7, and 15 as set out above in this statement of claim, in that compulsory medical treatment has been clearly ruled, by the Supreme Court of Canada, and other Appellate Courts, as violating s.7 of the Charter.

360. That **none** of the above ***Charter*** violations are saved by s.1 of the ***Charter***, as they fail to meet the test, thereunder, as enunciated in, inter alia, the ***Oakes*** decision, as the measures:

(a) Are not pursuant to valid statutory objective;

(b) The measures are not rational;

(c) The measures are not tailored for minimal impairment of the **Charter** rights;

(d) The measures dilatory effects far outweigh their beneficial effects;

361. That, with respect to enforcements measures, of police, by-law, and health officers:

(a) A "reception, or "informal gathering", under s. 19 and 20 of ***Order of the Provincial Health Officer – Gatherings and Events (March 24th, 2021)***, or any such subsequent order(s), pursuant to the ***Public Health Act [SBC 2008],*** does **not** include a gathering whose obvious purpose is to assemble, associate and otherwise gather to exercise freedom of speech, expression and/or assembly and religion as constitutionally recognized under the ***Constitution Act, 1867*** as well as s.2 of the ***Charter;***

(b) With respect to the masking that:

 (i) No police officer has the jurisdiction to apply the ***Trespass Act, [RSBC 2018] c. 3*** to a person who declares a legal exemption to a mask, and who enters a public place; and

 (ii) Owners of places of business who refuse to comply with lawful exemptions may be charged with an offence pursuant to the ***Emergency Program Act [RSBC 1996] c. 111*** and ***Ministerial Orders*** and ***Regulations*** thereunder;

 (iii) Police Officers are equally entitled to masking exemptions and to be free from coercion by their superiors to take a Covid vaccine, or PCR test contrary to their constitutional right to refuse based on informed consent;

 (iv) Police officers, like any other citizen, are constitutionally entitled, as ruled by the ***Supreme Court of Canada*** and ***Court of Appeal***, to refuse medical treatment without informed consent, including vaccines, and that Police officers should be free from coercion by superiors to be vaccinated;

(c) That police, and/or a by-law, Provincial Offences, or Health Officer, with respect to an individual who fails and/or refuses to comply with any oral and written orders from any of the Provincial Respondents do not have the powers of arrest against that individual under Provincial ***Regulations*** such as those set out in Part 4, Division 6 of the ***Public Health Act SBC [2008]***, and the closing summation of Bonnie Henry's ***Order*** of March 31st, 2021;

(d) That the bar of entry across "Provincial Borders", but for "essential travel" by residents/citizens coming from Alberta, as well as the **intra**-provincial travel bans without probable grounds of an offence being committed, which is a form of imposing Martial Law, without the jurisdiction to do so as per s.91(7) of the ***Constitution Act 1867***. It is also contrary s.7 of the **Charter (Liberty)**, for vagueness and over-breadth as well as s.6 of the **Charter**, and thus compels the Police officer to breach their oath to uphold the Constitution and further, that the RCMP has no jurisdiction to set up roadblocks at British Columbia's "borders" and refuse passage into British Columbia, as well as set out by the SCC, Pre-**Charter**, in ***inter alia Winner***;

(e) That the measures and enforcement of the measures under ***Ministerial Orders 172/2021 and 182/2021***, as set out above in subparagraph (d) constitutes Martial Law, Police State measures outside the scope of the Province's jurisdiction under s.92 of the ***Constitution Act, 1867,*** and are within, subject to constitutional restraints, the jurisdiction of the Federal Parliament under s.91(7) and (1) and the "Peace, Order, and Good Government "(POGG)" Power on s.91 of the ***Constitution Act, 1867***, and thus further compels the Police officer to breach their oath to uphold the Constitution;

(f) That the failure and/or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the ***Criminal Code*** or constitute "obstruct peace officer" contrary to s. 129 of the ***Criminal Code*** thus granting the power of arrest to a police officer in the enforcement of a regulatory and/or municipal by-law as enunciated by the ***SCC*** in ***R v. Sharma [1993] 1 S.C.R. 650***;

(g) That the RCMP has no jurisdiction to enforce Provincial Health nor "emergency" measures in the Province of British Columbia;

(h) That the restriction of physical movement and travel bans based on "essential travel", is a violation of s.7 liberty and security of the person, not in accordance with fundamental justice as being void for vagueness, as well as overbreadth, and impossible to enforce, in that it is nearly impossible to ascertain, while respecting an individual's ***Charter*** right to remain silent, and right against arbitrary detention and questioning, to determine whether that person has, "on reasonable and probable grounds" committed an offence;

(i) A police constable or by-law officer cannot, by way of general, blanket order(s), from his/her administrative supervisors, be directed how, when and in what circumstance, to lay a charge against an individual and thus dictate the discretion of that Police officer;

(j) No politician should be directing nor commenting on how, whom or in what circumstances any police officer should enforce nor apply the applicable law;

(k) The Covid emergency measures violate a police constable's duty, as office-holder to Her Majesty the Queen. in that the enforcement of the provisions, and the enforcement provision(s) are of no force and effect and unconstitutional in in allowing, and being directed by superiors, to violate a citizen's constitutional rights under the ***Constitution Act 1867***, as well as the ***Charter***, as follows:

    (i) Violation of freedom of expression, speech, association, assembly and religion contrary to those unwritten constitutional rights recognized by the Supreme Court of Canada through the Preamble to the ***Constitution Act, 1867,*** as well as s.2 of the ***Charter;***

    (ii) Violation of the right to liberty and security of the person through the arbitrary and unreasonable detention, arrest, and interference with the physical liberty and movement of citizens, contrary to the

Liberty of the Subject under ***Habeas Corpus***, as well as ss. 7, 9, and 10(c) of the ***Charter;***

(iii) Violation of the protection against unreasonable search and seizure contrary to s.8 of the ***Charter;***

(iv) Placing police officers in the potential violation, with respect to religious gatherings and services, of committing an offence contrary to s. 176 of the ***Criminal Code;***

362. That the Constitutional Rights of the Plaintiffs have been violated as set out in the within Statement of Claim as set out in the facts, as well as the relief sought, including the relief sought for monetary damages.

363. Such further or other grounds as counsel may advances and this Honourable Court accept.

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Signature of
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Rule 7-1 (1) of the Supreme Court Civil Rules states:

> (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
>
> (a) Prepare a list of documents in Form 22 that lists
>
> (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
>
> (ii) all other documents to which the party intends to refer at trial, and
>
> (b) serve the list on all parties of record.

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*] **Part1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This claim challenges the statutory and constitutional validity of the Covid measures, both Federal and Provincial by way of Declaratory, and other relief.

Part2: THIS CLAIM ARISES FROM THE FOLLOWING:

[*Check one box below for the case type that best describes this case.*]

A personal injury arising out of:

[ ] a motor vehicle accident

[ ] medical malpractice

[ ] another cause

A dispute concerning:

[ ] contaminated sites

[ ] construction defects

[ ] real property (real estate)

[ ] personal property

[ ] the provision of goods or services or other general commercial matters

[ ] investment losses

[ ] the lending of money

[ ] an employment relationship

[ ] a will or other issues concerning the probate of an estate

[ ] a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[*Check all boxes below that apply to this case*]

[ ] a class action

[ ] maritime law

[ ] aboriginal law

[x] constitutional law

[ ] conflict of laws

[ ] none of the above

[] do not know

Part 4:

[*If an enactment is being relied on, specify. Do not list more than 3 enactments.*]

-ss.2, 6, 7, 8, 9, 10, 15, 24 and 52 of the **Constitution Act, 1982**

-Emergency Program Act [RSBC 1996] c. 111 [RSBC 1996] ss. 2,7,8,9,15,24

-Public Health Act [SBC 2008] c. 28

Vancouver
12-Jan-22
REGISTRY

S217586

No. 217586
Vancouver Registry

In the Supreme Court of British Columbia

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

RESPONSE TO CIVIL CLAIM

Filed by: Her Majesty the Queen in right British Columbia, Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General (the "Province" or the "Provincial Defendants")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants' Response to Facts

1. The facts alleged in paragraphs 23-24, 27, 30-37, 39, and 42 of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in paragraphs 25-26, 28-29, 38, and 44-331 of Part 1 of the notice of civil claim are denied.

3. The facts alleged in paragraphs 1-22, 40-41, and 43 of Part 1 of the notice of civil claim are outside the knowledge of the Province.

Division 2 – Defendants' Version of Facts

Introduction

1. The COVID-19 pandemic is an ongoing global pandemic of the novel coronavirus SARS-CoV-2, which causes the illness known as COVID-19. As of January 1, 2022, the global death toll from COVID-19 exceeded 5.4 million. Across Canada there have been over 30,000 deaths and 95,000 hospitalizations. In British Columbia, there have been over 2,400 deaths and 12,900 hospitalizations.

2. Nations, territories, and jurisdictions throughout the world, including British Columbia, have implemented a variety of public health measures designed to combat the spread of infection, protect citizens against serious illness and death, and prevent hospital and critical care facilities from being overwhelmed.

3. The plaintiffs' 391-page notice of civil claim (the "Claim") is a prolix and convoluted document that attempts to challenge the scientific and legal basis for the entirety of British Columbia's response to the COVID-19 pandemic. The Claim is replete with factual inaccuracies, misinformation, groundless accusations against public officials, inflammatory language, and conspiracy theories.

4. Part 1 of the Claim contains over a 1,300 paragraphs and sub-paragraphs. The Claim is not, in its current form, amenable to a comprehensive response from the Province and will be addressed only summarily at this time.

5. In response to the whole of Part 1 of Claim, the Province denies every fact and allegation pleaded by the plaintiffs, unless expressly admitted in Part 1, Division 1 of the Province's response to civil claim.

6. In response to paragraphs 155 and 283 of Part 1 and the whole of the Claim, the COVID-19 pandemic is patently not a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs" such as Bill Gates in order to "install a New World (Economic) Order".

7. In general response to the Claim's allegations of misconduct or bad faith on the part of individually named Provincial Defendants, the Province says these are spurious claims, with no merit whatever, that are unequivocally denied.

The COVID-19 Pandemic

8. The Provincial Health Officer (the "PHO") is the senior public health official for the Province, appointed pursuant to the *Public Health Act,* SBC 2008, c. 28 (the "*Public Health Act*"). The PHO leads the public health response under the *Public Health Act* to public health emergencies in British Columbia, including the transmission of the novel coronavirus SARS-CoV-2 that causes the illness known as COVID-19.

9. The first diagnosis of a case of COVID-19 in British Columbia occurred on January 27, 2020.

10. In response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim:
    a. SARS-CoV-2 is a highly transmissible virus that can be spread by symptomatic and asymptomatic people primarily through virus containing droplets and aerosols that are then inhaled by others;
    b. SARS-CoV-2 has a higher transmissibility rate (i.e., a higher basic reproductive number) compared to influenza;
    c. Ongoing transmission in populations leads to the emergence of new variants of SARS-CoV-2, some of which are more transmissible and/or can cause more severe illness than earlier strains of SARS-CoV-2; and

11. In further response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim, the Province and the PHO have been actively trying to prevent and contain the transmission of SARS-CoV-2 and maintain the ability of the healthcare system to meet the needs of the population for COVID-19 related care and other healthcare, including critical care and surgical services, through a series of comprehensive public health measures, including health promotion, prevention, testing, case identification, isolation of cases and contact tracing, and more recently vaccination and vaccine cards, all based on the best available and generally accepted scientific evidence, including epidemiological data for COVID-19 in British Columbia, nationally and internationally.

12. In further response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim, without adequate public health measures SARS-CoV-2 would spread exponentially.

13. In further response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim, preventing and controlling transmission of communicable diseases is essential to maintaining the provincial health system's ability to deliver quality care and continue the safe delivery of essential health services, for both COVID-19 related care and other healthcare, including critical care and surgical services.

14. In response to paragraphs 306-331 of Part 1 and the whole of the Claim, the presently available vaccines for SARS-CoV-2 are safe, highly effective and an important preventative measure that provides protection for individuals and other persons with whom they come into contact from infection, severe illness, and possible death from COVID-19.

Declarations by the PHO and the Minister of Public Safety and Solicitor General

15. On March 17, 2020, the PHO declared the transmission of the infectious agent SARS-CoV-2, which had caused cases and outbreaks of COVID-19 within British Columbia, to be a "regional event" as defined under s. 51 of the *Public Health Act* (the "PHO Declaration").

16. Pursuant to s. 51 of the *Public Health Act*, a regional event is that which poses "an immediate and significant risk to public health."

17. In response to paragraphs 289 and 331 of Part 3 and the whole of the Claim, the designation of a regional event allows the PHO to exercise powers under Part 5 of the *Public Health Act,* including the power to make oral and written public health orders in response to the COVID-19 pandemic.

18. On March 18, 2020, the Minister of Public Safety and Solicitor General ("MPSSG") declared a state of provincial emergency under the *Emergency Program Act*, RSBC 1996 c.111 (the "*Emergency Program Act*") due to the COVID-19 pandemic. The declaration of emergency was extended numerous times before it eventually expired on June 30, 2021 (the "MPSSG Declaration").

19. In response to paragraphs 130-151 of Part 1 and the whole of the Claim, the declaration of a state of emergency allows the MPSSG to exercise powers under Part 3 of the *Emergency Program Act*, including section 10(1) which empowers the MPSSG to "do all acts and implement all procedures he considers necessary to prevent, respond to or alleviate the effects of the emergency."

Orders issued by the PHO

20. From March 2020 to date, the PHO has made orders under the *Public Health Act* in response to the COVID-19 regional event, including new orders relating to commercial establishments, types of gatherings, prescribed industries, prescribed recreational activities, and preventative health measures and orders varying, revoking or amending prior orders in response to the changing circumstances of the COVID-19 pandemic in British Columbia (the "PHA Orders").

21. In response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, the aim of the PHA Orders is to prevent and contain the transmission of SARS-CoV-2 and maintain the ability of the health care system to meet the needs of the population for COVID-10 related care and other healthcare, including critical care and surgical services, based on the best available and generally accepted scientific evidence and epidemiological data at the time the particular order is issued.

22. In further response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, over the course of the pandemic, the scientific community and public health officials have learned that the likelihood of transmission of SARS-CoV-2 is greater when people, particularly unvaccinated and partially vaccinated people, are interacting:

a. in communal settings (e.g. gatherings, events, celebrations), other than in transactional settings (e.g. at retail outlets);

b. in close proximity to each other;

c. in crowded settings;

d. in indoor settings; and

e. when speaking, and especially when singing, chanting or engaging in excited expression.

23. In further response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, the overriding concern is to ensure that PHA Orders and other public health guidance protect the most vulnerable members of society while minimizing social disruption and preserving the ability of the healthcare system to meet the needs of the population for COVID-19 related care and other healthcare, including critical care and surgical services.

24. In further response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, in appropriate circumstances, many of the PHA Orders include a section that advises people who are affected by an order that they can request a variance by making a request for reconsideration to the PHO under s. 43 of the *Public Health Act*.

25. In response to paragraphs 167-189 of Part 1 and the whole of the Claim, the Province denies that the PHA Orders have caused the impacts and effects alleged in the Claim and further deny that any effects that the PHA Orders may have had give rise to or support the legal causes of actions advanced, or the remedies sought, in the Claim.

Orders issued by the MPSSG

26. From March 2020 to date, the MPSSG has made orders under the *Emergency Program Act* in response to the declared provincial state of emergency due to COVID-19, including new orders and orders revoking or amending prior orders in response to the changing circumstances of the COVID-19 pandemic in British Columbia (the "MPSSG Orders").

27. In response to paragraphs 144-151 of Part 1 and the whole of the Claim, the MPSSG Orders have been issued in relation to a wide-range of topics which, in the view of the MPSSG, were necessary to address, prevent, respond to or alleviate the effects of the COVID-19 pandemic in British Columbia including, but not limited to:

a. the adjustment of limitations periods applying to court proceedings;

b. travel;

c. electronic witnessing of wills and other documents;

d. the facilitation of local government meetings and bylaw processes and electronic attendance at statutory meetings;

e. the ongoing provision of critical services, essential goods and supplies; and

f. the maximum charges to be applied for food delivery services.

28. In further response to paragraph 144-151 of Part 1 and the whole of the Claim, the *COVID-19 Related Measures Act*, SBC 2020, c. 8 ("*CRMA*") enacted the MPSSG Orders listed in its Schedules 1 and 2 as legislative provisions. Many of the MPSSG Orders identified in the Claim have legislative force by virtue of *CRMA* as of March 17, 2020 (for M139/2020) or as of the date that the MPSSG Order was issued under the *Emergency Program Act*.

29. In further response to paragraphs 144-151 of Part 1 and the whole of the Claim, the Province denies that the MPSSG Orders have caused the effects and impacts alleged in the Claim and further deny that any effects that the MPSSG Orders may have had give rise to or support the legal causes of actions advanced, or the remedies sought, in the Claim.

Part 2: RESPONSE TO RELIEF SOUGHT

30. The defendants consent to the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **none.**

31. The defendants oppose the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **all.**

32. The defendants take no position on the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **none.**

Part 3: LEGAL BASIS

33. The Claim is a scandalous, frivolous, and vexatious pleading. The Claim fails to meet the basic requirements for pleadings and is an abuse of the Court's process. The Claim should be struck in accordance with Rule 9-5(1) of the *Supreme Court Civil Rules.*

34. The Province denies all of the allegations set out in Part 3 of the Claim.

35. The impugned PHA Orders, MPSSG Orders, Declarations, and actions or conduct of the Provincial Defendants specified in the Claim (the "Impugned Orders and Actions") were implemented or undertaken in good faith, in accordance with the best available and generally accepted medical science, to minimize the spread of the novel SARS-CoV-2 virus and associated illness and death, with an overarching goal of protecting the health and safety of British Columbians during an unprecedented global pandemic.

36. The Province denies that any of ss. 30-32 or 39 of the *Public Health Act* or s. 17 of the *Infants Act,* RSBC. 1996, c. 223 (the "Impugned Provisions"), or the Impugned Orders and Actions set out in the Claim, violate the *Charter of Rights and Freedoms,* including ss. 2, 6, 7, 8, 9, and 15, are *ultra vires* the Province's jurisdiction under s. 92 of the *Constitution Act, 1867*, or are otherwise unlawful or unconstitutional.

37. In the event any of the Impugned Provisions or Impugned Orders and Actions infringe upon *Charter* rights, which is firmly denied, such limits are demonstrably justified in a free and democratic society and saved by s. 1 of the *Charter*.

Defendants' address for service:

Ministry of Attorney General
Legal Services Branch
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3
Attention: Mark Witten

Fax number address for service (if any): (604) 660-6797

E-mail address for service (if any): mark.witten@gov.bc.ca

Date: January 11, 2022

Solicitor for the Provincial Defendants
Mark Witten

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
  - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
  - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

Vancouver
14-Oct-21
REGISTRY

No. VLC-S-S-217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

RESPONSE TO CIVIL CLAIM

Filed by: Vancouver Island Health Authority and Providence Health Care (The "Health Authority Defendants")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants' Response to Facts

1. The facts alleged in none of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in all of Part 1 of the notice of civil claim are denied.

3. The facts alleged in none of Part 1 of the notice of civil claim are outside the knowledge of the Health Authority Defendants.

Division 2 –Health Authority Defendants' Version of Facts

4. Vancouver Island Health Authority is regional health board constituted pursuant to the *Health Authorities Act* R.S.B.C. 1996 c. 180, ("VIHA").

5. Providence Health Care is not a legal entity. Providence Health Care Society ("Providence") is a non-profit organization incorporated pursuant to the *Society Act*, RCBC 1996, c. 433.

6. The Health Authority Defendants deny every allegation of fact contained in the notice of civil claim and put the plaintiffs to strict proof thereof.

7. At all material times, the Health Authority Defendants provided appropriate and reasonable service and/or care.

8. At all material times, the Health Authority Defendants complied with the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8, *Emergency Program Act*, R.S.B.C. 1996, c. 111, regulations thereto, and Ministerial Orders.

Division 3 – Additional Facts

9. None at this time.

Part 2: RESPONSE TO RELIEF SOUGHT

10. The Health Authority Defendants oppose the granting of the relief sought in all of Part 2 of the notice of civil claim.

11. The Health Authority Defendants seek an order dismissing the plaintiffs' action against them with costs.

Part 3: LEGAL BASIS

12. The Health Authority Defendants deny every allegation of law contained in the notice of civil claim and put the plaintiffs to strict proof thereof.

13. The allegations contained in the notice of civil claim do not disclose a cause of action as against the Health Authority Defendants. There is no basis for granting the orders sought.

14. The notice of civil claim filed by the plaintiffs:

    a. discloses no reasonable claim,

    b. is unnecessary, scandalous, frivolous or vexatious,

    c. will prejudice, embarrass or delay the fair trial or hearing of the proceeding,

    d. is prolix and improperly pleads evidence; and

    e. is otherwise an abuse of the process of the court,

    and ought to be dismissed as against the Health Authority Defendants on these basis.

15. In further answer to the whole of the notice of civil claim, no action for damages lies or may be brought against the Health Authority Defendants, as all of their allegedly impugned actions were rendered pursuant to the *COVID-19 Related Measures Act* and/or the *Emergency Program Act*, R.S.B.C. 1996, c. 111, and the Health Authority Defendants plead and rely upon Section 5 of the *COVID-19 Related Measures Act*, and section 18 of the *Emergency Program Act*, R.S.B.C. 1996, c. 111. and amendments, regulations, and ministerial orders thereto, including Ministerial Order 120/2020 – Protection Against Liability (COVID-19) Order No. 2.

16. Further and in the alternative the *Canadian Charter of Rights and Freedoms* does not apply to the Health Authority Defendants.

17. In the further alternative and in further response, there is no basis in fact or law for a claim against the Health Authority Defendants pursuant to the *Canadian Charter of Rights and Freedoms.*

18. In the further alternative and in further response, the Health Authority Defendants deny that they breached any of the plaintiffs' rights under the *Canadian Charter of Rights and Freedoms.*

19. The Health Authority Defendants specifically deny that they owe the plaintiffs, or any of them, a duty of care (common law, statutory, or otherwise) as alleged or at all.

20. If the Health Authority Defendants did owe the plaintiffs, or any of them, a duty of care (common law, statutory, or otherwise), which is not admitted but denied, the Health Authority Defendants deny that they breached any duty to the plaintiffs (common law, statutory, or otherwise), or any of them.

21. In the alternative, no act or omission on the part of the Health Authority Defendants or on the part of any of their employees, agents or servants constituted negligence or breach of

any duty (common law, statutory, or otherwise) owed to the plaintiffs, or any of them, as alleged or at all, and any service, care or treatment provided by their employees, servants, or agents, in respect of the service, care or treatment provided to the plaintiffs met the applicable standard of care and was in accordance with standard and approved practice and procedures and was rendered competently with reasonable care, skill and diligence, and without fault or neglect, in the manner of a reasonably prudent health authority.

22. The Health Authority Defendants deny that the plaintiffs, or any of them, suffered, or continue to suffer, any injury, loss, damage or expense which is recoverable at law and put the plaintiffs to strict proof thereof.

23. In the alternative, the Health Authority Defendants say that if the plaintiffs, or any of them, did suffer injury, loss, damage or expense, which is not admitted but denied, this injury, loss, damage or expense was not caused or contributed to by any acts or omissions of the Health Authority Defendants, or their employees, servants, or agents.

24. Decisions regarding diagnosis, treatment, and level of care a patient receives are solely made by physicians. Physicians are independent contractors and not employees of the Health Authority Defendants. The Health Authority Defendants are not vicariously liable for any acts or omissions of the independent contractor physicians.

25. The Health Authority Defendants says that any care or treatment rendered to the plaintiffs by its employees, servants or agents, was performed and provided pursuant to physicians' orders.

26. If the plaintiffs suffered any injury, loss, damage or expense, as alleged or at all, which is denied, then:

    f. such losses would not have reasonably been predicted or foreseen by a reasonable health authority or its employees, servants or agents;

    g. the Health Authority Defendants could not have prevented, avoided, or minimized the plaintiffs' loss by the exercise of reasonable care;

    h. these were caused by the plaintiffs' own negligence, or alternatively the plaintiffs' negligence was a contributing cause, the particulars of which will be plead as soon as they become known to the Health Authority Defendants, in which case the Health Authority Defendants seeks an apportionment of fault at the trial of this matter pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333; and,

    i. such losses were caused by the fault of other parties for whom the Health Authority Defendants are not responsible or, in the alternative, such fault contributed to the plaintiffs' alleged losses, the particulars of which will be plead when they become known to the Health Authority Defendants, in which case the

Health Authority Defendants pleads and relies on the *Negligence Act*, R.S.B.C. 1996, c. 333, and shall seek apportionment of fault at the trial of this proceeding.

27. In the alternative, if the plaintiffs suffered, or will suffer, any injury, loss, damage or expense, which is not admitted but specifically denied, the plaintiffs failed to mitigate their losses by failing to take all reasonable steps to minimize or avoid such loss, damage, or expense.

Health Authority Defendants' address for service:
Carfra Lawton LLP
6th Floor - 395 Waterfront Crescent
Victoria BC V8T 5K7

Fax number address for service (if any): (250) 381-7804

E-mail address for service (if any): N/A

Dated: 14/Oct/2021

Signature of Timothy J. Wedge
☐ defendant ☑ lawyer for the Vancouver Island Health Authority and Providence Health Care Society

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> (a) prepare a list of documents in Form 22 that lists
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> (i) all documents that are or have been in the party’s possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
>
> (ii) all other documents to which the party intends to refer at trial, and
>
> (b) serve the list on all parties of record.

Vancouver
12-Jan-22
REGISTRY

No. S217586
Vancouver Registry

In the Supreme Court of British Columbia

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

NOTICE OF APPLICATION

(Application Pursuant to Rule 9-5 of the Supreme Court Civil Rules)

Name of Applicants: Her Majesty the Queen in right British Columbia (the "Province"); Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General (collectively, the "Provincial Defendants")

To: The Plaintiffs

c/o ROCCO GALATI
Rocco Galati Law Firm Professional Corporation
1062 College Street
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Tel: (416) 530-9684
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c/o LAWRENCE WONG
Barrister & Solicitor
210-2695 Granville Street
Vancouver, B.C., V6P 4Z7
Tel: (604) 739-0118
Fax: (604) 739-0117

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, at 10:00 am on February 3, 2022 via MS Teams for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order striking the whole of the Plaintiffs' Notice of Civil Claim filed in this matter on August 17, 2021, without leave to amend.

2. Costs.

Part 2: FACTUAL BASIS

1. On August 17, 2021, the Plaintiffs filed a 391-page Notice of Civil Claim (the "Claim") that attempts to challenge the scientific and legal basis for the entirety of British Columbia and Canada's response to the COVID-19 pandemic. Part 1 of the Claim contains over 1,300 paragraphs and sub-paragraphs.

2. In addition to Her Majesty the Queen in Right of the Province and the Attorney General of Canada, the Plaintiffs have also named as defendants: Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, the Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, and TransLink (British Columbia).

3. The Claim is a prolix and convoluted document that is replete with groundless accusations against public officials, inflammatory language, and conspiracy theories.

4. The Claim characterises the COVID-19 pandemic as a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs" such as Bill Gates in order to "install a New World (Economic) Order" (Part 1, paras. 155, 283).

Part 3: LEGAL BASIS

5. The Plaintiffs' Claim is deficient in form and substance. It is a scandalous, frivolous, and vexatious pleading that fails to meet the basic requirements for pleadings and is an abuse of the Court's process. The Claim should be struck in accordance with Rule 9-5(1) of the *Supreme Court Civil Rules*, without leave to amend.

Pleadings Generally

6. Supreme Court Civil Rule ("Rule") 3-1 provides, in part:

> **Contents of notice of civil claim**
>
> (2)A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the Plaintiff against each named defendant;
>
> (c) set out a concise summary of the legal basis for the relief sought;
>
> ...
>
> (g) otherwise comply with Rule 3-7. [emphasis added]

7. Rule 3-7 provides, in part:

> **Pleading must not contain evidence**
>
> (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
>
> ...
>
> **Pleading conclusions of law**
>
> (9)Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
>
> ...
>
> **General damages must not be pleaded**
>
> (14)If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading. ...

8. The function of pleadings is to clearly define the issues of fact and law to be determined by the court. The plaintiff must state, for each cause of action, the material facts. Material facts are those facts necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

   Homalco Indian Band v. British Columbia, [1998] B.C.J. No. 2703 (S.C.), para. 5

9. As the Court of Appeal recently held in *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362, para 44:

> None of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the *Rules* and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

Application to Strike

8. Rule 9-5(1) provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> > (a) it discloses no reasonable claim or defence, as the case may be,
> >
> > (b) it is unnecessary, scandalous, frivolous or vexatious,
> >
> > ...
> >
> > (d) it is otherwise an abuse of the process of the court ...

9. A pleading may be struck under Rule 9-5(1) if it is plain and obvious that the pleading contravenes any of Rule 9-5(1)(a) through (d).

Knight v. Imperial Tobacco Canada Ltd., 2011 SCC 42 at para. 17.

10. Evidence is inadmissible on an application under Rule 9-5(1)(a) but may be considered on an application under the remaining paragraphs of Rule 9-5(1). The Province relies on subparagraphs 9-5(1)(a)(b) and (d).

Rule - 9-5(1)(a) – The Notice of Civil Claim Discloses No Reasonable Claim

11. The Claim is premised upon non-justiciable questions and relies heavily upon international treaties, *Criminal Code* provisions, and unknown causes of action that are incapable of disclosing a reasonable cause of action for the purposes of Rule 9-5(1)(a).

12. For example, the Plaintiffs' petition the Court for declarations pertaining to questions of science, public health, and conspiracy theories that are not justiciable, including:

    a. "A Declaration that the science, and preponderance of the scientific world community, is of the consensus that: a) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARS-CoV-2 which leads to COVID-19" (Part 2, para. 312(1));

    b. "A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a bona fide, nor an actual "pandemic", and declaration of a bona fide pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs" (Part 2, para. 302);

    c. "A Declaration that administrating medical treatment without informed consent constitutes experimental medical treatment" (Part 2, para. 321);

    d. "A Declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to de facto put most small businesses and activities out of business" (Part 2, para. 307); and

   e. "A Declaration that the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are: a) not scientifically, or medically, based; b) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, as a mere screening test, of 3.5% accuracy" (Part 2, para. 311).

13. The Plaintiffs allege numerous violations (and non-violations) of the *Criminal Code* that are not properly raised in a civil action (*Simon v. Canada,* 2015 BCSC 924, para. 45), including:

    a. "Crime[s] against humanity under the Criminal Code of Canada" (Part 1, para. 299; Part 3, para. 333);

    b. "Medical experimentation" that constitute "Criminal act[s] … pursuant to the War Crime and Crimes against Humanity Act" (Part 2, para. 292(a));

    c. "Criminal extortion" (Part 1, para. 261);

    d. "The 'extra' suicides and drug over-doses undisputedly tied to Covid-measures constitutes criminal negligence causing death" (Part 1, para. 264);

    e. "Criminal vaccine experiments causing horrific damage to innocent children in India, Pakistan, Africa and other developing countries" (Part 1, para. 211(a));

    f. A Declaration that failure and/or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the Criminal Code or constitute "obstruct peace officer" contrary to s. 129 of the Criminal Code (Part 2, para. 323(f)).

14. The Plaintiffs allege numerous violations of international legal instruments, unwritten constitutional principles, and causes of action unknown to law that are not actionable in Canadian courts (*Li v. British Columbia*, 2021 BCCA 256, paras. 107-109; *Toronto v. Ontario,* 2021 SCC 34, para. 5), including the following:

    a. "Vaccine mandates violate 'The Universal Declaration of Bioethics and Human Rights', the Nuremberg Code, professional codes of ethics, and all provincial health Acts." (Part 1, para. 260);

    b. "Administering medical treatment without informed consent constitutes experimental medical treatment contrary to the Nuremberg Code and Helsinki Declaration of 1960" (Part 1, para. 299; Part 3, para. 333);

    c. "Vesting an indefinite emergency power in [various defendants] constitutes constitutional violation of 'dispensing with Parliament, under the pretense of Royal Prerogative', contrary to the English Bill of Rights (1689) as read into our unwritten constitutional rights through the Pre-Amble of the Constitution Act, 1867" (Part 2, para. 295; Part 3, para. 336);

    d. "The declared state of emergency, and measures implemented thereunder contravene" … "the same parallel unwritten constitutional rights, enshrined through the Pre-Amble of the Constitution Act, 1867" (Part 1, para. 283(c)(iv);

e. "[T]hat (solitary confinement) isolation/quarantine of asymptomatic children" violates the "*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") and the Convention on the Rights of the Child*" (Part 2, para. 311(e); and

f. "The COVID Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, … constitute a constitutional violation of the abdication of the duty to govern" (Part 2, para. 296; Part 3, para. 326).

15. To the extent that the Claim attempts to plead causes of action that are known to law, such as breaches of *Charter* rights or the separation of powers, the Claim fails to set out material facts which, if true, support these claims.

16. The general rule that facts pleaded should be accepted as true for the purposes of a strike application does not apply in a "case like this where the notice of civil claim is replete with assumptions, speculation, and in some instances, outrageous allegations. The law is clear that allegations based on assumption and speculation need not be taken as true."

Willow v. Chong, 2013 BCSC 1083, para. 19

See, also, Simon v. Canada, 2015 BCSC 924, para. 54

17. The Plaintiffs have failed to plead the *concise* statement of *material* facts that is necessary to support any complete cause of action. The *Charter* claims are inextricably bound up in a prolix, argumentative, and wildly speculative narrative of grand conspiracy that is incapable of supporting a viable cause of action. It is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from another, or conjecture and conspiracy from asserted facts.

Fowler v. Canada (Attorney General), 2012 BCSC 367, para. 54

Simon, supra, paras 54-59

18. It is plain and obvious that the Claim, as pleaded, fails to disclose a reasonable cause of action.

9-5(1)(b) The Notice of Civil Claim is Scandalous, Frivolous and Vexatious

Scandalous and Embarrassing

19. A pleading is scandalous if it does not state the real issue in an intelligible form and would require the parties to undertake useless expense to litigate matters irrelevant to the claim.

Gill v. Canada, 2013 BCSC 1703, para. 9

20. A claim is also scandalous or embarrassing if it is prolix, includes irrelevant facts, argument or evidence, such that it is nearly impossible for the defendant to reply to the pleading and know the case to meet. Pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck.

Gill, supra para. 9

Strata Plan LMS3259 v. Sze Hang Holding Inc., 2009 BCSC 473, at para. 36

Kuhn v. American Credit Indemnity Co., [1992] B.C.J. No. 953 (S.C.)

21. The Claim is a scandalous pleading because it is prolix, confusing, and nearly impossible to respond to:
    a. The 391-page Claim attempts to plead dozens of causes of action and *Charter* breaches and seeks over 200 declarations. It is, as a result, nearly impossible to know the case to be met.
    b. The Claim contains extensive passages of completely irrelevant information, including:
        i. A COVID-19 timeline beginning in 2000 with Bill Gates stepping down as Microsoft CEO (Part 1, para 44) and including such other events as Bill Gates pledging $10 billion in funding in 2010 for the World Health Organization and announcing the "Decade of Vaccines" (Part 1, para. 50);
        ii. A lengthy narrative describing an alleged "global political agenda behind [the] unwarranted measures" (Part 1, paras. 207-300);
        iii. A detailed 81-page narrative about the individual Plaintiffs dealings with government employees, health care professionals, and police officers (Part 1, pages 1-81).
    c. The Claim relies extensively on the *Criminal Code of Canada* (Part 1, paras. 11(b)(h), 115, 141(h), 207(l), 299; Part 2 para. 291, Part 3 paras. 322(k)(iv), 323(f), 333, 361(f)(k)(iv));
    d. The Claim contains lengthy and convoluted legal arguments (i.e., Part 1 page 108 para. 141; Part 2, paras. 286, 324, 358);
    a. The Claim raises allegations against individuals and entities who are not named as parties such as Bill Gates (Part 1, paras. 216-222), Facebook, Amazon, Google, Yahoo (Part 1, paras. 174, 216), Doug Ford (Part 1, para. 152(c)), and others.
22. The Claim is also a scandalous pleading because it fails to meet the basic requirements for pleadings under the *Rules*.
    a. The Claim contains over 1600 paragraphs and subparagraphs. It fails to set out a concise statement of the material facts, relief sought, and legal basis in violation of Rules 3-1(1)-(3);
    b. The Claim pleads evidence in contravention of Rule 3-7(1), including dozens of lengthy quotations from various COVID-19 commentators and activists and hundreds of footnotes to miscellaneous websites, articles, policy documents, and articles;
    c. The Claim pleads conclusions of law, unsupported by facts, in contravention of Rule 3-7(9);
    d. The Claim appears to plead amounts of damages in contravention of Rule 3-7(14).

Frivolous

23. A pleading is frivolous if it is without substance, is groundless, fanciful, 'trifles with the court' or wastes time".

Borsato v. Basra, [2000] B.C.J. No. 84, 43 C.P.C. (4th) 96, at para 24

24. The Claim is a frivolous pleading because it promotes fanciful conspiracy theories about the origins of the COVID-19 pandemic, the efficacy of COVID-19 measures, and the motivations of the Provincial Defendants. These allegations include, by way of example only:

    a. "The Plaintiffs state, and the fact is, that the illegal actions, and decrees issued by The Defendants and other public officials were done, in abuse and excess of their offices, knowingly to propagate a groundless and falsely-declared 'pandemic'' … designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs." (Part 1, para. 155);

    b. "The Plaintiffs state, and the fact is, that the non-medical aims and objectives to declare the "pandemic", for something it is not beyond one of many annual seasonal viral respiratory illnesses, was to, inter alia, effect the following non-medical agendas, by using the COVID- 19 [*sic*] as a cover and a pretext: (a) To effect a massive bank and stock market bail-out needed because the banking system was poised to again collapse since the last collapse of 2008 in that the World debt had gone from $147 Trillion dollars in 2008 to $321 Trillion dollars in January, 2020" (Part 1, para 208(a));

    c. "The fact is that the pandemic pretense is there to establish a "new normal", of a New (Economic) World Order, with a concurrent neutering of the Democratic and Judicial institutions and an increase and dominance of the police state; (c) A massive and concentrated push for mandatory vaccines of every human on the planet earth with concurrent electronic surveillance by means of proposed: (i) Vaccine "chips", bracelets", and "immunity passports"; (ii) Contract- tracing via cell-phones; (iii) Surveillance with the increased 5G capacity; (d) The elimination of cash- currency and the installation of strictly digital currency to better-effect surveillance." (Part 1, para. 208(b)-(d)); and

    d. "The Plaintiffs state that, and fact is, this global vaccination scheme which is being propelled and pushed by the Defendants, is with the concurrent aim of total and absolute surveillance of the Plaintiffs and all citizens." (Part 1, para. 308)

Rule 9-5(1)(a) and (d) – The Claim is Vexatious and an Abuse of Process

25. Little distinction exists between a vexatious action and one that is an abuse of process as the two concepts have strikingly similar features.

Dixon v. Stork Craft Manufacturing Inc., 2013 BCSC 1117

26. Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.),* [2003] 3 S.C.R. 77, the court stated at para. 37:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

27. Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights. Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

Lang Michener Lash Johnston v. Fabian, [1987] O.J. No. 355, at para. 19

28. There are a multitude of bases upon which to conclude that the Claim is an abuse of process. These include the Plaintiffs' attempt to use the judicial process to adjudicate conspiracy theories and seek declarations on non-justiciable questions of medical science and public health policy.

29. More concerning, the Claim bears the hallmarks of a vexatious and abusive claim that is intended to harass and oppress the parties (and non-parties):

    a. The Claim advances against the Defendant Provincial Health Officer, without factual foundation, spurious allegations of "crimes against humanity" in relation to the implementation of COVID-19 measures and international public health work in the early 2000s (Part 1, para. 293);

    b. The Claim advances irrelevant allegations about alleged conflicts of interests or hypocritical conduct relating to the private lives of both parties and non-parties (Part 1 para 8(k), 44, 154(c)-(f), 155, 207(b), 298);

    c. The Plaintiffs make broad, sweeping criminal allegations against a large number of named and unnamed government employees and officials (Part 1, para 11, 141(h), 151(d), 261 (pg. 234) 264 (pg. 235) 300(d));

    d. The Claim uses inflammatory and inappropriate language to describe alleged actions of Defendants and public officials such as "egregious crimes against humanity", (Part 1 para. 290) "fraudulent" (Part 1 para. 251), or "Stalinist censorship" (Part 1 para. 280 (pg. 308), or to suggest that politicians or officials have "no clue" (Part 1 para. 154), are "wholly unqualified" (Part 1 para. 154) or are "outright lying" (Part 1 para. 279 (pg. 240)).

30. The Province submits the Claim has been brought for an improper purpose.

31. The Plaintiffs and their counsel must know, or ought to know, that a 391-page Claim seeking over 200 declarations concerning alleged criminal conduct and the efficacy of public health measures "cannot succeed … [and] would lead to no possible good": *Lang Michener*, *supra.*

32. The Claim is intended, at least in part, to intimidate and harass public officials and politicians, including the Provincial Health Officer, by advancing spurious, public allegations of criminal conduct, conflicts of interest, and ulterior motives. This intention is further corroborated by the Plaintiff Action4Canada's simultaneous campaign to

encourage individuals to serve government officials and politicians with "Notices of Liability" for their actions in responding to the COVID-19 pandemic (Affidavit #1 of Rebecca Hill, Ex. G, I).

33. The Claim is also intended, at least in part, to consolidate, publicize, and amplify COVID-19 conspiracy theories and misinformation. The Claim is a book-length tirade against the entirety of British Columbia's respond to the pandemic, with dozens of quotes from, and hundreds of footnotes to, anti-mask, anti-lockdown, and anti-vaccine resources. Both Action4Canada and its counsel have promoted the Claim online and on social media (Affidavit #1 of Rebecca Hill, Ex. D, K).
34. These are improper purposes to file and prosecute a civil action. There can be no question that the Claim is an abuse of process. Permitting this litigation to proceed would violate the principles of judicial economy and the integrity of the administration of justice.
35. Providing the Plaintiffs with an opportunity to redraft their pleadings would only further this abuse of the Court's process.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Rebecca Hill, made on January 10, 2022.

The Applicant estimates that the application will take 1 day.

[x] This matter is within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within the time for response to application described below,

(a) file an Application Response in Form F32;

(b) file the original of every affidavit, and of every other document, that

  (i) you intend to refer to at the hearing of this application, and

  (ii) has not already been filed in the family law case; and,

(c) serve on the applicant 2 copies, and on every other party one copy, of the following

  (i) a copy of the filed Application Response,

  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person, and

  (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: January 11, 2022

Signature of lawyer for the applicant
Mark Witten

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs .... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

....

....

....

Date: ....

Signature of [ ] Judge [ ] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts

This **NOTICE OF APPLICATION** is prepared by **Mark Witten**, Barrister & Solicitor, of the Ministry of Attorney General, whose place of business and address for service is 1301 - 865 Hornby Street, Vancouver, British Columbia, V6Z 2G3; Telephone: (604) 660-5476; Facsimile: (604) 660-6797

Vancouver
18-May-22
REGISTRY

No. S217586
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General
British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester,** Peter **Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)**

Defendants

AMENDED APPLICATION RESPONSE

Application Response of: The Plaintiffs (Respondents)

THIS IS A RESPONSE TO THE Notice(s) of Application of:

(a) Her Majesty the Queen in Right of British Columbia, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education; and Mike Farnworth, Minister of Public Safety and Solicitor General ("Provincial

Defendants"); which application was filed April 28th, 2022, and received by the Plaintiffs (Respondents) April 29th, 2022;

(b) The Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("The Federal Defendants" or "Canada");

(c) Peter Kwok and Translink;

(d) Vancouver Island Health Authority and Providence Health Care.

All of which Applications, and Application Responses, are scheduled to be heard together, to the presiding judge or master, at the courthouse at 800 Smithe Street, Vancouver, B.C., on May 31, 2022, at 9:45am.

TAKE NOTICE THAT the Application Response will be made by the Plaintiffs(Respondents) by Microsoft Teams.

PART 1: ORDERS CONSENTED TO

The Respondent Plaintiffs do not consent to any order sought by the Applicant Defendants.

PART 2: ORDERS OPPOSED

The Respondent Plaintiffs oppose the motion to strike in whole and in part.

PART 3- ORDERS ON WHICH NO POSITION IS TAKEN

N/A

PART 4: FACTUAL BASIS:

The factual basis is as plead and set out in the Notice of Liability (Claim) filed by the Plaintiffs.

PART 5- LEGAL BASIS

1. It is submitted, as reflected by the Plaintiff's Notice of Liability, filed August 17th, 2021, that:

   (a) all material facts necessary to support the causes of action have been properly plead and set out;

   (b) that all the causes of action have been fully and properly plead; and

   (c) there is no basis, in law to strike they Notice of Liability (Claim) in whole or in part.

- **Motion to Strike – General Principles**

2. It is submitted, by the Supreme Court of Canada, and the Appellate Courts, that:

   (a) the facts pleaded by the Plaintiff must be taken as proven and fact:

   - ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735***
   - ***Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC)***
   - ***Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441***
   - ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959***
   - ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279***
   - ***Trendsetter Ltd. v. Ottawa Financial Corp. (1989) 32 O.A.C. 327 (C.A.)***
   - ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.)***
   - ***Canada v. Arsenault 2009 FCA 242***
   - ***R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42, [2011] 3 S.C.R. 45***

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
>
> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."
>
> **- *Nelles, supra,* p. 627**

and rephrased, re-iterated by the Supreme Court of Canada, in ***Dumont***, wherein the Court stated that,

> "***It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'***.
>
> Issues as to the proper interpretation of relevant provisions…and the effect…upon them would appear to be better determined at trial where a proper factual base can be laid."
>
> **- *Dumont, supra.* p. 280**

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."
>
> **- *Hunt, supra (SCC)***

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
>
> …

> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the Plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the Plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the Plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.
>
> - ***Hunt, supra at p. 14***

and further that:

> [21] Valuable as it is, the Motion to Strike **is a tool that must be used with care.** The Law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedly Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like that one at issue in *Donoghue v. Stevenson***.** therefore, on a Motion to Strike, it is not determinative that the law has not yet recognized the particular claim. **The Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.**
>
> - ***R. v. Imperial Tobacco Canada Ltd., supra at para 21.***

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";

- ***Trendsetter Ltd**, **supra,*** **(Ont. C.A.).**

(c) (i) and that a statement of claim should not be struck just because it is "novel";

- ***R. v. Imperial Tobacco Canada Ltd., supra.***
- ***Nash v. Ontario (1995) 27 O.R. (3d) (C.A.)***
- ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)***
- ***Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)***
- ***Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";

- ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)

(iii) and that to strike, the Defendant must produce a "decided case ***directly on point*** from the same jurisdiction demonstrating that the very same issue has been ***squarely dealt with and rejected***";

- ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div).

(d) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.

- ***Grant v. Cormier – Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.)
- ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)

- **Declaratory Relief Sought**

3. It is submitted that the Declaratory relief is plead with respect to the material facts and available to the Plaintiffs.

4. The Plaintiffs submit that Declaratory relief goes to the crux of the constitutional right to judicial review, which right the Supreme Court of Canada has re-affirmed in ***Dunsmuir:***

> **28** By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> **…**
>
> **31** The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". ***In short, judicial review is constitutionally guaranteed in Canada,*** particularly with regard to the definition and enforcement of jurisdictional limits..,.

5. This Court, in ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,*** re-affirmed the ample and broad right to seek declaratory relief, in quoting the Supreme Court of Canada in ***Solosky***:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> **- *Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830***

6. More recently, the Supreme Court of Canada, in the ***Manitoba Metis*** case reaffirmed the breadth of the right to declaratory relief to rule that it cannot be statute-barred:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. ***The constitutionality of legislation has always***

> ***been a justiciable question:*** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. ***The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).
> …
> [140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Charter* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. ***The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.
> …
> [143] ***Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available***. As argued by the intervener Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: factum, Assembly of First Nations' at para. 31. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.
>
> - ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

7. It has been long-stated, by the Supreme Court of Canada that "The constitutionality of legislation has always been a justiciable issue".

> ***- Thorson v. AG of Canada [1975] 1 SCR 138, @ p. 151***
> ***- Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, @ paragraph 134***

8. It is further submitted that, with respect to the mandatory order sought against crown actions, including the named word, based on constitutional grounds, that such remedies are available, pre as well as post Charter.

9. It has always been trite law, even prior to the ***Charter***, that where constitutional rights are engaged, the Courts may issue ***mandamus*** to the exercise of the highest order of discretion, namely royal ***fiat***.

- ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC)
- ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44It

wherein the Court ruled @ pp. 545-6:

> …
> All executive powers, whether they derive from statute, Common Law or prerogative, must be adapted to conform with constitutional imperatives.
> …
> I need not consider which of these views should prevail in ordinary cases. For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution … .

- ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC)

which ruling has been echoed by the Supreme Court of Canada in the ***Reference re Secession of Quebec***.

- ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217, paragraphs 32, 44, 70-72.

10. It is further submitted that other relief for misfeasance public office is properly plead and remedies available.

- Roncarelli v. Duplessis, [1959] S.C.R. 121

- Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263, 2003 SCC 69

11. It is further submitted that relief by way of the tort of conspiracy is also properly plead and available as set out, **inter alia**, by the Supreme Court of Canada.

- Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959

12. It is lastly submitted that all other relief, including in monetary damages, without proof of **mala fides**, has been plead and available.

- ***Ward*** v. ***Canada*** [1993] 2 S.C.R. 689 (SCC) @ pp.724-25

13. It is lastly submitted that the Respondents intend to file a full written argument as permitted by the **Rules**, for the return date of the within application.

PART 6: MATERIAL TO BE RELIED ON

14. The Respondents (Plaintiffs) intend to rely on the following:

(a) the facts and Claim as set out in the Notice of Liability ruled August 17th, 2021;
(b) a written argument to be filed by the Respondents;
(c) the jurisprudence set out in within response and written argument of the Respondent Plaintiffs to filed;
(d) a Book of Authorities; and
(e) such further material as counsel may advise and this Honourable Court permits.

15. The Respondents (Plaintiffs) estimate that the application will take one day, which has been scheduled for May 31, 2022.

16. The Respondents (Plaintiffs) have filed in this proceeding a document that contains the application respondent's address for service.

Date: May 2nd, 2022

Signature of
[ ] plaintiff [x]lawyer for plaintiff(s)

For ROCCO GALATI LAW FIRM
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Tim Delaney and Justin Hamilton
Lindsay Kenney LLP 1800, 401
West Georgia Street Vancouver, BC
V6B 5A1 TDelaney@lklaw.ca /
jhamilton@lklaw.ca

Vancouver
17-Jan-22
REGISTRY

No. S 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

APPLICATION RESPONSE

Application response of: The defendants, Vancouver Island Health Authority and Providence Health Care (the “application respondents”)

THIS IS A RESPONSE TO the notice of application of Her Majesty the Queen in Right British Columbia filed 12/Jan/2022.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: all.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in none of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in none of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. N/A

Part 5: LEGAL BASIS

1. N/A

Part 6: MATERIAL TO BE RELIED ON

1. N/A

The application respondents estimate that the application will take 1 day.

☒ The application respondents have filed in this proceeding a document that contains the application respondents' address for service.

Date: 17/Jan/2022

Signature of ☐ application respondent
☑ lawyer for application respondents
Timothy J. Wedge

Pursuant to BC Supreme Court Notice No. 42 “COVID-19: CHAMBERS APPLICATIONS BY TELEPHONE AND MICROSOFT TEAMS", the Application Respondent provides the following contact details for the telephone or Microsoft Teams hearing:

Attn: Timothy J. Wedge
Carfra Lawton LLP
6th Floor – 395 Waterfront Crescent
Victoria BC V8T 5K7
Phone: 250-995-4264
Email: twedge@carlaw.ca

Vancouver
19-Jan-22
REGISTRY

NO. S217586
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martin, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

AND:

Her Majesty the Queen in Right of British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

APPLICATION RESPONSE

Application Response of: The Defendant, British Columbia Ferry Services Inc. (operating as British Columbia Ferries) ("**BC Ferries**")

THIS IS A RESPONSE TO the Notice of Application of Her Majesty the Queen in Right of British Columbia; Dr. Bonnie Henry; Premier John Horgan; Adrian Dix, Minister of Health; Jennifer Whiteside, Minister of Education; and Mike Farnworth, Minister of Public Safety and Solicitor General filed the 12th day of January, 2022.

PART 1: ORDERS CONSENTED TO

BC Ferries consents to the orders sought in paragraphs 1-2 of Part 1 of the Notice of Application.

PART 2: ORDERS OPPOSED

BC Ferries opposes the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

BC Ferries takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

PART 4: FACTUAL BASIS

1. N/A.

PART 5: LEGAL BASIS

1. N/A.

PART 6: MATERIAL TO BE RELIED ON

1. The pleadings filed herein; and

2. Such further and other materials as counsel may advise.

BC Ferries estimates that the application will take one day.

BC Ferries has not filed in this proceeding a document that contains an address for service.

BC Ferries' address for service:

McCarthy Tétrault LLP
Barristers & Solicitors
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5
Attention: Michael A. Feder, Q.C.
Connor Bildfell

Email address for service:

mfeder@mccarthy.ca
cbildfell@mccarthy.ca

DATED: January 19, 2022

Michael Feder

MICHAEL A. FEDER, Q.C.
CONNOR BILDFELL
Counsel for the Defendant,
British Columbia Ferry Services Inc.

VANCOUVER
APR 14 2022
REGISTRY

No. S217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILLONA ZINK, FREDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), and the ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

APPLICATION RESPONSE

Application Response of: Peter Kwok and TransLink (British Columbia) (sic) (collectively, "the TransLink Defendants")

THIS IS A RESPONSE TO the Notice of Application of Her Majesty the Queen in Right of British Columbia; Dr. Bonnie Henry; Premier John Horgan; Adrian Dix, Minister of Health; Jennifer Whiteside, Minister of Education; and Mike Farnworth, Minister of Public Safety and Solicitor General filed the 12th day of January, 2022.

PART 1: ORDERS CONSENTED TO

1. The TransLink Defendants consent to the orders sought in paragraphs 1-2 of Part 1 of the Notice of Application.

PART 2: ORDERS OPPOSED

1. The TransLink Defendants oppose the granting of NONE of the orders sought Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

1. The TransLink Defendants take no position on NONE of the orders sought Part 1 of the Notice of Application.

PART 4: FACTUAL BASIS

1. N/A.

PART 5: LEGAL BASIS

1. N/A.

PART 6: MATERIAL TO BE RELIED ON

1. The pleadings filed herein; and,
2. Such further and other materials as counsel may advise.

The TransLink Defendants estimate that the application will take one day.

The TransLink Defendants have filed a document in this proceeding that contains their address for service.

Dated: April 14, 2022

per

Timothy J. Delaney

Counsel for the defendants Peter Kwok and

TransLink (British Columbia) (sic)

Vancouver
28-Apr-22
REGISTRY

No. VLC-S-S217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

NOTICE OF APPLICATION

NAME OF APPLICANT: The Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("Canada").

TO: the Plaintiffs

TAKE NOTICE that an application will be made by the Applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, BC on **May 31, 2022 at 9:45 am** for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. That the Notice of Civil Claim of the Plaintiffs be struck out in its entirety, without leave to amend, pursuant to Rule 9-5(1) on the grounds that it:

    a. discloses no reasonable claim;

    b. fails to conform to the requirements of proper pleadings;

    c. is unnecessary, scandalous, frivolous, vexatious, embarrassing, and prejudicial; and,

    d. is likewise an abuse of process of the court.

2. In the alternative, that the Plaintiffs be ordered to amend the Notice of Civil Claim in its entirety pursuant to the instructions of this Honourable Court; and

3. Costs.

PART 2: FACTUAL BASIS

1. The Plaintiff filed the Notice of Civil Claim (the "Claim") on August 17, 2021.

2. The Claim is prolix, comprising 391 pages, alleging a long list of wrongs against a long list of defendants, including the defendants represented by Canada.

3. It does not plead with any clarity the sufficient material facts or a discernable legal basis for Canada to file a response.

PART 3: LEGAL BASIS

1. Canada relies on Rule 9-5 of the *Supreme Court Civil Rules*, and says that the Claim ought to be struck on the grounds that it discloses no reasonable claim.

2. Rule 9-5 of the *Supreme Court Civil Rules*, BC Reg 168/2009 ("*SCCR Rules*") provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

> (a) it discloses no reasonable claim or defence, as the case may be,
> (b) it is unnecessary, scandalous, frivolous or vexatious,
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

3. The test to strike out a pleading is whether it is plain and obvious that the claim discloses no reasonable cause of action: ***Nevsun Resources Ltd v Araya***, 2020 SCC 5 (**"*Nevsun*"**), para 64.

4. On a motion to strike, the Court is required to accept the facts as set out in the Claim: ***Hunt v Carey Canada Inc***, [1990] 2 SCR 959; ***Nevsun***, para 64.

5. The pleadings may be subjected to a "skeptical analysis" by the Court where the plaintiff has made speculative and "sweeping allegations of things like intolerance, deceit harassment, intimidation and falsifying documents against the defendants": ***Young v Borzoni***, 2007 BCCA 16, paras 30-32. The Supreme Court of Canada established that, "[n]o violence is done to the rule where allegations, incapable of proof, are not taken as proven": ***Operation Dismantle Inc v The Queen***, [1985] 1 SCR 441, para 27.

6. The function of pleadings is to clearly define the issues of fact and law to be determined by the Court. A plaintiff must plead all material facts necessary to formulate a cause of action. It is incumbent on the plaintiff to plead the facts upon which it relies in making its claim. The plaintiff is not entitled to rely on the possibility that new facts may come up as the case progresses: ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42, para 22.

7. Where pleadings are "overwhelmed with difficulty, the various provisions of [Rule] 9-5(1) may apply together": ***Grosz v Royal Trust Corporation of Canada***, 2020 BCSC 128 ("***Grosz***"), para 97.

The Claim generally

8. In the case at hand, the Claim contains conclusions of law without supporting material facts, fails to concisely plead material facts, fails to set out what allegations are being made against

whom and generally fails to conform with the rules of pleadings, such that it is impossible to determine what causes of action the plaintiffs are attempting to advance.

9. The verbose and undefined nature of the Claim fails to ensure efficiency and fairness, and fundamentally does not allow Canada to identify the claims to be addressed.

10. The Claim intertwines several seemingly distinct and unrelated events, and in so doing fails to clearly, concisely, and lucidly define the issues of fact and law the Court is being asked to determine: ***Sahyoun v Ho***, 2013 BCSC 1143 (**"*Sahyoun*"**), paras 21 & 23.

11. The Claim fails to include a summary of the legal basis for the relief sought, which includes naming which cause of action each of the Plaintiffs seeks to advance against whom in Part 3 of the Claim: ***SCCR Rules***, Rule 3-1(2)(c); ***Sahyoun***, para 33.

12. The Claim describes several different events and fails to include a concise statement of the material facts, and "if a material fact is omitted, a cause of action is not effectively pled": ***Sahyoun***, para 25; ***SCCR Rules***, Rule 3-1(2)(a).

13. That Claim fails to make clear what cause of action is alleged against each defendant and what relief is sought: ***Sahyoun***, paras 30-31. Neither Canada, nor the other defendants should be required to divine the claims being made against them. They should not have to guess what it is they are alleged to have done: ***Sahyoun***, paras 19 & 30-31.

Amending Pleadings

14. There are instances where amending a pleading or merely striking a portion of the pleadings will remedy any defects identified under Rules 3-1(2) or Rule 9-5. Striking the pleadings in full is permitted where "an amendment would be fruitless because the proposed claim, regardless of how it is drafted, is without legal foundation": ***Camp Development Corp v Greater Vancouver Transportation Authority***, 2009 BCSC 819 (aff'd 2010 BCCA 284), para 19. Where pleadings are fundamentally deficient and lack particularized damages, then it is better to strike the claim than amend: ***Grosz***, para 109.

Costs

15. Canada asks for its costs fixed as a lump sum of $550 payable forthwith, pursuant to Rule 14-1(1)(d) and (15).

16. Pursuant to Rules 14-1(1)(d) and (15), the Court may award lump sum costs and set the amount of those costs. The award of costs is highly discretionary, and a lump sum costs award may reflect a judge's concern with the conduct of a party or be an appropriate and expedient means of avoiding further proceedings and submissions on costs from the parties: ***Mousa v The Institute of Electrical and Electronics Engineers, Incorporated***, 2014 BCCA 415, para 34.

Part 4: MATERIAL TO BE RELIED ON

1. The Petition filed August 17, 2021;
2. *Supreme Court Civil Rules*, BC Reg 168/2009;
3. Authorities cited in the notice of application; and
4. Such other authorities and materials as counsel may advise and the court may permit.

The applicant estimates that the application will take 3 hours.

[**X**] This matter is within the jurisdiction of a master.

[ ] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: April 28, 2022

Signature of lawyer for filing party

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Fax: (604) 666-1462

Per: Olivia French
Email: olivia.french@justice.gc.ca

Per: Andrea Gatti
Email: andrea.gatti@justice.gc.ca

File: LEX-500065130

Solicitor for the Applicant

THIS Notice of Application is prepared and served by the Attorney General of Canada whose place of business and address for service is the Department of Justice Canada, British Columbia Regional Office, 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs .... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

....

....

....

Date: ....
[dd/mmm/yyyy]

....
Signature of [ ] Judge [ ] Master

Amended Application Response of the Plaintiffs filed May 18, 2022

SEE TAB 5

Vancouver
18-May-22
REGISTRY

No. S 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

APPLICATION RESPONSE

Application response of: The defendants, Vancouver Island Health Authority and Providence Health Care (the “application respondent”)

THIS IS A RESPONSE TO the notice of application of the defendant, The Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport (“Canada”) filed 28/Apr/2022.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: all.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in none of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in none of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. N/A

Part 5: LEGAL BASIS

1. N/A

Part 6: MATERIAL TO BE RELIED ON

1. N/A

The application respondent estimates that the application will take 1 day.

☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: 18/May/2022

Signature of ☐ application respondent
☑ lawyer for application respondent
Timothy J. Wedge

Pursuant to BC Supreme Court Notice No. 42 "COVID-19: CHAMBERS APPLICATIONS BY TELEPHONE AND MICROSOFT TEAMS", the Application Respondent provides the following contact details for the telephone or Microsoft Teams hearing:

Attn: Timothy J. Wedge
Carfra Lawton LLP
6th Floor – 395 Waterfront Crescent
Victoria BC V8T 5K7
Phone: 250-995-4264
Email: twedge@carlaw.ca

MAR 14 2022

No. S217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILLONA ZINK, FREDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), and the ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

APPLICATION RESPONSE

Application Response of: Peter Kwok and TransLink (British Columbia) (sic) (collectively, "the TransLink Defendants")

THIS IS A RESPONSE TO the Notice of Application of the Attorney General of Canada, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("Canada") filed the 13th day of January, 2022.

PART 1: ORDERS CONSENTED TO

1. The TransLink Defendants consent to the orders sought in paragraphs 1-3 of Part 1 of the Notice of Application.

PART 2: ORDERS OPPOSED

1. The TransLink Defendants oppose the granting of NONE of the orders sought Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

1. The TransLink Defendants take no position on NONE of the orders sought Part 1 of the Notice of Application.

PART 4: FACTUAL BASIS

1. N/A.

PART 5: LEGAL BASIS

1. N/A.

PART 6: MATERIAL TO BE RELIED ON

1. The pleadings filed herein; and,
2. Such further and other materials as counsel may advise.

The TransLink Defendants estimate that the application will take one day.

The TransLink Defendants have filed a document in this proceeding that contains their address for service.

Dated: April 14, 2022

per

Timothy J. Delaney

Counsel for the defendants Peter Kwok and

TransLink (British Columbia) (sic)

Vancouver
17-Jan-22
REGISTRY

No. S 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

NOTICE OF APPLICATION

Names of applicants: The Defendants, Vancouver Island Health Authority and Providence Health Care (the "Applicants")

To: Plaintiffs

And to: Their Counsel

And to: Her Majesty the Queen in Right British Columbia, Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General

And to: Their counsel

TAKE NOTICE that an application will be made by the applicants to the presiding judge or master of the courthouse at 800 Smithe Street, Vancouver, British Columbia, **by Microsoft Teams**, on 3/Feb/2022 at 10:00 am for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order striking the whole of the Plaintiffs' notice of civil claim filed in this matter on August 17, 2021, without leave to amend; and,
2. Costs

Part 2: FACTUAL BASIS

1. On August 17, 2021, the Plaintiffs filed a 391-page notice of civil claim (the "Claim") that attempts to challenge the scientific and legal basis for the entirety of British Columbia and Canada's response to the COVID-19 pandemic. Part 1 of the Claim contains over 1,300 paragraphs and sub-paragraphs.
2. The Plaintiffs have named numerous defendants: Her Majesty the Queen in Right of the Province, the Attorney General of Canada, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, the Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, and TransLink (British Columbia).
3. The Claim is a prolix and convoluted document that is replete with groundless accusations against public bodies and public officials, inflammatory language, and conspiracy theories.
4. The Claim characterises the COVID-19 pandemic as a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs" such as Bill Gates in order to "install a New World (Economic) Order" (Part 1, paras. 155, 283). Bill Gates is not a party to this proceeding.
5. The Applicants filed their response to civil claim on October 14, 2021 in which they deny the entirety of the Claim and assert that it ought to be struck.

Part 3: LEGAL BASIS

6. The Plaintiffs' Claim is deficient in form and substance. It is a scandalous, frivolous, and vexatious pleading that fails to meet the basic requirements for pleadings and is an abuse of

the Court's process. The Claim should be struck in accordance with Rule 9-5(1) of the Supreme Court Civil Rules, without leave to amend.

Pleadings Generally

7. *Supreme Court Civil Rule* (the "*Rules*") 3-1 provides, in part:

> **Contents of notice of civil claim**
> (2) A notice of civil claim must do the following:
> (a) set out a concise statement of the material facts giving rise to the claim;
> (b) set out the relief sought by the Plaintiff against each named defendant;
> (c) set out a concise summary of the legal basis for the relief sought;
> …
> (g) otherwise comply with Rule 3-7. [emphasis added]

8. Rule 3-7 provides, in part:

> **Pleading must not contain evidence**
> (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
> …
> **Pleading conclusions of law**
> (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
> …
> **General damages must not be pleaded**
> (14) If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading. …

9. The function of pleadings is to clearly define the issues of fact and law to be determined by the court. The plaintiff must state, for each cause of action, the material facts. Material facts are those facts necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

Homalco Indian Band v. British Columbia, [1998] B.C.J. No. 2703 (S.C.), para. 5

10. As the Court of Appeal recently held in *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, para 44:

> None of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the Rules and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

Application to Strike

11. Rule 9-5(1) provides:

> **Scandalous, frivolous or vexatious matters**

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> …
>
> (d) it is otherwise an abuse of the process of the court ...

12. A pleading may be struck under Rule 9-5(1) if it is plain and obvious that the pleading contravenes any of Rule 9-5(l)(a) through (d).

Knight V. Imperial Tobacco Canada Ltd, 2011 SCC 42 at para. 17

13. Evidence is inadmissible on an application under Rule 9-5(l)(a) but may be considered on an application under the remaining paragraphs of Rule 9-5(1). The Applicants rely on subparagraphs 9-5(l)(a)(b) and (d).

Rule - 9-5(l)(a)-The Notice of Civil Claim Discloses No Reasonable Claim

14. The Claim is premised upon non-justiciable questions and relies heavily upon international treaties, Criminal Code provisions, and unknown causes of action that are incapable of disclosing a reasonable cause of action for the purposes of Rule 9-5(1)(a).

15. For example, the Plaintiffs petition the Court for declarations pertaining to questions of science, public health, and conspiracy theories that are not justiciable, including:

    a. "A Declaration that the science, and preponderance of the scientific world community, is of the consensus that: a) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARSCoV-2 which leads to COVID-19" (Part 2, para. 312(1));

    b. "A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a bona fide, nor an actual "pandemic", and declaration of a bona fide pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs" (Part 2, para. 302);

    c. "A Declaration that administrating medical treatment without informed consent constitutes experimental medical treatment" (Part 2, para. 321);

    d. "A Declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to de facto put most small businesses and activities out of business" (Part 2, para. 307); and

    e. "A Declaration that the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are: a) not scientifically, or medically, based; b) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, as a mere screening test, of 3.5% accuracy" (Part 2, para. 311).

16. The Plaintiffs allege numerous violations (and non-violations) of the Criminal Code that are not properly raised in a civil action (*Simon v. Canada*, 2015 BCSC 924, para. 45); including:

    a. "Crime[s] against humanity under the Criminal Code of Canada" (Part 1, para. 299; Part 3, para. 333);

    b. "Medical experimentation" that constitute "Criminal act[s] ... pursuant to the War Crime and Crimes against Humanity Act" (Part 2, para. 292(a));

    c. "Criminal extortion" (Part 1, para. 261);

    d. "The 'extra' suicides and drug over-doses undisputedly tied to Covid-measures constitutes criminal negligence causing death" (Part 1, para. 264);

    e. "Criminal vaccine experiments causing horrific damage to innocent children in India, Pakistan, Africa and other developing countries" (Part 1, para. 21 l(a));

    f. A Declaration that failure and/ or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the Criminal Code or constitute "obstruct peace officer" contrary to s. 129 of the Criminal Code (Part 2, para. 323(f)).

17. The Plaintiffs allege numerous violations of international legal instruments, unwritten constitutional principles, and causes of action unknown to law that are not actionable in Canadian courts (*Li v. British Columbia*, 2021 BCCA 256, paras. 107-109; *Toronto v. Ontario*, 2021 SCC 34, para. 5), including the following:

    a. "Vaccine mandates violate 'The Universal Declaration of Bioethics and Human Rights', the Nuremberg Code, professional codes of ethics, and all provincial health Acts." (Part 1, para. 260);

    b. "Administering medical treatment without informed consent constitutes experimental medical treatment contrary to the Nuremberg Code and Helsinki Declaration of 1960" (Part 1, para. 299; Part 3, para. 333);

    c. "Vesting an indefinite emergency power in [various defendants] constitutes constitutional violation of 'dispensing with Parliament, under the pretense of Royal Prerogative', contrary to the English Bill of Rights (1689) as read into our unwritten constitutional rights through the Pre-Amble of the Constitution Act, 1867" (Part 2, para. 295; Part 3, para. 336);

    d. "The declared state of emergency, and measures implemented thereunder contravene" … "the same parallel unwritten constitutional rights, enshrined through the Pre-Amble of the Constitution Act, 1867" (Part 1, para. 283(c)(iv);

    e. "[T]hat (solitary confinement) isolation/quarantine of asymptomatic children" violates the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") and the Convention on the Rights of the Child" (Part 2, para. 311 (e); and

    f. "The COVID Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, … constitute a constitutional violation of the abdication of the duty to govern" (Part 2, para. 296; Part 3, para. 326).

18. To the extent that the Claim attempts to plead causes of action that are known to law, such as breaches of Charter rights or the separation of powers, the Claim fails to set out material facts which, if true, support these claims.

19. The general rule that facts pleaded should be accepted as true for the purposes of a strike application does not apply in a "case like this where the notice of civil claim is replete with assumptions, speculation, and in some instances, outrageous allegations. The law is clear that allegations based on assumption and speculation need not be taken as true."

Willow v. Chong, 2013 BCSC 1083, para. 19
See, also, Simon v. Canada, 2015 BCSC 924 ["*Simon*"], para. 54

20. The Plaintiffs have failed to plead the concise statement of material facts that is necessary to support any complete cause of action. The Charter claims are inextricably bound up in a prolix, argumentative, and wildly speculative narrative of grand conspiracy that is incapable of supporting a viable cause of action. It is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from another, or conjecture and conspiracy from asserted facts.

Fowler v. Canada (Attorney General), 2012 BCSC 367, para. 54
Simon, supra, paras 54-59

21. It is plain and obvious that the Claim, as pleaded, fails to disclose a reasonable cause of action.

9-5(l)(b) The Notice of Civil Claim is Scandalous, Frivolous and Vexatious

Scandalous and Embarrassing

22. A pleading is scandalous if it does not state the real issue in an intelligible form and would require the parties to undertake useless expense to litigate matters irrelevant to the claim.

Gill v. Canada, 2013 BCSC 1703 ["*Gill*"], para. 9

23. A claim is also scandalous or embarrassing if it is prolix, includes irrelevant facts, argument or evidence, such that it is nearly impossible for the defendant to reply to the pleading and know the case to meet. Pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck.

Gill, supra para. 9
Strata Plan LMS3259 v. Sze Hang Holding Inc., 2009 BCSC 473, at para. 36
Kuhn v. American Credit Indemnity Co., [1992] B.C.J. No. 953 (S.C.)

24. The Claim is a scandalous pleading because it is prolix, confusing, and nearly impossible to respond to:

    a. The 391 page Claim attempts to plead dozens of causes of action and Charter breaches and seeks over 200 declarations. It is, as a result, nearly impossible to know the case to be met.

    b. The Claim contains extensive passages of completely irrelevant information, including:

    i. A COVID-19 timeline beginning in 2000 with Bill Gates stepping down as Microsoft CEO (Part 1, para 44) and including such other events as Bill Gates pledging $10 billion in funding in 2010 for the World Health Organization and announcing the "Decade of Vaccines" (Part 1, para. 50);
    ii. A lengthy narrative describing an alleged "global political agenda behind [the] unwarranted measures" (Part 1, paras. 207-300);
    iii. A detailed 81 page narrative about the individual Plaintiffs dealings with government employees, health care professionals, and police officers (Part 1, pages 1-81).

  c. The Claim relies extensively on the Criminal Code of Canada (Part 1, paras. 1 l(b)(h), 115, 141(h), 207(1), 299; Part 2 para. 291, Part 3 paras. 322(k)(iv), 323(f), 333, 361 (f)(k)(iv));

  d. The Claim contains lengthy and convoluted legal arguments (i.e., Part 1 page 108 para. 141; Part 2, paras. 286, 324, 358);

  e. The Claim raises allegations against individuals and entities who are not named as parties such as Bill Gates (Part 1, paras. 216-222), Facebook, Amazon, Google, Yahoo (Part 1, paras. 174,216), Doug Ford (Part 1, para. 152(c)), and others.

25. The Claim is also a scandalous pleading because it fails to meet the basic requirements for pleadings under the *Rules*.

  a. The Claim contains over 1600 paragraphs and subparagraphs. It fails to set out a concise statement of the material facts, relief sought, and legal basis in violation of Rules 3-1(1)-(3);

  b. The Claim pleads evidence in contravention of Rule 3-7(1), including dozens of lengthy quotations from various COVID-19 commentators and activists and hundreds of footnotes to miscellaneous websites, articles, policy documents, and articles;

  c. The Claim pleads conclusions of law, unsupported by facts, in contravention of Rule 3-7(9);

  d. The Claim appears to plead amounts of damages in contravention of Rule 3-7(14).

Frivolous

26. A pleading is frivolous if it is without substance, is groundless, fanciful, 'trifles with the court' or wastes time".

Borsato v. Basra, [2000] B.C.J. No. 84, 43 C.P.C. (4th) 96, at para 24

27. The Claim is a frivolous pleading because it promotes fanciful conspiracy theories about the origins of the COVID-19 pandemic, the efficacy of COVID-19 measures, and the motivations of the Provincial and Health Authority Defendants. These allegations include, by way of example only:

  a. "The Plaintiffs state, and the fact is, that the illegal actions, and decrees issued by The Defendants and other public officials were done, in abuse and excess of their offices, knowingly to propagate a groundless and falsely-declared 'pandemic" ...

designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs." (Part 1, para. 155);

b. "The Plaintiffs state, and the fact is, that the non-medical aims and objectives to declare the "pandemic", for something it is not beyond one of many annual seasonal viral respiratory illnesses, was to, inter alia, effect the following non-medical agendas, by using the COVID- 19 [sic] as a cover and a pretext: (a) To effect a massive bank and stock market bail-out needed because the banking system was poised to again collapse since the last collapse of 2008 in that the World debt had gone from $147 Trillion dollars in 2008 to $321 Trillion dollars in January, 2020" (Part 1, para 208(a));

c. "The fact is that the pandemic pretense is there to establish a "new normal", of a New (Economic) World Order, with a concurrent neutering of the Democratic and Judicial institutions and an increase and dominance of the police state; (c) A massive and concentrated push for mandatory vaccines of every human on the planet earth with concurrent electronic surveillance by means of proposed: (i) Vaccine "chips", bracelets", and "immunity passports"; (ii) Contract- tracing via cell-phones; (iii) Surveillance with the increased 50 capacity; (d) The elimination of cash- currency and the installation of strictly digital currency to better-effect surveillance." (Part 1, para. 208(b)-(d)); and

d. "The Plaintiffs state that, and fact is, this global vaccination scheme which is being propelled and pushed by the Defendants, is with the concurrent aim of total and absolute surveillance of the Plaintiffs and all citizens." (Part 1, para. 308)

Rule 9-5(l)(a) and (d) - The Claim is Vexatious and an Abuse of Process

28. Little distinction exists between a vexatious action and one that is an abuse of process as the two concepts have strikingly similar features.

Dixon v. Stork Craft Mamifacturing Inc., 2013 BCSC 1117

29. Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (CUPE)*, [2003] 3 S.C.R. 77, the court stated at para. 37:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

30. Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights. Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

Lang Michener Lash Johnston v. Fabian, [1987] O.J. No. 355 [“*Lang Michener*”], at para. 19

31. There are a multitude of bases upon which to conclude that the Claim is an abuse of process. These include the Plaintiffs' attempt to use the judicial process to adjudicate conspiracy theories and seek declarations on non-justiciable questions of medical science and public health policy.

32. More concerning, the Claim bears the hallmarks of a vexatious and abusive claim that is intended to harass and oppress the parties (and non-parties):

    a. The Claim advances against the Defendant Provincial Health Officer, without factual foundation, spurious allegations of "crimes against humanity" in relation to the implementation of COVID-19 measures and international public health work in the early 2000s (Part 1, para. 293);

    b. The Claim advances irrelevant allegations about alleged conflicts of interests or hypocritical conduct relating to the private lives of both parties and non-parties (Part 1 para 8(k), 44, 154(c)-(f), 155, 207(b), 298);

    c. The Plaintiffs make broad, sweeping criminal allegations against a large number of named and unnamed government employees and officials (Part 1, para 11, 141 (h), 15l(d), 261 (pg. 234) 264 (pg. 235) 300(d));

    d. The Claim uses inflammatory and inappropriate language to describe alleged actions of Defendants and public officials such as "egregious crimes against humanity", (Part 1 para. 290) "fraudulent" (Part 1 para. 251), or "Stalinist censorship" (Part 1 para. 280 (pg. 308), or to suggest that politicians or officials have "no clue" (Part 1 para. 154), are "wholly unqualified" (Part 1 para. 154) or are "outright lying" (Part 1 para. 279 (pg. 240))

33. The Applicants submit the Claim has been brought for an improper purpose. The Plaintiffs and their counsel must know, or ought to know, that a 391 page Claim seeking over 200 declarations concerning alleged criminal conduct and the efficacy of public health measures "cannot succeed ... [and] would lead to no possible good": *Lang Michener, supra*.

34. The Claim is intended, at least in part, to intimidate and harass health authorities, public officials and politicians, including the Provincial Health Officer, by advancing spurious, public allegations of criminal conduct, conflicts of interest, and ulterior motives. This intention is further corroborated by the Plaintiff Action4Canada's simultaneous campaign to encourage individuals to serve government officials and politicians with "Notices of Liability" for their actions in responding to the COVID-19 pandemic (Affidavit #1 of Rebecca Hill, Ex. G, I).

35. The Claim is also intended, at least in part, to consolidate, publicize, and amplify COVID-19 conspiracy theories and misinformation. The Claim is a book-length tirade against the entirety of British Columbia's response to the pandemic, with dozens of quotes from, and hundreds of footnotes to, anti-mask, anti-lockdown, and anti-vaccine resources. Both Action4Canada and its counsel have promoted the Claim online and on social media (Affidavit #1 of Rebecca Hill, Ex. D, K).

36. These are improper purposes to file and prosecute a civil action. There can be no question that the Claim is an abuse of process. Permitting this litigation to proceed would violate the principles of judicial economy and the integrity of the administration of justice.

37. Providing the Plaintiffs with an opportunity to redraft their pleadings would only further this abuse of the Court's process.

Part 4: MATERIAL TO BE RELIED ON

1. The pleadings filed in this action;
2. Affidavit #1 of Rebecca Hill made 10 January 2022

The applicants estimates that the application will take 1 day collectively with the application of the Province of British Columbia.

☒ This matter is within the jurisdiction of a master.

☐ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,
(b) file the original of every affidavit, and of every other document, that
  (i) you intend to refer to at the hearing of this application, and
  (ii) has not already been filed in the proceeding, and
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  (i) a copy of the filed application response;
  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 17/Jan/2022

Signature of Timothy J. Wedge
☐ applicant ☑ lawyer for applicants, Vancouver Island Health Authority and Providence Health Care

Attn: Timothy J. Wedge
Carfra Lawton LLP
6th Floor – 395 Waterfront Crescent
Victoria BC V8T 5K7
Phone: 250-995-4264
Email: twedge@carlaw.ca

To be completed by the court only:

Order made:

☐ in the terms requested in paragraphs .... of Part 1 of this notice of application

☐ with the following variations and additional items:

....

....

....

Dated:
....

Signature of ☐ Judge ☐ Master

Appendix

THIS APPLICATION INVOLVES THE FOLLOWING:

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☐ amend pleadings

☐ add/change parties

☐ summary judgment

☐ summary trial

☐ service

☐ mediation

☐ adjournments

☐ proceedings at trial

☐ case plan orders: amend

☐ case plan orders: other

☐ experts

Amended Application Response of the Plaintiffs filed May 18, 2022

SEE TAB 5

VANCOUVE
APR 14 2022

No. S217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILLONA ZINK, FREDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), and the ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

APPLICATION RESPONSE

Application Response of: Peter Kwok and TransLink (British Columbia) (sic) (collectively, "the TransLink Defendants")

THIS IS A RESPONSE TO the Notice of Application of Vancouver Island Health Authority and Providence Health Care, filed the 17th day of January, 2022.

PART 1: ORDERS CONSENTED TO

1. The TransLink Defendants consent to the orders sought in paragraphs 1-2 of Part 1 of the Notice of Application.

PART 2: ORDERS OPPOSED

1. The TransLink Defendants oppose NONE of the orders sought in Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

1. The TransLink Defendants take no position on NONE of the orders sought Part 1 of the Notice of Application.

PART 4: FACTUAL BASIS

1. N/A.

PART 5: LEGAL BASIS

1. N/A.

PART 6: MATERIAL TO BE RELIED ON

1. The pleadings filed herein; and,
2. Such further and other materials as counsel may advise.

The TransLink Defendants estimate that the application will take one day.

The TransLink Defendants have filed a document in this proceeding that contains their address for service.

Dated: April 14, 2022

per

Timothy J. Delaney

Counsel for the defendants Peter Kwok and

TransLink (British Columbia) (sic)

VANCOUVER
APR 14 2022
REGISTRY

No. S217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILLONA ZINK, FREDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), and the ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

NOTICE OF APPLICATION

Name of the Applicants: Peter Kwok and TransLink (British Columbia) (sic) (collectively, "the Applicants")

To: The Plaintiffs
c/o ROCCO GALATI
Rocco Galati Law Firm Professional Corporation
1062 College Street
Lower Level Toronto, Ontario, M6H 1A9
Tel: (416) 530-9684
Fax: (416) 530-8129

c/o LAWRENCE WONG
Barrister & Solicitor
210 – 2695 Granville Street
Vancouver, B.C., V6P 4Z7
Tel: (604) 739-0118
Fax: (604) 739-0117

TAKE NOTICE that an application will be made by the applicants to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, at 10:00am on May 31, 2022 via MS Teams for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order striking the whole of the plaintiffs' Notice of Civil Claim filed in this matter on August 17, 2021, without leave to amend.

2. In the alternative, an order striking paragraphs 9 (a) to (k) and 324 (h) of the Notice of Civil Claim, without leave to amend.

3. Costs.

Part 2: FACTUAL BASIS

1. The defendant "Translink (British Columbia)" is improperly named. Translink is a trade name, not a legal entity. The South Coast British Columbia Transportation Authority is the entity that oversees the provision of public transportation services in the lower mainland of British Columbia, including the Skytrain. The defendant, Peter Kwok, is a police constable employed by the South Coast British Columbia Transportation Authority Police Service.

2. The plaintiffs' Notice of Civil Claim (the "Claim") attempts to challenge the scientific basis and of the existence of the COVID -19 pandemic and the moral basis of the response to it, by the governments of British Columbia and Canada.

3. In addition to the defendants, Peter Kwok and TransLink, the plaintiffs have also named various parties as defendants, including, amongst others: Prime Minister, Justin Trudeau; Canada's Chief Public Health Officer, Theresa Tam; British Columbia's Provincial Health Officer, Dr. Bonnie Henry; Premier John Horgan; the Minister of Health, Adrian Dix; British Columbia Ferry Services Inc.; the Royal Canadian Mounted Police; and, the Canadian Broadcasting Corporation.

4. At page 85, paragraph 44, the Claim contains what the plaintiffs call the COVID-19 "Timeline". It does not begin in 2019 but rather it begins in 2000 with Bill Gates stepping down as CEO of Microsoft and creating the Gates Foundation. From there on it is not an exaggeration to say the Claim raises a host of conspiracy theories.

5. The Claim characterizes the COVID-19 pandemic as a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global

Oligarchs" such as Bill Gates, in order to "install a New World (Economic) Order" (Part 1, paras. 155, 283(d)).

6. The Claim alleges the total number of COVID "cases" and "deaths" have been "hyper-inflated" and "distorted" (see page 180).

7. The plaintiffs allege there is a "global political, economic agenda behind the "unwarranted measures" taken by governments (see p. 188).

8. The Claim also makes numerous references to evidence or apparent evidence, including evidence that would likely be inadmissible at trial (for example, the results of public opinion polls; general opinions about organizations like WHO, etc.). The Claim is not just argumentative; it is entirely an argument.

9. The Claim complains about various government initiated measures, to address the COVID-19 pandemic.

10. For example, two plaintiffs allege they were unable to use the BC Ferry without wearing masks: see paras. 4 and 5. Some complain that their businesses (i.e. a salon and a restaurant) were forced to close for a period of time: see paras. 7 and 8.

11. Specifically relevant to these applicants, the plaintiff, Valerie Foley, complains that she was not permitted to remain on a Skytrain car without wearing a mask: para. 9.

12. In the Relief Sought, the plaintiff Foley claims this action breached her Charter rights under sections 7, 8, 9 and 10 of the Charter and she seeks $2 Million in damages: para. 324 (h).

13. The Legal Basis portion of the Claim makes no direct reference to the defendants, TransLink or Kwok. Instead it makes a number of general allegations that masks are not effective (see paras. 343 (e), (h) and 352) and that "no police officer has the jurisdiction to apply the Trespass Act, to a person who declares a legal exemption to a mask and who enters a public place" (para. 361 (b)).

Part 3: LEGAL BASIS

Application to Strike

1. Rule 9-5(1) provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition, or other document on the ground that
>
> (a) It discloses no reasonable claim or defence, as the case may be,
>
> (b) It is unnecessary, scandalous, frivolous, or vexatious,
>
> ...
>
> (d) It is otherwise an abuse of process of the court.

2. The plaintiffs' Claim is deficient in form and substance. It is a scandalous, frivolous, and vexatious pleading that fails to meet the basic requirements for pleadings and is an abuse of the Court's process. The Claim should be struck in accordance with Rule 9-5(1) of the *Supreme Court Civil Rules*, without leave to amend.

Homalco Indian Band v. British Columbia, [1998] B.C.J. No, 2703 (S.C.), para, 5
Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc., 2021 BCCA 362, at para. 44.

3. A pleading may be struck under Rule 9-5(1) if it is plain and obvious that the pleading contravenes any of sub-rules 9-5(1)(a) through (d).

Knight v. Imperial Tobacco Canada Ltd., 2011 SCC 42 at para. 17

4. Evidence is inadmissible on an application under Rule 9-5(1)(a) but may be considered on an application under the remaining paragraphs of Rule 9-5(1). The Applicants rely on subparagraphs 9-5(1)(a), (b), and (d).

5. On this application to strike the Claim, these applicants repeat and rely on the submissions made by the other applicants, including:

- Her Majesty the Queen in Right of British Columbia and the Provincial Defendants, as set out in their Notice of Application filed January 12, 2022;
- The Vancouver Island Health Authority and Providence Health Care, set out in their Notice of Application filed January 17, 2022; and,

- The Attorney General of Canada, RCMP and others, in their Notice of Application filed January 13, 2022.

Rule 9-5(1)(a) – The Notice of Civil Claim Discloses No Reasonable Claim

6. The plaintiffs are seeking declarations pertaining to questions of science, public health, and conspiracy theories that are not justiciable. Numerous examples can be found in the Claim including at paragraphs 291, 302, 307, 311 and 312.

7. As an example, the plaintiffs allege that the declared state of emergency by Premier John Horgan, and the measures implemented thereunder are: "Not based on any scientific or medical basis; and, are ineffective, false and extreme" (see para. 283 (c)).

8. The plaintiffs allege numerous violations (and non-violations) of the *Criminal Code* that are not properly raised in a civil lawsuit (*Simon v. Canada*, 2015 BCSC 924, para. 45).

9. The Claim alleges the COVID-pandemic "was pre-planned, and executed as a false pandemic through the WHO, by Billionaire, Corporate and Organizational Oligarchs the likes of Bill Gates, GAVI, the WHO and their former and current associates such as Theresa Tam and Bonnie Henry, the WEF, and others, in order to install a New World (Economic) Order..." (see para. 283 (d)). This was allegedly done for various reasons, including to "disguise a massive bank and corporate bail-out" and to "shift society in all aspects into a virtual world at the control of these vaccine, pharmaceutical, technological, globalized oligarchs, whereby the plaintiffs, and all others cannot organize nor congregate" (see para. 283,(d) (v)).

10. The plaintiffs allege numerous violations of international legal instruments, unwritten constitutional principles, and causes of action unknown to law that are not actionable in Canadian courts (*Li v. British Columbia*, 2021 BCCA 256, paras. 107-109, *Toronto v. Ontario*, 2021 SCC 34, para. 5).

11. The general rule that facts pleaded should be accepted as true for the purposes of a strike application does not apply in a "case like this where the notice of civil claim is replete with assumptions, speculation, and in some instances, outrageous allegations. The law is clear that allegations based on assumption and speculation will not be taken as true".

Willow v. Chong, 2013 BCSC 1083, para. 19
Simon v. Canada, 2015 BCSC 924, para. 54

12. Further, the court may take judicial notice of the existence of the COVID-19 virus.

R. v. Find, 2001 SCC 32 at para. 48
Khodeir v. Canada (Attorney General), 2022 FC 44, at paras. 20, 22-23, 62

13. The plaintiffs have failed to plead the *concise* statement of *material* facts that is necessary to support any complete cause of action. The *Charter* claims are inextricably bound up in a prolix, argumentative, and wildly speculative narrative of grand conspiracy that is incapable of supporting a viable cause of action. It is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from another, or conjecture and conspiracy from asserted facts.

Fowler v. Canada (Attorney General), 2012 BCSC 367, para. 54
Simon, *supra*, paras. 54-59

14. It is plain and obvious that the Claim, as pleaded, fails to disclose a reasonable cause of action.

Rule 9-5(1)(b) – The Notice of Civil Claim is Scandalous, Frivolous, and Vexatious

Scandalous and Embarrassing

15. A pleading is scandalous if it does not state the real issue in an intelligible form and would require the parties to undertake useless expense to litigate matters irrelevant to the claim.

Gill v. Canada, 2013 BCSC 1703, para. 9

16. A claim is also scandalous or embarrassing if it is prolix, includes irrelevant facts, argument or evidence, such that it is nearly impossible for the defendant to reply to the pleading and know the case to meet. Pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck.

Gill, *supra*, para. 9
Strata Plan LMS3259 v. Sze Hang Holding Inc., 2009 BCSC 473, at para. 36
Kuhn v. American Credit Indemnity Co., [1992] B.C.J. No. 953 (S.C.)

17. The Claim is a scandalous pleading because it is prolix and confusing, making it nearly impossible to respond to it.

Frivolous

18. A pleading is frivolous if it is without substance, is groundless, fanciful, 'trifles with the court' or wastes time.

Borsato v. Basra, [2000] B.C.J. No. 84, 43 C.P.C. (4th) 96 at para. 24

19. The Claim is a frivolous pleading because it advances conspiracy theories about the origins of the COVID-19 pandemic, the efficacy of COVID-19 measures, and the motivations of the defendants. Further, the underlying basis of the Claim is to question the science, since the government response to the pandemic is based on there actually being a disease called COVID-19 and it being a serious disease that has killed many people.

20. The plaintiffs' Claim is really a political, scientific and moral argument, not a legal argument. The plaintiffs are free to seek to advance their arguments with their political representatives, in scientific journals, or in the "court of public opinion" but the Claim does not raise legal issues, to be decided by a Court of Law.

Rule 9-5(1)(a) and (d) – The Claim is Vexatious and an Abuse of Process

21. Little distinction exists between a vexatious action and one that is an abuse of process as the two concepts have strikingly similar features.

Dixon v. Stork Craft Manufacturing Inc., 2013 BCSC 1117

22. Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, [2003] 3 S.C.R. 77, the court stated at para. 37:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice.

23. Vexatious actions include those brought for an improper purpose, including harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights. Where it is obvious that an action cannot succeed, or it the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

Lang Michener Lash Johnston v. Fabian, [1987] O.J. No. 355, at para. 19

24. There are a multitude of bases upon which to conclude that the Claim is an abuse of process. These include the plaintiffs' attempt to use the judicial process to adjudicate conspiracy theories and seek declarations on non-justiciable questions of medical science and health policy.

25. The Applicants submit that the Claim has been brought for an improper purpose. To allow the Claim to proceed would not be a proper use of judicial resources and would harm the integrity of the administration of justice.

26. The plaintiffs and their counsel must know, or ought to know, that a 391-page Claim seeking over 200 declarations concerning alleged criminal conduct and the efficacy of health measures cannot succeed...[and] would lead to no possible good": *Lang Michener, supra.*

27. The Claim is also intended, at least in part, to consolidate, publicize, and amplify COVID-19 conspiracy theories and misinformation. The Claim is a book-length tirade against the entirety of Canada's and British Columbia's response to the pandemic.

28. Providing the plaintiffs with an opportunity to redraft their pleadings would only further this abuse of the Court's process.

Part 4: MATERIAL TO BE RELIED ON

The Applicant estimates that the application will take 1 day.

[X] This matter is within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within the time for response to application described below,

(a) file an Application Response in Form F32;

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the family law case; and,

(c) serve on the applicant 2 copies, and on every other party one copy,. of the following

(i) a copy of the filed Application Response,

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person, and

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: April 14, 2022

po

Signature of Timothy J. Delaney
counsel for the Applicants, Translink (sic) and Peter Kwok

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs .... of Part 1 of this notice of application

☐ with the following variations and additional terms:

....

....

....

....

Date: ....

Signature of ☐ Judge ☐ Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discover
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts

Amended Application Response of the Plaintiffs filed May 18, 2022

SEE TAB 5

Vancouver
18-May-22
REGISTRY

No. S 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

APPLICATION RESPONSE

Application response of: The defendants, Vancouver Island Health Authority and Providence Health Care (the “application respondent”)

THIS IS A RESPONSE TO the notice of application of the defendants, Peter Kwok and TransLink (British Columbia) filed 14/April/2022.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: all.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in none of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in none of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. N/A

Part 5: LEGAL BASIS

1. N/A

Part 6: MATERIAL TO BE RELIED ON

1. N/A

The application respondent estimates that the application will take 1 day.

☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Date: 18/May/2022

Signature of ☐ application respondent
☑ lawyer for application respondent
Timothy J. Wedge

Pursuant to BC Supreme Court Notice No. 42 "COVID-19: CHAMBERS APPLICATIONS BY TELEPHONE AND MICROSOFT TEAMS", the Application Respondent provides the following contact details for the telephone or Microsoft Teams hearing:

Attn: Timothy J. Wedge
Carfra Lawton LLP
6th Floor – 395 Waterfront Crescent
Victoria BC V8T 5K7
Phone: 250-995-4264
Email: twedge@carlaw.ca

No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

JOINT APPLICATION RECORD – VOLUME 3

Application to Strike Proceedings

Counsel for the Plaintiffs: **Rocco Galati**	Rocco Galati Professional Law Corporation 1062 College Street, Lower Level Toronto, ON M6H 1A9 Fax: 416-530-8129 Email: rocco@idirect.com
Counsel for Vancouver Island Health Authority and Providence Health Care ("Heathy Authority Defendants"): **Timothy J. Wedge**	Carfa Lawton LLP 6th Floor – 395 Waterfront Crescent Victoria, BC V8T 5K7 Fax: 250-381-7804 Email: twedge@carlaw.ca

--Continued Next Page--

Date, and Time of Hearing: May 31, 2022 at 10:00 am
Place of Hearing: Vancouver, British Columbia
Time Estimate: 1 day
Joint Application Record Prepared By:
Attorney General of British Columbia

Counsel for Her Majesty the Queen in Right of British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, and Mike Farnworth, Minister of Public Safety and Solicitor General ("Provincial Defendants"): **Mark Witten**	Ministry of Attorney General Legal Services Branch 1301-865 Hornby Street Vancouver, BC V6Z 2G3 Fax: 604-660-6797 Email: mark.witten@gov.bc.ca
Counsel for the Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("Canada") **Olivia French and Andrea Gatti**	Attorney General of Canada Department of Justice Canada British Columbia Regional Office 900-840 Howe Street Vancouver, BC C6Z 2S9 Fax: 604-666-1462 Email: olivia.french@justice.gc.ca Email: andrea.gatt@justice.gc.ca
Counsel for Peter Kwok and TransLink (British Columbia) (the "TransLink Defendants") **Timothy J. Delaney**	Lindsay Kenney LLP 1800-401 West Georgia Street Vancouver, BC V6B 5A1 Fax: 604-687-2347 Email: tdelaney@lklaw.ca
Counsel for British Columbia Ferry Services Inc ("BC Ferries") **Michael A. Feder, Q.C., and Connor Bildfell**	McCarthy Tetrault LLP 2400-745 Thurlow Street Vancouver, BC V6E 0C5 Fac: 604-643-7900 Email: mfeder@mccarthy.ca Email: cbildfell@mccarthy.ca

No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

JOINT APPLICATION RECORD INDEX

TAB DOCUMENT

VOLUME 1

Pleadings

1. Notice of Civil Claim filed August 17, 2021

2. Response to Civil Claim of the Provincial Defendants filed January 12, 2022

3. Response to Civil Claim of the Health Authority Defendants filed October 14, 2021

Application to Strike – Provincial Defendants

4. Notice of Application of the Provincial Defendants filed January 12, 2022

5. Amended Application Response of the Plaintiffs filed May 18, 2022

6. Application Response of the Health Authority Defendants filed January 17, 2022

7. Application Response of BC Ferries filed January 19, 2022

8. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Canada

9. Notice of Application of Canada filed April 28, 2022

10. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

11. Application Response of the Health Authority Defendants filed May 18, 2022

12. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Health Authority Defendants

13. Notice of Application of the Heath Authority Defendants filed January 17, 2022

14. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

15. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – TransLink Defendants

16. Notice of Application of TransLink filed April 14, 2022

17. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

18. Application Response of the Health Authority Defendants filed May 18, 2022

Affidavits

19. Affidavit #2 of Rebecca Hill filed May 24, 2022

VOLUME 2

Case Law of the Defendants (Applicants)

20. *Borsato v. Basra*, [2000] B.C.J. No. 2855

21. *Camp Development Corp v. Greater Vancouver Transportation Authority,* 2009 BCSC 819

22. *Dixon v. Stork Craft Manufacturing Inc.* 2013 BCSC 1117

23. *Fowler v. Canada (Attorney General),* 2012 BCSC 367

24. *Gill v. Canada,* 2013 BCSC 1703

25. *Grosz v. Royal Trust Corporation of Canada,* 2020 BCSC 128

26. *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.)

27. *Khodeir v. Canada (Attorney General),* 2022 FC 44

28. *Kuhn v. American Credit Indemnity Co.,* [1992] B.C.J. No. 953 (S.C.)

29. *Lang Michener Lash Johnson v. Fabian,* [1987] O.J. No. 355

30. *Li v. British Columbia,* 2021 BCCA 256

31. *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362

32. *Mousa v. The Institute of Electrical and Electronics Engineers, Incorporated,* 2014 BCCA 415

33. *Nevson Resources Ltd. v. Araya,* 2020 SCC 5

34. *R. v. Find,* 2001 SCC 32

35. *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42

36. *Sahyoun v. Ho,* 2013 BCSC 1143

37. *Simon v. Canada,* 2015 BCSC 924

38. *Strata Plan LMS3259 v. Sze Hang Holding Inc.,* 2009 BCSC 473

39. *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.*), [2003] 3 S.C.R. 77

40. *Toronto v. Ontario*, 2021 SCC 34

41. *Willow v. Chong*, 2013 BCSC 1083

42. *Young v. Borzoni,* 2007 BCCA 16

Legislation of the Defendants (Applicants)

43. *Supreme Court Civil Rules,* BC Reg 168/2009, Rules 3-1, 3-7, 9-5, 14

Case Law of the Plaintiffs (Application Respondents)

44. *592 U.S.* ______ (2020)

45. *A.G. Canada v. Inuit Tapirasat of Canada* [1980] 2 S.C.R. 735

46. *Adams-Smith v. Christian Horizons,* (1997) 14 C.P.C. (4th) 78 (Ont. Gen. Div.)

47. *Air Canada v. A.G.B.C.,* [1986] 2 S.C.R. 539 (SCC)

48. *Arsenault v. Canada,* 2009 FCA 242

49. *Canada v. Solosky,* [1980] 1 S.C.R. 821

50. *Canada (Prime Minister) v. Khadr,* [2010] 1 S.C.R. 44

51. *Canadian Society for the Advancement of Science in Public Policy v. Henry*, 2022 BCSC 724

52. *Carter v. Canada (Attorney General),* 2015 SCC 5

53. *Dalex Co. v. Schawartz Levitsky Feldman*, (1994) 19 O.R. (3d) 463 (Gen. Div.)

54. *Dumont v. Canada (Attorney General),* [1990] 1 S.C.R. 279

VOLUME 3

55. *Fleming v. Reid,* (1991) 48 O.A.C. 46 (CA)

56. *Grant v. Cormier – Grant, et al.,* (2001) 56 O.R. (3d) 215 (Ont. C.A.)

57. *Hanson v. Bank of Nova Scotia,* (1994) 19 O.R. (3d) 142 (C.A.)

58. *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959

59. *J.N. v. C.G.,* 2022 ONSC 1198

60. *Jacob Puliyel v. Union of India & Ors.*

61. *M.A. v. De Villa,* 2021 ONSC 3828

62. *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14

63. *Miller (Litigation Guardian of) v. Wiwchairyk,* (1997) 34 O.R. (3d) 640 (Ont. Gen. Div.)

64. *Nash v. Ontario,* (1995) 27 O.R. (3d) 1 (Ont. C.A.)

65. *Nelles v. Ontario,* (1989) 60 DLR (4th) 609 (SCC)

66. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263

67. *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441

68. *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991) 5 O.R. (3d) 778 (C.A.)

69. *Reference re Secession of Quebec,* [1998] 2 S.C.R. 217

70. *Roncarelli v. Duplessis,* [1959] S.C.R. 121

71. *Sgt. Julie Evans v. AG Ontario*

72. *Singh v. Canada (Citizenship and Immigration),* 2010 FC 757

73. *TD Bank v. Delloitte Hoskins & Sells,* (1991) 5 O.R. (3d) 417 (Gen. Div.)

74. *Thorson v. AG of Canada,* 1975 1 S.C.R. 138

75. *Trendsetter Ltd. v. Ottawa Financial Corp.,* (1989) 32 O.A.C. 327 (C.A.)

76. *Vancouver (City) v. Ward,* 2010 SCC 27

Case Law – Additional Struck Claims

77. *Al Omani v. Canada,* 2017 FC 786

78. *Almacén v. Canada,* 2016 FC 300

79. *Almacén v. Canada,* 2016 FCA 296

80. *Cabral v. Canada (Minister of Citizenship and Immigration),* 2016 FC 1040

81. *Committee for Monetary and Economic Reform v. Canada,* 2015 FCA 20

82. *Committee for Monetary and Economic Reform v. Canada,* 2016 FC 147

83. *Committee for Monetary and Economic Reform v. Canada,* 2016 FCA 312

84. *Committee for Monetary and Economic Reform v. Canada,* [2017] S.C.C.A. No. 47

85. *Da Silva Campos v. Canada (Minister of Citizenship and Immigration),* 2015 FC 884

86. *Gill v. Maciver,* 2022 ONSC 1279

87. *Mancuso v. Canada (Minister of National Health and Welfare),* 2014 FC 708

88. *Mancuso v. Canada (Minister of National Health and Welfare),* 2015 FCA 227

89. *Mancuso v. Canada (National Health and Welfare),* [2016] S.C.C.A. No. 92

90. *Sivak v. Canada,* 2012 FC 272

91. *Wang v. Canada,* 2016 FC 1052

92. *Wang v. Canada,* 2018 FCA 46

93. *Wang v. Canada,* [2018] S.C.C.A. No. 368

Borsato v. Basra, [2000] B.C.J. No. 2855

British Columbia Judgments

British Columbia Supreme Court

Williams Lake, British Columbia

A.F. Wilson J.

Oral judgment: February 28, 2000.

Williams Lake Registry No. 9912697

[2000] B.C.J. No. 2855 | 2000 BCSC 1898 | 117 A.C.W.S. (3d) 52

Between Dennis Borsato, plaintiff, and Davinder Basra a.k.a. Bo Basra and N.A.K. Holdings Ltd., defendants

(14 paras.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, noncompliance with discovery rules — Courts — Masters — Jurisdiction.

Appeal by Basra from a Master's order striking out his statement of defence and requiring that a new statement of defence be filed. In his motion record, the plaintiff, Borsato, had claimed that the statement of defence should be struck on the basis that Basra had failed to deliver a proper list of documents and failed to reply to a demand for particulars. Basra defended the motion on that basis. The Master ruled that Borsato was not entitled to the particulars he demanded. However, the Master struck the statement of defence anyway, on the basis that it did not comply with Rule 19, and that it was frivolous or vexatious. Basra argued that the Master had erred and exceeded his jurisdiction by granting relief on the basis of Rules not pleaded by Borsato, so that Basra did not have notice of the case he had to meet on the motion.
HELD: Appeal allowed.

The Master had exceeded his jurisdiction. Borsato had not pleaded Rules 19(20), 19(21) and 19(24) in his motion record, and Basra had not been prepared to defend the motion in relation to those rules. Basra was entitled to notice of the case he had to meet. The order striking the statement of defence was set aside. The court noted that if the two counsel involved had shown each other normal courtesy in terms of timeliness and particulars, none of this would have had to come before the courts. The court refused to order costs on that basis.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 2(2)(d), 19(20), 19(21), 19(24), 52(11).

Counsel

P.L. Schmit, for The plaintiff. A. Czepil, for the defendants.

A.F. WILSON J. (orally)

1 This is an appeal from the decision of Master Baker pronounced January 10th, 2000, in which he ordered that the defendants' statement of defence filed September 14th, 1999 be struck, and that the defendants prepare, file and deliver an amended statement of defence. The Master further ordered that the Plaintiff recover its costs of the application in any event of the cause.

2 A number of errors have been alleged in the reasons of the Master. I have heard argument on only one of them, because of the time involved. That is expressed in the brief of argument filed on behalf of the appellant, that the Master erred in basing his decision on a ground not raised in the notice of motion, or alternatively, in finding that the plaintiff's notice of motion gave the defendants adequate notice of the nature of the application. So I am specifically not dealing with the issue of whether the statement of defence was proper under Rule 19(20), or if it was frivolous, vexations and embarrassing under Rule 19(24). What I am dealing with is, in essence, whether the defendants were given proper notice of the relief which was subsequently granted by the Master. That is a jurisdictional matter, in that Rule 52(11), which sets out the powers of the court in a chambers application, says that on an application the court may grant or refuse the relief claimed in whole or in part, or dispose of any question arising on the application. If the court goes beyond those powers (there are a number of other sub-rules, but they do not apply in this case), then it is acting in excess of its jurisdiction and the order is not valid.

3 Here, the notice of motion sought an order to strike out the statement of defence filed September 14th, 1999 and grant judgment pursuant to Rule 2(2)(d) of the Supreme Court Rules, and other relief relating to delivery of particulars, delivery of a list of documents, delivery of an affidavit verifying the defendants' list of documents and costs.

4 The application was made in the context of pleadings in a construction claim. The statement of claim and writ of summons was filed on August 25th, 1999, and served on the defendant on the same date. An appearance was filed on August 27th, and the statement of defence in question filed on September 14th. There was then a demand for discovery and production of documents and a demand for particulars delivered on October 5th. The list of documents had not been delivered by the time the notice of motion was issued. Counsel for the defendants had delivered a letter in which he said, in essence, that particulars were not appropriate. By the time of the application the list of documents had been delivered, so that part of the application was abandoned.

5 What I take from that is that a reasonable defendant would expect, on return of this application, to deal with the issue of whether the demand for particulars was a proper one, and if the failure to provide the particulars as demanded was the subject, or should be the subject, of sanctions. The Master held that the demand for particulars was not proper, and there is no issue with respect to that. So the issue before me is if a notice of motion applies for relief, relying on one rule, whether the Master can grant that relief, based on other rules of which the defendant has not been given notice. The answer to that may well be contextual. I would not go so far as to say that a Master cannot refer to rules in a ruling that are not set out in the notice of motion. But the essence of the matter, I think, has to be as set out by Mr. Justice Owen-Flood in the case of Braunizer v. Canadian Pacific Ltd. (1995), 10 B.C.L.R. (3d) 195, in which he said that the real test as to the validity of an interlocutory notice of motion is whether it give the legal entities to whom it is directed reasonable notice of the application against them, and what is being sought in that application.

6 I am satisfied that this notice of motion did not give the defendants reasonable notice of what was being sought against them. In particular, I do not agree with the Master that the defendants could be expected, because of their knowledge of the law, to defend the application based on Rule 19(20), Rule 19(21) and Rule 19(24) when those rules had not been pleaded. I am assisted by the decision of Mr. Justice Spencer in Back Halsey Stuart Shields Incorporated v. Charles et al (1982), 140 D.L.R. (3d) 378, in which he agreed with counsel's position that the qualifier, if I can call it that, in Rule 52(11)(a) relating to, "any question arising on the application" must have reference to questions raised by the specific form of the notice of motion, and cannot have reference to questions which go substantially beyond the motion. In that case Mr. Justice Spencer held that the judgment had been given without notice to the defendant and under circumstances where he was deprived of his right to be heard. The facts are not particularly helpful in that case, but he did say that such a judgment is contrary to the rules of natural justice and capable of being declared a nullity for that reason, rather than merely being treated as an irregularity. Later on he went on to say that a defendant, particularly an unrepresented defendant, ought not to be left to guess at the relief which the plaintiff will seek. What you must have is attention drawn specifically to what it is that the chambers judge will be asked to do.

7 While here it is true that the defendant did have notice of what was being sought, to have the statement of defence struck out, the reasonable assumption to be drawn by the defendant and his counsel was that the basis for that was because of the failure to deliver the list of documents or to reply to the demand for particulars. I accept the submissions of counsel for the defendants that he was not prepared to deal with the issues of the adequacy of the pleadings under Rule 19, and that, in fact, he did not deal with a number of the issues dealt with by the Master in the reasons for judgment.

8 So, in essence, I find that the defendants did not have notice of the application, or did not have notice of the relief which was ultimately granted by the Master, and that the Master did exceed his jurisdiction in going beyond the relief claimed, or "dispos(ing) of any question arising on the application" as set out in Rule 52(11)(a). For that reason his order should be set aside. The appeal will thus be allowed.

9 I do want to make a comment, however, generally about this matter getting this far. It seems to me, as a matter of common courtesy between counsel, that where counsel files a statement of defence and asks for a reasonable time to get full instructions from his client, indicating that he will then file a further statement of defence dealing more specifically with the issues, and asks for a reasonable length of time to provide a complete list of documents, giving reasons why he is not able to comply within the time specified in the rules, that common courtesy of counsel should be to allow those periods of time, unless there is some serious prejudice. And I admit that I am making these comments without knowing whether there is serious prejudice. I am also well aware that the counsel who were involved are not the counsel heard by me today. But it does seem to me that this entire matter is one which should have been dealt with without the necessity of having to come to court, having the Master deal with the matter and having the matter dealt with on appeal. As I say, if what I consider to be common courtesy between counsel was followed in this case, then I do not think there would have been a need for any of these court proceedings.

10 So, in the result, the appeal is allowed and the order will be set aside.
(SUBMISSIONS BY COUNSEL)

11 MR. CZEPIL: Costs of the appeal, My Lord?

12 THE COURT: No, I am not going to award costs of the appeal, essentially on the basis which I have just set out. I really think that these entire court proceedings are unnecessary and should not have happened.

13 MR. CZEPIL: Well I agree with that, My Lord, but I didn't initiate it either, right? At least my client didn't.

14 THE COURT: Well, on the other hand, Mr. Czepil, you could have filed an amended statement of defence and avoided the problem that arose by the demand for particulars. As I say I haven't dealt with the merits of the issue on the particulars. The Master held that there was no entitlement to them and that's not in issue on the appeal. But it's pretty clear that what the plaintiff wanted was to know what the defence was, and this probably could have been avoided by filing an amended statement of defence fully setting out what the defence was. So I am not going to allow costs on the appeal.

A.F. WILSON J.

End of Document

Camp Development Corp. v. Greater Vancouver Transportation Authority, [2009] B.C.J. No. 1223

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.E.D. Savage J. (In Chambers)

Heard: May 4 and 6, 2009.

Judgment: June 19, 2009.

Docket: S064157

Registry: Vancouver

[2009] B.C.J. No. 1223 | 2009 BCSC 819 | 84 R.P.R. (4th) 41 | 97 L.C.R. 143 | 2009 CarswellBC 1635 | 179 A.C.W.S. (3d) 370

Between Camp Development Corporation, Plaintiff, and Greater Vancouver Transportation Authority, Defendant

(108 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Amendment of — Statement of claim — Adding new cause of action — To alter or add to claim for relief — Plaintiff's application to amend its statement of claim allowed in part — Challenges to the validity of an expropriation were required prior to vesting, which had taken place nearly four years ago — The GVTA did not require all of the expropriated land for a bridge development and transferred the surplus lands to a third party — The plaintiff argued the defendant was under a duty to offer to sell the excess land back to it — The basic limitation period of six years for pure economic loss, which applied to the alleged torts, had not expired — Expropriation Act, s. 21, s. 51 — Limitation Act, s. 3(2)(a) — Supreme Court Rules, Rule 19(7), Rule 19(24).

Municipal law — Powers of municipality — Expropriation — Compensation — Plaintiff's application to amend its statement of claim allowed in part — Challenges to the validity of an expropriation were required prior to vesting, which had taken place nearly four years ago — The GVTA did not require all of the expropriated land for a bridge development and transferred the surplus lands to a third party — The plaintiff argued the defendant was under a duty to offer to sell the excess land back to it — The basic limitation period of six years for pure economic loss, which applied to the alleged torts, had not expired — Expropriation Act, s. 21, s. 51 — Limitation Act, s. 3(2)(a) — Supreme Court Rules, Rule 19(7), Rule 19(24).

The plaintiff Campo Development Corp. applied to amend its statement of claim in relation to an expropriation action. The plaintiff sought to question the validity of the expropriation and to seek additional relief in the nature of a return of part of the lands, arguing that there had been an improper disposal to third parties. The Greater Vancouver Transportation Authority (GVTA) expropriated approximately 89 acres of land for use in a linear development of a bridge. The GVTA did not require all of the expropriated land for the bridge development and transferred the surplus lands to a third party. The plaintiff took the position the defendant was under a duty to offer to sell the excess land back to it and was liable to suffer some remedy as a result. The original statement of claim was filed almost three years prior to the plaintiff's application. GTVA opposed the making of the amendments, arguing that they were a challenge to the validity of the expropriation almost four years after it occurred.
HELD: Application allowed in part.

The amendments seeking to challenge the validity of the expropriation were disallowed but those amendments seeking a remedy arising from section 21 of the Expropriation Act were allowed. Section 51 of the Expropriation Act restricted challenges to the validity of an expropriation to the time prior to vesting, which had taken place nearly four years ago. The basic limitation period of six years for pure economic loss, which applied to the alleged torts, had not expired.

Statutes, Regulations and Rules Cited:

Expropriation Act, RSBC 1996, CHAPTER 125, s. 4, s. 5, s. 11, s. 12, s. 13, s. 14, s. 15, s. 16, s. 17, s. 18, s. 21, s. 23, s. 24, s. 29, s. 48, s. 45, s. 46, s. 47, s. 51

Expropriation Act, S.B.C. 1987, c. 23,

Expropriation Amendment Act, 2004, SBC 2004, CHAPTER 61, 97/ 2005,

Judicial Review Procedure Act, RSBC 1996, CHAPTER 241, s. 8

Land Clauses Act (U.K.),

Limitation Act, RSBC 1996, CHAPTER 266, s. 3(2)(a)

Supreme Court Rules, Rule 19(1), Rule 19(7), Rule 19(24)

Counsel

Counsel for the Plaintiff: J.L. Carpick, M.F. Robson, H. Shapray, Q.C.

Counsel for the Defendant: E. Hanman, L.J. Alexander.

Reasons for Judgment

Table of Contents

I. Introduction
II. Pleading Amendments Generally
    A. Plain and Obvious Standard
    B. Material Facts
    C. Inconsistent Pleadings
    D. Rule 19(24) Scandalous, frivolous, or vexatious matters
III. The Scheme of the Expropriation Act
IV. Section 51
    A. GVTA Argument
    B. Camp Argument
    C. Analysis
        1. Section 51 a Bar
        2. Inconsistent Pleading & Substantive Law

        3. Limitation Argument
- V. Bad Faith & Section 21
    1. Limitation Argument
    2. No Cause of Action
    3. Substantive Defences
    4. Analysis
- VI. Summary

J.E.D. SAVAGE J.

I. Introduction

1 This expropriation action was scheduled for trial commencing April 20, 2009 but the trial was adjourned in part because the plaintiff who is the applicant seeks to amend its statement of claim. There are two sets of amendments that are at issue. One set of amendments questions the validity of the expropriation. A second set of amendments seeks return of a part of the lands, arguing that there has been an improper disposal to third parties.

2 The background to this action and application is briefly as follows.

3 In June 2005, the Greater Vancouver Transportation Authority ("GVTA"), an expropriating authority under the *Expropriation Act*, R.S.B.C. 1996, c. 125 (the "*Act*"), expropriated approximately 89 acres of land in Maple Ridge (the "Property") owned by Camp Development Corporation ("Camp") (the "Expropriation"). The Expropriation was stated to be for use in a linear development of the Golden Ears Bridge across the Fraser River.

4 On June 21, 2005, the GVTA registered an expropriation notice on the subject lands and a vesting notice was registered on June 29, 2005, transferring title of the subject lands into the name of the GVTA.

5 On June 29, 2005, the GVTA made an advance payment totalling $7,650,000 and subsequently made an additional payment bringing the total paid, to date, to approximately $9 million.

6 On June 27, 2006, Camp filed a Writ of Summons and Statement of Claim said to be "subject to the compensation action procedure rule". The following relief was sought in the Statement of Claim:

(a) The difference between the market value of the Property and the Advance Payment plus disturbance damages.

(b) Interest pursuant to sections 46 and 47 of the Expropriation Act.

(c) Costs pursuant to section 45 of the Expropriation Act.

(d) Damages caused by making a totally inadequate advance payment.

Filed Writ of Summons and Statement of Claim, Chambers Record, Tab 11

7 Nowhere in the original Statement of Claim is there a claim challenging the validity of the Expropriation or seeking return of a portion of the Property.

8 Camp accepted all of the advance payments made by the GVTA to date, and commenced this proceeding on the basis that the land had been lawfully expropriated. As noted, Camp took the position that the advance payment was "totally inadequate".

9 Camp, almost three years after it filed the Statement of Claim now seeks leave to amend the Statement of Claim to include the following causes of action and/or relief:

(a) Damages resulting from Excessive Expropriation;

(b) Unlawful disposition of Surplus Land because of the defendant's failure to comply with section 21 of the Act;

(c) The GVTA convey to the Camp the Surplus Land;

(d) The GVTA is a trespasser on some of the land of the Camp and is liable to the Camp in damages;

(e) Damages as a result of the failure to comply with section 21 of the Act;

(f) Waiver of Tort, and more specifically, that the Camp may waive its claim for damages and elect to claim, instead, disgorgement by the GVTA and payment to the Camp of all of the benefits gained by the GVTA as a result of the misconduct;

(g) The GVTA obtained a benefit of taking land it wrongfully expropriated which benefit would have accrued to the Camp;

(h) The GVTA was unjustly enriched by the Excessive Expropriation, and is liable to the Camp; and

(i) By carrying out an Excessive Expropriation, the GVTA acted in bad faith.

Draft Amended Statement of Claim, Chambers Record, Tab 3

10 In its application Camp summarily describes its position thus:

1. Camp seeks to advance the following claims to which the Authority objects
    (a) The Authority expropriated more land than it actually required for its purposes. This made the expropriation void, or entitles Camp to damages.
    (b) The authority breached section 21 of the *Expropriation Act* by failing to offer to sell the excess land back to Camp.
    (c) By causing Maple Ridge to delay Camp's rezoning application, the Authority unlawfully interfered with Camp's economic interests.
    (d) The Authority acted in bad faith. In particular, the Authority unlawfully expropriated an excessive amount of land.
2. Camp also seeks a remedy on the basis of a plea of "waiver of tort", that is, disgorgement by the Authority of the gain it made, not simply compensatory damages.
3. Regarding the proposed amended pleading, Camp's allegation about the Authority taking more land than it needed, and acting in bad faith, is that any compensation Camp may be entitled to receive under the Expropriation Act based purely on a "market value" opinion is significantly less than its true loss as a result of the expropriation ("loss" in this sense being the economic position Camp would be in but for the expropriation, even taking into account all proper adjustments). Camp assert that tort based compensation or alternatively the "waiver of tort" provides a more just indemnity than the Expropriation Act alone.
4. For example, Camp contends that because its cost base of the land was so low (it purchased the land in 1993) it was in a unique position that no current buyer could exploit If the Property had not been expropriated, Camp would have developed it by constructing industrial warehouses, leased them, and earned an income stream having a much more significant value than is reflected by the compensation stipulated to be as market value Camp is entitled to receive under the Expropriation Act.
5. Also, had Camp been further along in this process than it was allowed to get by reason of the alleged tortious conduct of the Authority, it might have had a better case for establishing a higher market value of the expropriated property.

6. In part, Camp's complaint is due to the fact that the definition of market value in the Expropriation Act stipulates a price determined on the basis that the land owner is a willing seller. That was not true in Camp's situation because - being on the cusp of developing, but not yet having developed the property - if it had sold the property, Camp would have had to accept a price lower than the amount at which it valued the land if Camp retained it because any profit to be realized by development would not have been paid to Camp by a willing buyer.

11 The crux of one set of proposed amendments is at its most fundamental, a challenge to the validity of the Expropriation. Camp alleges that all, or a portion of the taking was invalid because of the GVTA's alleged unlawful or "bad faith" actions in carrying out the Expropriation. Based on these allegedly unlawful actions Camp is seeking to have the Property or a portion thereof conveyed back.

12 At this time there is a bridge on the lands. As explained to me, Camp does not actually seek a return of all of the lands, but if the Expropriation is invalid, the GVTA would have to expropriate anew, with a different valuation date, and there is benefit to Camp in that.

13 The second set of proposed amendments relates to the obligations of GVTA if not all of the expropriated land is required for purpose of the expropriation. Camp says that the GVTA breached its obligations under section 21 of the Act.

14 The reason for the proposed amendments is Camp's view that "... any compensation Camp may be entitled to receive under the *Expropriation Act* based purely on a 'market value' opinion is significantly less than its true loss as a result of the expropriation ('loss' in this sense being the economic position Camp would be in but for the expropriation, even taking into account all property adjustments)".

15 It is Camp's view that tort based compensation or alternatively waiver of tort provides a more just indemnity than the *Expropriation Act* remedies.

16 The GVTA opposes most of the amendments. The basis of their objections are that (1) Section 51 of the Act, and section 8 of the *Judicial Review Procedure Act*, is a bar to the relief claimed; (2) that Section 21 of the Act is a bar to the relief claimed; (3) that the *Limitation Act* is a bar to the relief claimed, (4) that the proposed amendments are inconsistent with the original relief claimed, and there is an estoppel based on conduct.

17 Camp asserts opposing positions based on its interpretation of the statutes and caselaw, and argues further, that the court should not adjudicate these issues without a trial in an application to amend the pleadings.

II. Pleading Amendments Generally

A. Plain and Obvious Standard

18 In deciding whether to dismiss an action or to allow an amendment to pleadings generally, the remedy of striking a pleading and dismissing a claim is limited to situations in which it is plain and obvious that the claim cannot succeed because it does not raise a triable issue. The fact that the matter is obscure, either by reason of fact or law, is not, by itself, a basis upon which to strike a pleading and dismiss a claim.

19 Striking a pleading and dismissing a claim is restricted to situations in which redrafting an amendment would be fruitless because the proposed claim, regardless of how it is drafted, is without legal foundation: *Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.*, 2007 BCSC 426 at para. 22.

20 In *Extra Gift Exchange Inc.*, the pleadings as they stood were so prolix and confusing that it was difficult, if not impossible, for the defendants to know the claims they were to meet. The pleadings were struck and the claims were dismissed where it was plain and obvious that they would fail; and amendments were permitted where it was not plain and obvious they would fail.

21 The main subrules at issue in this application are RR. 19(1), (7), and (24) of the *Supreme Court Rules*, B.C. Reg. 221/90.

22 Rule 19, as far as is relevant, states as follows:

> Contents
>
> (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.
>
> Inconsistent allegations
>
> (7) A party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.
>
> Alternative allegations
>
> (8) Subrule (7) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.
>
> Scandalous, frivolous or vexatious matters
>
> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

B. Material Facts

23 Rule 19(1) states that, "[a] pleading ... shall contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved".

24 The requirement to plead material facts and not evidence is, on occasion, troublesome. The problem is that a party must plead all material facts on which he intends to rely at trial, omitting no averment essential to success (see *Wyman and Moscrop Realty Ltd. v. Vancouver Real Estate Board* (1957), 8 D.L.R. (2d) 724 (B.C.C.A.)) without violating the stricture against pleading evidence.

25 As Frederick Irvine, *McLachlin & Taylor: British Columbia Practice*, looseleaf, 3d ed. (Markham: Lexis Nexis Canada Inc., 2006) [*British Columbia Practice*], points out at 19-3(2):

> The distinction between material facts and evidence is essentially one of degree. A material fact is a fact that of itself is necessary to establish a legal proposition and without which the cause of action is incomplete: *Bruce v. Odhams Press Ltd.,* [1936] 1 All E.R. 287, [1936] 1 K.B. 697 (C.A.). Evidence includes those facts necessary to establish the material facts: *Phillips v. Phillips* (1878), 4 Q.B.D. 127 (C.A.). It is a safe practice, if in doubt, to plead a matter as the risk of having an order go to strike out a portion of one's pleading as being evidence is remote, and the consequences of such an order are slight (costs), while the consequences of having omitted to plead a material fact might be to have one's pleading struck out or claim dismissed for failure to state a cause of action or defence.

26 In *Reid v. British Columbia (Egg Marketing Board)* (2002), 23 C.P.C. (5th) 127 at para. 13 (B.C.S.C.), the chambers judge cited with approval the following passage from Fraser & Horn, *The Conduct of Civil Litigation in British Columbia*, Vol. 1 (Vancouver: Butterworths, 1995) at 265-66:

> Any affirmative pleading should be complete enough as a narrative that the real story of what occurred between the parties may be understood by anyone reading it. This will occasionally lead the pleader to include information which, strictly speaking, is not necessary or entirely proper ... So long as the (technically) superfluous information contributes to the comprehensibility of the narrative and is not scandalous, prejudicial or embarrassing to the meaning of Rule 19(24) it seems permissible and even desirable to stretch the Rules of pleading somewhat.

27 That said, the standard elucidated in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.) at p. 110 (adopted in *Strauss v. Jarvis*, 2007 BCCA 605 at para. 15), is that material facts must be prepared in conventional form so that the defendant knows the case he has to meet. Pleadings that fail to identify the cause of action, that contain irrelevant material, or that are intended to confuse, are prejudicial and will be struck.

C. Inconsistent Pleadings

28 Rule 19(7) states, "[a] party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading". The effect of this rule is to prevent a party from setting up a claim in a subsequent pleading, which is inconsistent with an earlier pleading.

29 *British Columbia Practice* discusses the traditional interpretation of R. 19(7) as follows:

> R. 19(7) was given its conventional interpretation in *Business Depot Ltd. v. Lehndorff Management Ltd.*, [1996] B.C.J. No. 1961, 48 B.C.L.R. (3d) 326, at paras. 23-25 (C.A.), where the court (without reference to other authorities) described R. 19(7) as the rule against what is commonly known as "departure" and found the departure in several respects: (1) the reply alleged an oral contract different from the contract alleged in the statement of claim; (2) the reply asserted a collateral oral contract; and (3) the reply claimed rectification of the contract. Those were all different causes of action from those pleaded in the statement of claim, in which the plaintiff had sought specific performance. The court held that the plaintiff was bound by the statement of claim and that the remedy of rectification was therefore not available to it.

30 In *Bratsch Inc. v. LeBrooy* (1991), 3 C.P.C. (3d) 192 (B.C.S.C.), the court asserts the order of pleadings does not make a difference and a party cannot plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading. However, in *Gabbs v. Bouwhuis*, 2005 BCSC 1782, Bennett J. (as she then was) observed that *Bratsch* had been "... criticized by legal writers for interpreting 'previous pleading' as including the same document", citing *British Columbia Practice* in that context.

31 Madam Justice Bennett declined to follow *Bratsch*, because it did not refer to the significant body of case law on that point, and therefore was not binding authority. The court concluded at para. 24 that a party may plead inconsistent claims in the statement of claim and defence but cannot make an alternative claim that is inconsistent in reply or in a defence to a counterclaim.

32 As plaintiff's counsel note in their *Reply to Defendant's Outline*, R. 19(7) is not intended to restrict a party's right to plead in the alternative: R. 19(8).

D. Rule 19(24) Scandalous, frivolous, or vexatious matters

33 The basic issue to be determined on an application under R. 19(24) is whether there is a question to be tried, regardless of the complexity or novelty of that question. That issue must be decided on the basis of the pleadings as they stand or as they might be amended: *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.).

34 The court's role in such an application is to decide whether the claimant has a plausible argument that ought to be heard at trial. The procedure under R. 19(24) is only to be relied on in "plain and obvious cases": *Hunt v. T&N plc*, [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273.

35 In *Dempsey v. Envision Credit Union*, 2006 BCSC 750 at paras. 6-17, Madam Justice Garson summarizes the law on R. 19(24) and extracts five general propositions from the authorities concerning the circumstances under which pleadings will be struck. It is worth noting that in the instant case the defendant states at para. 21 of its *Chambers Brief of the Defendant Re: Amendment of Statement of Claim*, that only RR. 19(24)(a), (b), and (d), are at issue in the application. Thus, the portions of *Dempsey* relating to R. 19(24)(c) are not relevant.

36 Paras. 6-17 of *Dempsey* state as follows:

> **LEGAL TEST TO STRIKE PLEADINGS OR ACTIONS PURSUANT TO R. 19(24)**
>
> [6] R. 19(24) of the *Rules of Court* provides as follows:
>
>> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>>
>> (a) it discloses no reasonable claim or defence as the case may be,
>>
>> (b) it is unnecessary, scandalous, frivolous or vexatious,
>>
>> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>>
>> (d) it is otherwise an abuse of the process of the court,
>>
>> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>>
>> (27) No evidence is admissible on an application under sub rule (24) (a).
>
> [7] The question of whether a pleading discloses no reasonable claim under R. 19(24)(a) is to be determined on the basis that the facts as pleaded are true. Where it is "plain and obvious" that the claims, as pleaded, or as they might be amended, disclose no reasonable claim, the court has the discretion to dismiss the claim. Any doubt is to be resolved in favour of allowing the pleadings to stand (see *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 at p. 980; *Citizens of Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C.) at p. 276, para. 3.
>
> **RULE 19(24)(b) (c) and (d)**
>
> [8] In *Citizens for Foreign Aid Relief Inc.* the court set out a useful summary of the jurisprudence respecting R. 19(24)(b) and (c) as follows at para. 47:
>
>> Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc*. (1987), 17 B.C.L.R. (2d) 38 (B.C.S.C.) ... A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [1992] B.C.J. No. 86 (December 2, 1991), Doc. Vancouver C9136131 (B.C.S.C.) ... A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd.*, [1992] B.C.J. No. 1567 (July 3, 1992), Doc. Prince George 20714 (B.C. Master). (see also *Borsato v. Basra*, 2000 BCSC 28)
>
> [9] Pleadings will be struck out if they abuse the process of the court. Abuse of process is a flexible doctrine that allows the court to prevent a claim from proceeding where it "violates such principles as judicial economy, consistency, finality and the integrity of the administration of justice". (see *Toronto (City) v. Canadian Union of Public Employees (CUPE) Local 79*, [2003] 3 S.C.R. 77 at para. 37).
>
> [10] One way in which these principles are violated is where parties make allegations in subsequent proceedings that are *res judicata*. Parties may not bring forward in a subsequent action, points related to the subject matter of previous litigation that the parties, exercising reasonable diligence, might have been able to bring forward. (*Johnson v. Gore Wood & Co.*, 2002 2 A.C.1 at 23 English Court of Appeal and *Samos Investments Inc. v. Pattison*, [2004] B.C.J. No. 705).

[11] In *Henderson v. Henderson*, 3 Hare 100, 114 to 115, cited in *Samos*, the plea of *res judicata* was discussed.

> In trying this question, I believe I state the rule of court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[12] In *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.) at para. 18 it was held that R. 19(24)(d) gives the court the discretion to dismiss actions on the basis of abuse of process, that is, where the court process is being used for an improper purpose:

> The categories of abuse of process are open. Abuse of process may be found where proceedings involve a deception on the court or constitute a mere sham; where the process of the court is not being fairly or honestly used, or is employed for some ulterior or improper purpose; proceeding which are without foundation or serve no useful purpose and multiple or successive readings which cause or are likely to cause vexation or oppression.

[13] In *Babavic,* Baker J. cited with approval the statement from I.H. Jacob, in "The Inherent Jurisdiction of the Court" as follows at page 9:

> [The principle of abuse of process] connotes that the process of the court must be used properly, honestly and in good faith, and must not be abused. It means that the court will not allow its function as a court of law to be misused, and it will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation. Unless the court had power to intervene summarily to prevent the misuse of legal machinery, the nature and function of the court would be transformed from a court dispensing justice into an instrument of injustice.
>
> It follows that where an abuse of process has taken place, the intervention of the court by stay or even dismissal of proceedings may often be required by the very essence of justice to be done, and so to prevent parties being harassed and put to expense by frivolous, vexatious or groundless litigation.

[14] In *Toronto v. CUPE,* Arbour, J. stated at para. 35;

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice". (*R. v. Power,* [1994] 1 S.C.R. 601, at page 616), and as "oppressive treatment" (*R. v. Connelly*, [1989] 1 S.C.R. 1659, at page 1667).

[15] In *Toronto v. CUPE*, Arbour J. cited with approval Madam Justice McLachlin's statement concerning the doctrine of abuse of process in *R. v. Scott* [1990] 3 S.C.R. 979 as follows at para. 35;

> Abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underlying the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

[16] In *Borsato v. Basra,* [2000] B.C.J. No. 84 (S.C.), reversed on other grounds, [2000] B.C.J. No. 2855) Master Baker said at para. 24:

> The plaintiff also attacks the statement of defence under Rule 19(24). A pleading is frivolous if it is without substance, is groundless, fanciful, "trifles with the court" or wastes time. This statement of

> defence does, in my view, waste time and verges on the fanciful. There may, somewhere in the general traverse, be grounds, but as pleaded it lacks substance. It is therefore frivolous.
>
> A pleading is vexatious if it is without bona fides, is "hopelessly oppressive" or causes the other party anxiety, trouble or expense. This statement of defence cannot be said to be oppressive and possibly not without bona fides, but is almost certain to cause the plaintiff (and indeed has already caused) anxiety, trouble and expense. It is therefore vexatious.
>
> A pleading, to avoid being embarrassing, must not be concealing or evasive. It must state the real issue in an intelligible form. It must, in short, be a part, even in a minimally articulated form, of that constructive conversation to which I have alluded. This statement of defence does not meet that standard. It is therefore embarrassing.
>
> [17] In summary, a pleading will be struck out if:
>
> (a) the pleadings are unintelligible, confusing and difficult to understand (Citizens for Foreign aid Reform, supra);
>
> (b) the pleadings do not establish a cause of action and do not advance a claim known in law (*Citizens for Foreign aid Reform, supra*);
>
> (c) the pleadings are without substance in that they are groundless, fanciful and trifle with the Court's time (*Borsato v. Basra*);
>
> (d) the pleadings are not bona fides, are oppressive and are designed to cause the Defendants anxiety, trouble and expense (*Borsato v. Basra, supra*);
>
> (e) the action is brought for an improper purpose, particularly the harassment and oppression of the defendants (*Ebrahim v. Ebrahim,* 2002 BCSC 466.

37 In the recent case of *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2009 BCSC 577 at para. 31, Madam Justice Garson revisited R. 19(24)(a) and added to the above discussion the proposition that, "... difficult questions of law, even if they are complex or novel, may well be decided under this rule if on a proper analysis of the law it is plain and obvious that the claim cannot succeed".

38 The test on an application under RR. 19(24)(b), (c), or (d) is the same as that under R. 19(24)(a), that is, the applicant must show that it is "plain and obvious" that the pleading offends the subrule in question: *Hunt*.

III. The Scheme of the *Expropriation Act*

39 Prior to the Act, various statutes provided that local government and various other provincially created authorities, had expropriation powers and used procedures that were set out in those respective statutes. The new *Expropriation Act*, S.B.C. 1987, c. 23 established uniform procedures.

40 Previously, the procedures were different, and if an enactment contained no procedure, reliance was to be had on the old *Land Clauses Act* renamed the *Expropriation Act* by the statute revision commissioner in 1979, but founded in U.K. enactments in the mid 1800's.

41 This state of the law prompted Lambert J.A., in *Tenner* (1982) 34 B.C.L.R. 285 to opine that it is "... a commentary on the state of the law in the field of expropriation in British Columbia that the plaintiff's rights to compensation in this cased are determined by such an ancient and imperfect enactment. ..."

42 New legislation was not precipitously enacted.

43 On January 27, 1961 the Clyne Royal Commission was established to review the state of the law in B.C. Following the Clyne Royal Commission and the 1968 Ontario Royal Commission inquiring into civil rights (the McRuer commission) there was the 1971 Law Reform Commission Report. A draft of the proposed legislation was circulated by British Columbia in a "green paper" in 1982. On April 28, 1987 the Attorney General introduced Bill 22, the *Expropriation Act*, which received Royal Assent June 26, 1987. See *The Law of Expropriation and Compensation in Canada*, Todd, Eric C.E., 2nd Edition, Carswell, 1992.

44 The current Act, like Bill 22, provides for a pre-expropriation inquiry (s. 11-18), approval processes (s. 4, 5, 18), notice of expropriation (s. 6), acquisition procedures, registration (s. 23, 24), advance payment (s. 20), compensation (s. 29-48) and costs (s. 48). Under Bill 22 the Expropriation Compensation Board was created which had original jurisdiction to deal with compensation claims. In 2005, the Expropriation Compensation Board was abolished and originating jurisdiction in expropriation actions conferred on this court: *Expropriation Amendment Act, 2004*, S.B.C. 2004, c. 61, 97/2005: Expropriation Compensation Board Transitional Regulation.

IV. Section 51

45 Amendments to paragraphs 8A-8F plead excessive expropriation and that the expropriation is *ultra vires* and void. These are related to the amendments to paragraphs 39-47, paragraphs 60-61 and some of the amendments to the prayer for relief.

A. GVTA Argument

46 GVTA opposes the making of the amendments. GVTA argues that the crux of the amendments is fundamentally a challenge to the validity of the Expropriation almost four years after the Expropriation. The proposed amendments allege that all or a portion of the taking is invalid because of GVTA's unlawful or bad faith actions in carrying out the expropriation. Thus, based on these allegedly unlawful actions Camp seeks to have the property and/or a portion thereof conveyed back.

47 GVTA says that the validity of the Expropriation can only be challenged in limited circumstances. Section 51 of the Act, it says, constitutes a code and severely limits proceedings to challenge the validity of a taking. Section 51 reads as follows:

> 51 (1) Legal proceedings to challenge the validity of an expropriation must not be brought after land vests under section 23.
>
> (2) Subject to subsection (1), an application under the *Judicial Review Procedure Act* must be brought within 30 days after the order or determination subject to review is made.

48 In this case the expropriation notice was filed at the land title office on June 21, 2005, and on June 23, 2005 copies of the expropriation notice, and the certificate of approval of expropriation, were delivered to Camp. On June 28, 2005 GVTA delivered to Camp an advance payment of $7,650,000. Title to the land vested in the GVTA on filing of the vesting notice, on or about June 29, 2005. Later the advance payment was increased to approximately $9,000,000. This proceeding was commenced in 2006, claiming compensation for the Expropriation.

49 The Expropriation followed months of correspondence and discussion between the parties and their solicitors regarding whether there should be a whole or partial taking. Evidence regarding the discussions between GVTA and Camp regarding the lands at issue, and the amount of the proposed expropriation, is contained at pages 13-62 of the Affidavit of Rick Bosa, sworn February 19, 2009.

50 The GVTA relies on *Rella v. Village of Montrose*, 2006 BCSC 1383 at para. 52, 54-55, *Seaside Acres Ltd. v. Pacific Coast Energy Corporation et al.*, [1994] B.C.J. No. 217, 1994 CanLII 2503 (B.C.C.A.), *Roadmaster Auto Centre Ltd. v. Burnaby (District)* [1992] B.C.J. No. 2959.

51 Camp says that because the notice of expropriation was erroneous, the expropriation is a nullity, relying on the decision of the Court of Appeal in *Gray v. Langley (Township)* (1986) 9 B.C.L.R. (2d) 1, [1987] 2 W.W.R. 157, 34 M.P.L.R. 183, 34 D.L.R. (4th) 270.

52 Section 51(1) provides that legal proceedings to challenge the "validity" of an expropriation "must" not be brought after the land vests. The section, then, is directed at proceedings that challenge the validity of an expropriation. The provision is mandatory on its face. It says that such proceedings must not be brought after vesting. GVTA says that the plain meaning of this provision is that the amendments proposed by GVTA, alleging that the Expropriation is invalid, cannot be brought for the first time now, some 4 years after the vesting, as they raise an issue bound to fail.

53 In *Rella v. Village of Montrose* 2006 BCSC 1383 the petitioners sought relief pursuant to the *Judicial Review Procedures Act*, R.S.B.C. 1996, c. 241 for the expropriation of a portion of their residential property. It was alleged that there were various failings of the expropriating authority including failing to post a notice of expropriation, defective publication of the notice, failing to hold an inquiry, a mis-description in the purpose of the expropriation, too much land was taken, and the respondent was acting in bad faith. None of those allegations were made out, however, Holmes J. found that since the land had vested legal proceedings could not be brought:

> [55] The authorities are clear and consistent to the effect that the limitation in s. 51(2) of the *Act* is made expressly subject to s. 51(1) which governs. I therefore find the present proceeding statute barred by operation of s. 51(1) of the *Act*. [*Seaside Acres Ltd. v. Pacific Coast Energy Corp.*, [1992] B.C.J. No. 2923 (S.C.), aff'd (1994), 87 B.C.L.R. (2d) 229 (C.A.); *Roadmaster Auto Centre Ltd. v. Burnaby (District)*, [1992] B.C.J. No. 2959 (S.C.); *Erickson v. Kamloops (City)*, [1993] B.C.J. No. 1239 (S.C.); *White v. Prince George (City)* (1993), 50 L.C.R. 260 (B.C.E.C.B.); *Cejka v. Cariboo (Regional District)* (1995), 56 L.C.R. 131 (B.C.E.C.B.); *Whitechapel Estates Ltd. v. British Columbia (Ministry of Transportation and Highways)* (1998), 57 B.C.L.R. (3d) 130 (C.A.)]

54 The GVTA also relies on the decision of the Court of Appeal in *Seaside Acres Ltd. v. Pacific Coast Energy Corporation et al.*, 1994 CanLII 2503 (B.C.C.A.), [1994] B.C.J. No. 217 (B.C.C.A.). In that case, however, it was not disputed that if the process called for by the Act had been validly complied with, *Seaside's* petition was out of time (para 26).

55 In *Roadmaster Auto Centre Ltd. v. Burnaby (District)* [1992] B.C.J. No. 2959, a tenant sought a declaration that it held a valid and subsisting lease, seeking to set aside a vesting order. Blair J. dismissed the application:

> 17. I find that the application for relief made by the petitioner under the *Expropriation Act* was brought after the Vesting Notice was filed and hence, was out of time pursuant to s. 50(1) [now s. 51(1)] of the *Expropriation Act*. Similarly I find that the application for relief under the *Judicial Review Procedure Act* was brought more than thirty days after the 26 May 1992 decision and hence, was out of time pursuant to Section 50(2) [now s. 51(2)] of the same *Expropriation Act*.
>
> 18. As noted, the petitioner also seeks declaratory relief pursuant to Supreme Court Rule 10 outside the scope of both the *Expropriation* and *Judicial Review Procedure Acts*. I deny that application; to grant it would be to ignore the provisions of the *Expropriation Act* and the *Judicial Review Procedure Act* which are clearly applicable in the instant case.

56 The GVTA also argues that Camp's challenge is not permitted under the Act or *Supreme Court Rules*, in that the question of whether an expropriating authority's powers has been exercised in accordance with statutory requirements is not justiciable: see *B. Johnson & Co. (Builders), Ltd. v. Minister of Health*, [1947] 2 All E.R. 395, followed in *Pacific Forest Products Limited v. British Columbia (Minister of Transportation and Highways)* (1994), 53 L.C.R. 198 at p. 7-8.

B. Camp Argument

57 Camp argues that since the proposed amended pleading alleges that the notice is a nullity, there has been no expropriation. In places the arguments suggests that if the taking was not nullity in total there is partial invalidity. It is a nullity due to a material misrepresentation by the GVTA as to the true purpose of the expropriation. Thus the approval certificate and the vesting notice are also nullities:

> Additionally, the invalidity of the Notice results in the approval certificate and the vesting notice being nullities. The Property did not lawfully vest in the Authority's name and legal title to the Property must be returned to Camp.

58 This is of importance because:

> 131. Camp alleges that the Notice misstated the true purpose of the Expropriation and the Authority knowingly expropriated more land than it actually required for the stated purpose of the Expropriation. In particular:
>
> (i) The Authority's true purpose for the Expropriation included using and developing other works and facilities on the Property in addition to the Bridge.
>
> (ii) The other works and facilities did not comprise a "linear development" under the Expropriation Act.
>
> (iii) The Authority did not require all of the land it expropriated for the purpose of constructing the Bridge.
>
> 132. The *true* purpose of the expropriation must be stated on the expropriation notice or sections 4 and 6 of the *Expropriation Act* have not been complied with and purported any expropriation based an invalid expropriation notice is void because:
>
> (i) Service of a valid and truthful expropriation notice is a condition precedent to a valid expropriation (per VanKam).
>
> (ii) An expropriation can only be approved by an approving authority if it has the correct, actual information to base its decision to approve the expropriation.
>
> (iii) If a valid approval certificate cannot be given (because the expropriation notice the decision was purportedly made on was invalid) then there can be no valid vesting notice.
>
> (iv) If there is no valid vesting notice then the Property was not properly vested in the name of the Authority.
>
> (v) Additionally, if sections 4 and/or 6 have not been complied with, then the Authority has not expropriated in accordance with the provisions of the Expropriation Act, which means that it was not properly empowered to expropriate at all pursuant to the South Coast British Columbia Transportation Authority Act.

59 In arguing that the expropriation is a nullity, Camp relies on such cases as *Thorcon Enterprises Ltd. v. West Vancouver (District)*, [1988] B.C.J. No. 323 (S.C.), where it was held that expropriation notice must show on its face sufficient and accurate detail to allow the owner to decide whether an inquiry should be sought.

60 Additionally, Camp says there must be strict compliance with enabling legislation based on *Costello v. Calgary (City)* [1983] S.C.J. No. 4, *Van Kam Freightways Ltd. v. Kelowna (City)*, 2007 BCCA 287, [2007] B.C.J. No. 1026 (C.A.) and the failure to state exact purposes as in *Purchase v. Terrace (City)*, [1995] B.C.J. No. 247 (S.C.), can give rise to a finding that such an expropriation is *void ab initio*: *Gray v. Langley (Township)* [1986] B.C.J. No. 1215 (C.A.), *Rose v. Grand Bank (Town)* [1990] N.J. No. 121 (SCN-TD), 49 M.P.L.R. 232.

61 Camp argues further that as the taking is a nullity Camp, the actions of GVTA are tortuous and it is entitled to various remedies in tort for the wrongful conduct of the GVTA, including reconveyance of the property, damages, disgorgement, an accounting of the benefits received by the GVTA etc.

C. Analysis

1. Section 51 a Bar

62 The error that Camp asserts is that the Notice of Expropriation does not state the true purpose of the taking. The Notice of Expropriation is reproduced in the chambers brief at Exhibit A to the Affidavit of R. Bosa sworn February 19, 2009. The notice contains the following:

1. Greater Vancouver Transportation Authority, 1600-4720 Kingsway, Burnaby, British Columbia V5H 4N2, Telephone Number: (604) 453-4500 (the "Expropriating Authority") intends to expropriate land or interest in land with respect of which Camp Developments Corporation is the registered owner, the particulars of which are a full taking in fee simple over:

Parcel Identifier: 005-905-851

Legal Description: Parcel "H" (Plan with fee deposited 15901F) District Lot 280, Group I, New Westminster District

Civic Address: None

Parcel identifier: 004-346-327

Legal Description: Parcel "D" (Plan in absolute fees parcels book volume 12, folio 752 No. 6903F) District Lot 281, Group 1, Except: Firstly: that portion shown coloured red on plan with fee deposited 14957F.

Secondly Parcel "B" (Reference Plan 1963)

Thirdly: Two portions 4.06 acres and 2.85 acres more or less as shown on reference plan 1963, New Westminster District.

Civic Address: 10951 Hazelwood Street, Maple Ridge, B.C.

Parcel Identifier: 000-508-926

Legal Description:	Parcel "C" (Plan in Fee deposited 15901F),

Except: part subdivided by plan 35482, District Lot 281, Group 1, New Westminster District.

Civic Address:	19967 Wharf Street, Maple Ridge, B.C.

2. The nature of the interest in the land intended to be expropriated is a fee simple, full taking.
3. The purpose for which the interest in the land is required is the Golden Ears Bridge. Project Transportation system, which constitutes a linear development.
4. The Approving Authority with respect to this expropriation is the Greater Vancouver Transportation Authority pursuant to Section 1(1) of the *Expropriation Act* which is charged with the administration of the *Greater Vancouver Transportation Act* under which the Expropriating Authority is empowered to expropriate.
5. Where an owner is eligible under Section 10 of the *Expropriation Act* to request an inquiry, the Minister of Transportation and the Expropriating Authority must be served with a Notice of Request for Inquiry (Form 2), a copy of which is attached hereto, within thirty (30) days after the date this Expropriation Notice is served on the owner. The owner is NOT entitled to request an inquiry.
6. Permitted encumbrances are as set out in the letter to the Registrar of Land Titles.

63 Camp says the Expropriation is a nullity because the notice does not disclose the true purpose as only part of the lands was required for the Golden Ears Bridge Project Transportation System. It is acknowledged that the bridge is now built on the lands subject to the Expropriation, although there are excess lands.

64 In *Thorcon Enterprises*, Spencer J. held that in order for an inquiry officer to be able to hold an informative hearing it is necessary that the purpose of the expropriation be known. In that case no expropriation had taken place, as there was no notice of expropriation. The stated purpose of the bylaw was said only to be "or pleasure, recreation, or community use of the public". Although the title of the bylaw also referred to the "Argyle acquisition policy" the court could not give content to that phrase in the title to the bylaw. The court found that the bylaw, enacted a few days before the new *Expropriation Act* came into force, had not expropriated land in accordance with the *Expropriation Act*, and that the bylaw was too vague and uncertain. This is a case of first impression referencing the new Act.

65 Camp relies on *Costello* for the distinction between void and voidable bylaws, specifically that a statute enacting a formality attached to the exercise of a grant of authority by by-law must be examined in each instance to determine whether it is mandatory or directory. In general, where legislation interferes with private rights, conditions precedent to the exercise of statutory powers must be strictly complied with. While *Costello* stands for this general proposition, it specifically dealt with a matter where the claimant was not given notice of the expropriation.

66 *Van Kam* is another expropriation case relating to a failure to give notice, this time to an unrecorded leaseholder who was held to be an owner within the meaning of the Act. *Van Kam* follows *Costello*, however, Madam Justice Huddart, speaking for the Court, analyses the legislation and finds that "... the only conditions precedent to an expropriation are set down in s. 4 ..." which are service of an expropriation notice and approval of the approving authority. Service of an expropriation notice by section 6(1)(a) is restricted to an owner whose land is expropriated, and an owner whose interest is recorded in the land title office. Thus, although the unrecorded leaseholder had no notice of the expropriation, the expropriation was valid as the only condition precedents were met.

67 In *Purchase,* the owner sought a declaration that the actions of the city had effected an expropriation, and sought to mandamus the respondent to expropriate its lands. The petition was dismissed, but during the course of her decision Madam Justice Dorgan stated that there "... are no common law principles in the law of expropriation ..." approving the statement of Lord Pearson in *Rugby Water Board v. Shaw Fox*, [1972] 2 W.L.R. 757 at 763 that "... compulsory acquisition and compensation are entirely creatures of statute". Although in passing she stated an expropriation bylaw "... must be found to give proper and clear notice of what is to be expropriated, and must state its exact purposes", that statement is *obiter dicta* as for other reasons she found mandamus should be refused.

68 The parties argued at length the meaning of the various judgments in *Gray*, with differing positions on who was in the majority. Camp relied on the case for the proposition that the absence of notice of a tax sale is fatal, entitling the owner to set aside the sale, relying on the decision of Anderson J.A. GVTA on the other hand relied on the statement of McLachlin J.A., as she then was, who distinguished between statutes that made no provision regarding validity or finality, and those which did. She said:

> 72 Where the statute does not contain provisions indicating that a sale is to be valid or conclusive notwithstanding failure to follow the prescribed steps, the rule is that the sale which follows such failure is a nullity: *O'Brien v. Cogswell* (1889), 17 S.C.R. 420 at 424 [N.S.]; see also *Deverill v. Coe* (1886), 11 O.R. 222 (C.A.); *Dalziel v. Mallory* (1888), 17 O.R. 80; *Toronto Gen. Trusts Corp. v. Maryfield*, [1945] 3 W.W.R. 625 (Sask. C.A.).
>
> 73 On the other hand, where the statute contains provisions which indicate that the title obtained by the tax purchaser will remain valid notwithstanding a failure to comply with requirements of the Act, the sale will not be declared a nullity. Such provisions may take different forms. Some may be curative provisions. Some, like s. 473, may set out particular situations where the taxpayer may ask to have the sale set aside. And some, like s. 475, establish limitations on when an action can be brought. The important point is that the presence of such provisions indicates the intention of the legislature that, in certain circumstances, the title of the tax purchaser shall be final notwithstanding defects of procedure. Where the statute discloses this intention, it is not open to the former landowner to say that there has been no valid sale and hence that such provisions do not apply. The very purpose of such provisions is to ensure that the sale stands notwithstanding omissions which might otherwise affect its validity.
>
> 74 An example of such a statute is found in *Langdon v. Holytrex Gold Mines Ltd.*, [1937] S.C.R. 334, [1937] 2 D.L.R. 364. In that case, as in this, the municipality had failed to give the landowner the notice required by statute, and the land had been sold. In that case, too, as in this, the statute provided that after the expiry of the redemption period actions to recover the land were barred. The question, as in this case, was whether the sale or purported sale fell within the curative and limitation provisions of the Act. The Supreme Court of Canada held that they did, with the result that the taxpayer's action was barred by statute.

69 In discussing the policy behind the provisions she noted the following:

> 76 I am satisfied upon consideration of s. 473 and s. 475 that the intention of the legislature was to make tax sales final notwithstanding defects in procedure save for the specified exceptions. There are two stages. During the redemption period, under s. 473, there is a fairly broad right of challenge. After the redemption period, however, claims are restricted to compensation or indemnity; no claims with respect to the land itself or title can be maintained.
>
> 77 I am confirmed in this view by other considerations. First, this reading of the *Municipal Act* is consistent with the land registry system in place in British Columbia. The keystone of that system is the conclusiveness and finality of title as an indication of ownership. The prospect of challenges to the title of the tax purchaser long after the redemption period has passed and after the purchaser may have in good faith expended money and work in improving what he thought was his land is not consistent with the goals of our land registry system. More particularly, s. 255 of the *Land Title Act* provides that:
>
> > 255. (1) ... where land is sold for taxes, rates, or assessments, the registration of the tax sale purchaser for an estate in fee simple purges and disencumbers the land of
> >
> > (*a*) all the right, title and interest of every previous owner, or of those claiming under him ...

> Clearly the legislature's intention was that a purchaser such as Mrs. Griffith, who obtains title pursuant to s. *272* of the *Municipal Act* at the end of the redemption period, should take title free from any claims of the previous owner.
>
> 78 Second, the history of the legislation confirms the increasing concern of the legislature with ensuring certain title on tax sales, within such limits as are necessary to protect the property owner. Before 1900, tax purchasers in British Columbia could only purchase *prima facie* title. Tax titles could always be impeached, and tax purchasers were never sure of their titles: *Johnson v. Kirk* (1900), 30 S.C.R. 344. In 1900 the legislature enacted s. 8 of the *Land Registry Amendment Act* to cure uncertain tax titles by estopping and debarring claims after the redemption period: see *Temple v. North Vancouver* (1914), 6 W.W.R. 70 at 103-105 (S.C.C.) [B.C.], per Duff J.; *Crumm v. Shepard*, [1928] S.C.R. 487 at 511-12, [1928] 3 D.L.R. 887 [Alta.]. In 1913 the legislature added an indemnity provision for persons who could not recover their land because of the operation of the *Land Registry Act*. Between 1914 and 1919 the legislation permitted actions to set aside tax sales if they were brought within a year of delivery of the deed to the tax purchaser, but not otherwise. In 1919 the legislature repealed the existing tax sale provisions and enacted the predecessors of the present ss. 472 and 475 of the *Municipal Act*. Finally, in 1978, s. 255 of the *Land Title Act* was enacted, providing that the tax purchaser obtains fee simple free of encumbrances.

70 As I read the several decisions, Anderson, J.A.'s reasons were not adopted by the other members of the court. Anderson was of the view there was no sale. His reasons were not concurred in by Seaton, J.A. who considered the issue was triable, and referred the matter back to be resolved at trial. Seaton agreed with McLachlin, J.A., and Southin, J. below [3 B.C.L.R. (2d) 335], that if there was a sale section 475 of the *Municipal Act* prevents setting it aside.

71 In my view the cases involving a failure to give notice of an expropriation or of a tax sale are not helpful to Camp. What could be more fundamental in either context than notice to the owner? In *Van Kam*, however, even that was held to be subordinated to the legislative conditions precedent that restricted required notice to those with recorded interests.

72 In this case there is no dispute that part of the lands was required for the construction of the Golden Ears bridge. The question of whether all or only part of the lands was required was vetted between Camp and GVTA prior to the Expropriation in an exchange of correspondence. The Notice of Expropriation states that it is for "the Golden Ears Bridge Project Transportation System, which constitutes a linear development". It is plain and obvious that an argument based on the *Costello* line of authorities cannot succeed. See, for example, *Gray v. City of Oshawa et al.* [1972] 2 O.R. 856, 27 D.L.R. (3d) 35 (Ont. C.A.).

73 In my opinion, section 51 of the Act is a complete answer to Camp's application to amend its pleadings to challenge the validity of the Expropriation. Section 51(1), on its face, was intended to make available only for a limited period challenges to the validity of an expropriation. The availability of a challenge is restricted to the time prior to vesting. Vesting took place nearly four years ago, so the time limit to challenge the validity of the Expropriation expired long ago.

74 In these circumstances it is inappropriate to allow an amendment to a pleading, to challenge the validity of an expropriation, asserting a new cause of action after the expiration of a limitation period: *City Construction Co. Ltd. v. Salmon's Transfer Ltd.*, [1973] 5 W.W.R. 378 (C.A.).

75 Various actions of the expropriating authority might also be subject to judicial review. Section 51(2) restricts judicial review to within 30 days after the order or determination. Section 51(2) however is subject to section 51(1) which entails that once there is a vesting order, judicial review is not available either.

76 Of course any limitation period it can be argued has a draconian aspect as it forecloses rights. In my view, however, the legislature imposed strict limitations on the time frame within which the validity of expropriation might be challenged in express terms. There are good policy reasons for this which are found in the various reports that antedated passage of the modern *Expropriation Act*, i.e., the avoidance of confusion and delay in the creation of public works, especially linear ones which may involve years of planning and preparation.

77 To paraphrase what McLachlin J.A., said in *Gray*, the presence of these sections evinces an intention of the legislature that while there may be defects rendering an expropriation invalid, an expropriation must stand after vesting notwithstanding defects affecting validity. While in some respects that might appear draconian, that does not leave the expropriated person without redress. The expropriated person had the ability to challenge the expropriation albeit for a limited period. There is also other redress under the Act. The other redress is statutory compensation.

78 It follows that on my view, it would be inappropriate to allow the amendments which seek to challenge the validity of the Expropriation. That is because the proposed amendments raise an issue that is bound to fail. The GVTA raised other arguments opposing these amendments. It is appropriate to deal with those arguments.

2. Inconsistent Pleading & Substantive Law

79 Alternatively, GVTA takes issue with Camp amending its pleadings to allege the Expropriation is invalid, as this raises an inconsistency in the pleadings. There is no doubt that the original pleadings assert that there had been an expropriation and seeks statutory compensation.

80 The proposed pleading asserts that the expropriation is void or partially void and seeks to have what are described as excess lands returned. During the course of argument Camp suggested that it did not want the land returned that is being used for the Golden Ears bridge but that proving invalidity might require a new taking, requiring that compensation be at current values, not 2005 values.

81 GVTA argues that either the Expropriation was valid and Camp is entitled to statutory compensation, which is its original pleading, or the Expropriation is not valid, and Camp is entitled to some other remedy. Is this an additional concern regarding the proposed amendments?

82 GVTA relied on Rule 19(7) which provides that "A party shall not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading".

83 There are cases that interpret Rule 19(7) in the way contended for by GVTA. For example, in *Bratsch Inc. v. LeBrooy* [1991] B.C.J. No. 3290, Melnick J. held that a claim for specific enforcement of a contract that a party has already pleaded is void and of no effect, even though stated to be in the alternative, is a plea of an inconsistent right. To like effect is the decision of this court in *Westerlee Development Ltd. v. Adanac Customs Brokers Ltd.* (1994), 31 C.P.C. (3d) 136 where it was held that it was inconsistent to plead affirmation of the contract and specific performance or damages and then to plead repudiation of the contract.

84 Camp seeks to distinguish *Bratsch* on the basis that it was a contract repudiation case and relied on there being full knowledge, before there is an election. It says whether Camp can be held to have irrevocably elected a right to compensation as opposed to a right to seek a remedy based on the claim that the Expropriation was void, based on contract repudiation cases, is to ignore the very different substantive law that affects consideration of these types of cases.

85 In contract repudiation cases, it is argued, an alternate claim is not possible "a party simply cannot have it both ways-cannot say, I elected to terminate the contract but if I didn't do that I affirmed it". On the other hand "It is perfectly consistent to say the Expropriation was void, but if that is found not to be so, then Camp is entitled to more compensation under the statute that (sic) the Authority has paid".

86 In this case Camp first pled that there was an expropriation, inadequate advance payment, and that Camp was entitled to compensation under the Act. It then sought to amend the pleadings to say the expropriation was not valid. An examination of the caselaw indicates, in my opinion, a similarity between the substantive law on the election of remedies in contract and the law of expropriation, not the difference alleged.

87 In *Molander v. Cranbrook (City)*, [1980] B.C.J. No. 633, 20 L.C.R. (B.C.C.A.), 1980 CarswellBC 650, the court held that the owner having actively engaged in negotiating with the expropriating authority on the subject of compensation, while large sums were expended on construction, could not then about face and argue the expropriation was void some two years later.

88 In *M.E.P.C. Canadian Properties Ltd. v. The Queen* (1974), 7 L.C.R. 31, 64 D.L.R. (3d) 707, Mahoney J., considered expropriation proceedings under the *Expropriation Act*, R.S.C. 1970 (1st Supp.), c. 16:

> 14 The general principle is that where a person chooses between mutually exclusive courses of action in relation to another person he cannot later, as against that person, take up any but the course of action chosen, Lord Atkin, in *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A.C. 1 at p. 30 put it:
>
>> ... if a man is entitled to one of two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.
>
> 15 In this instance the plaintiff had a right to the property, if the expropriation were invalid as it contended, or it had a right to be paid if the expropriation were valid or if it withdrew or waived its contention. It did not have the right to both property and money. Its acceptance of the money was an unequivocal act made with full knowledge and constituted an election precluding it from thereafter seeking the property.

M.E.P.C. was followed by Lamperson J., in this court in *Erickson v. Kamloops (City)*, (1993), 50 L.C.R. 81, [1993] B.C.W.L.D. 1640.

89 In my opinion the proposed pleading seeks to assert rights inconsistent with the course of action taken by receiving the advance payment, issuing a writ claiming compensation, and standing by while the bridge was built . In this case Camp received notice of the expropriation, and notice of the vesting in 2005. It received compensation in the amount of $7,650,000 at the time of the expropriation and additional sums totalling $9,000,000. It challenged the amount of compensation as inadequate by commencing an action seeking additional compensation under the Act in 2006. Between then and now the Golden Ears bridge has been built on the lands. It is inconsistent to assert now that the Expropriation is invalid.

90 It raises an inconsistency in the pleadings to amend the pleadings now by asserting the Expropriation is invalid, having alleged in the original pleadings that the land was expropriated, there was inadequate compensation and sought additional compensation under the Act by issuance of the writ. The form of the proposed amendment indicates the inconsistency. The statement of claim originally asserts that on June 28, 2005 the authority expropriated the property. The proposed amendment says only that authority *purported* to exercise its power to expropriate.

91 I am mindful of the decision of Bennett J. (as she then was) in *Gabbs v. Bouwhuis*, 2005 BCSC 1782, a case not referred to by either party. In that case Bennett J. allowed amendments that provided alternate grounds for finding liability under a promissory note which the defendant had signed. The original averment alleged that the defendant was the guarantor under the note. The alternate grounds to be pleaded were that the defendant was the maker of the note or in the further alternative, an accommodation party to the note. The amendments were allowed. The amendment allowed were simply alternate theories seeking the same relief based on the same set of primary facts, the signing by the defendant of the note.

92 In the instant case the proposed amendments would assert rights inconsistent with those originally pleaded, and under which the action was originally commenced. In my view such pleadings are precluded by the substantive law of expropriation, not the *Supreme Court Rules*. The substantive law of expropriation, in that regard, is similar to contract election; i.e., having sought compensation under the Act in accordance with the time limits required by the Act, one cannot after vesting, receipt of the advance payment, after having triggered the right to seek enhanced compensation, and having stood by during construction, reverse course.

3. Limitation Argument

93 GVTA's third argument is based upon the *Limitation Act*. For the reasons given below I would not accede to that objection.

V. Bad Faith & Section 21

94 Camp also proposes to amend its statement of claim to allege that the GVTA exercised its statutory powers in bad faith in not complying with section 21 of the Act. The proposed amendments are contained in paragraphs 48-52.

95 Section 21 of the Act reads as follows:

> 21 (1) If, within 2 years after filing the vesting notice under section 23, the expropriating authority determines that the land is no longer required for its purposes, the authority must not, without the approval of the approving authority, dispose of the land without first offering it to the owner from whom the land was taken, or his or her successor.
>
> (2) If an owner referred to in subsection (1) wishes to re-acquire the land expropriated, but cannot agree with the expropriating authority on the purchase price, the court must summarily determine the market value of the land as at the time of making the summary determination, and that amount is the purchase price.
>
> (3) The costs of proceedings under this section must be borne by the parties, unless the court, in special circumstances, orders the expropriating authority or the owner to bear the costs of the other.
>
> (4) Part 7 of the *Land Title Act* applies to a re-acquisition under this section.

96 The proposed amended statement of claim says that the GVTA was under a duty to offer to sell the excess land back to Camp, breached that duty by disposing of the excess lands, and is liable to suffer some remedy in Camp's favour as a result. The breach is alleged to have occurred on or before June 28, 2007.

97 As I have said, paragraphs 48-61 allege bad faith in their being non-compliance with section 21 of the Act. GVTA argues in response that there is no cause of action revealed by these proposed amendments, and that a proceeding regarding bad faith is statute barred, or alternatively, there is a limitation defence.

1. Limitation Argument

98 GVTA argues that the amendments should not be permitted to allege these torts, if they are torts, because of the effluxion of the two year limitation period contained in the *Limitation Act*, R.S.B.C. 1996, c. 266. It says that a claim for damages whether based on contract, tort, or statutory duty has a two year limitation period.

99 Camp disagrees. The limitation period for pure economic loss is not "injury to property" within the meaning of section 3(2)(a) of the *Limitation Act*: see *Alberni District Credit Union v. Cambridge Properties Ltd.* (1985), 65 B.C.L.R. 297 (B.C.C.A.); *British Columbia (Workers' Compensation Board) v. Thompson Berwick Pratt & Partners* (1986), 24 B.C.L.R. (2d) 157 (B.C.C.A.).

100 The applicable limitation provision is therefore s. 3(5) which sets a basic limitation period of 6 years from the date the right to bring the action arose: see *Armstrong v. West Vancouver*, [2003] B.C.J. No. 303, 2003 CarswellBC 264 (B.C.C.A.), and *H.M.T.Q. for B.C., as represented by the Minister of Forests et al v. Tnasem Logging Ltd.*, 2006 BCCA 546.

2. No Cause of Action

101 GVTA argues that there is no cause of action alleged. Camp says that GVTA was in breach of its statutory duties under section 21. Section 21 also provides its own remedy.

3. Substantive Defences

102 GVTA says it has not disposed of the property, so that any obligation does not arise under section 21. Although title remains in the GVTA, Camp argues for an extended meaning to the term "disposed".

4. Analysis

103 With respect to the limitation defence in my opinion Camp is correct. The phrase "Injury to property" in section 3(2)(a) of the *Limitation* Act means physical harm caused by an external force: *410727 B.C. Ltd. Dayhu Investments Ltd.* 2004 BCCA 379 at paragraph 16. The limitation period for the torts alleged has not expired.

104 Whether it is necessary to plead a cause of action other than a failure to comply with section 21 is an arguable point, as is the question of whether a party is restricted to the remedy provided for by section 21. However, Camp pleads breach of statutory duty, which is a tort, and thus has pleaded a cause of action.

105 GVTA says it has not disposed of the property, so that any obligation does not arise under section 21. Camp argues for an extended meaning to the term "disposed". These are matters which can appropriately be dealt with in the pleadings.

106 In my opinion it is not plain and obvious at this stage that Camps arguments based on these or similar amendments must fail. In the circumstances, I would allow amendments similar to those currently contained in paragraphs 48-52. I say "similar to" because in light of my disallowance of some of the other amendments the wording of these proposed amendments might change.

VI. Summary

107 I disallow those amendments seeking to challenge the validity of the Expropriation as explained above. I allow those amendments seeking a remedy arising from s. 21 of the Act.

108 If there are any other matters arising the parties are at liberty to come back before the court. If the parties are unable to agree on costs, costs may be spoken to.

J.E.D. SAVAGE J.

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Dixon v. Stork Craft Manufacturing Inc., [2013] B.C.J. No. 1344

British Columbia Judgments

British Columbia Supreme Court

Victoria, British Columbia

G.R.J. Gaul J.

Heard: February 1, 2012.

Judgment: June 21, 2013.

Docket: 11-4482

Registry: Victoria

[2013] B.C.J. No. 1344 | 2013 BCSC 1117 | 3 C.C.L.T. (4th) 147 | 230 A.C.W.S. (3d) 369 | 2013 CarswellBC 1882

Between Jane Dixon, Dana Miller, Loretta McFadzean and Lisa Elliot, Respondents (Plaintiffs), and Stork Craft Manufacturing Inc., Fisher-Price Inc., Sears Canada Inc., Wal-Mart Canada Corporation, and Toys "R" Us (Canada) Ltd, Toys "R" Us (Canada) Ltee., Applicants (Defendants)

(74 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Class or representative actions — Procedure — Stay of action due to parallel proceeding — Disposition without trial — Stay of action — Another proceeding pending — Motion by defendants to stay action allowed — Plaintiffs launched proposed class action relating to negligent design, manufacture, distribution and sale of baby cribs in Canada — Action was subsequent to numerous other actions across Canada involving essentially same defendants and allegations — Action was improper attempt to re-litigate the issue of adding plaintiffs to existing class action and was a collateral attack on order made in existing class action — Action was improper attempt to add new causes of action to existing action, add new representative plaintiffs to existing action and toll limitation period.

Motion by the defendants to stay the plaintiffs' proposed class action. In November 2009, the defendant Stork Craft Manufacturing ("Stork Craft") issued a nation-wide recall of certain cribs it had manufactured between 1993 and 2009. Each of the plaintiffs, who were residents of British Columbia, Alberta, Saskatchewan and Ontario, owned a crib that was subject to the recall. On the same day that the recall was issued, Dodd, a resident of British Columbia launched a proposed class action against some of the defendants in this action relating to the negligent design, manufacture, distribution and sale of baby cribs in Canada. In addition, proposed class action lawsuits were launched in Ontario, Quebec, Saskatchewan, Alberta and Manitoba. The Alberta and Manitoba actions had been discontinued. While the parties had discussed the discontinuance of the Ontario action, it had not been discontinued as counsel for plaintiffs in that action realised there might be prejudice to the members of the Ontario class if the limitation period expired before the could opt into the Dodd action. In 2011, the plaintiff in the Dodd action had unsuccessfully applied to remove himself as representative plaintiff and to add some or all of the plaintiffs in this action as representative plaintiffs. Subsequently, in November 2011, the plaintiffs commenced this proposed class action and sought an order joining their action with the Dodd action. The actions were essentially the same except that this action named additional defendants, included plaintiffs that had previously applied to be added as plaintiffs to the Dodd action and included three additional causes of action including deceptive trade practices, breach of duty and negligent design and implementation of the recall. The defendants sought a stay of the action on the basis that it was vexatious and an abuse of process as it was an improper attempt to have

plaintiffs added to the Dodd action, was an impermissible collateral attack on the order refusing to add representative plaintiffs in the Dodd action, was commenced for an improper purpose The plaintiffs argued that all of the parties agreed that in return for the discontinuance of the Ontario, Alberta and Manitoba actions, the defendants in the Dodd Action agreed to proceed with a certification application in British Columbia with proposed representative plaintiffs for each of a resident class and a non-resident sub-class. They alleged that the defendants breached the settlement agreement by seeking a discontinuance of the Ontario Action while opposing the addition of non-resident plaintiffs in the Dodd Action and that their contradictory positions amounted to an abuse of the court's process justifying the dismissal of their application to stay the action.
HELD: Motion allowed.

This class action was an improper attempt to re-litigate the issue of adding plaintiffs to the Dodd action and was a collateral attack on the order refusing the addition of representative plaintiffs in the Dodd action. Furthermore, the action was an improper attempt to add new causes of action to the Dodd action, add new representative plaintiffs to the Dodd action and toll the limitation period. It was improper to secure amendments, which added new causes of action and new plaintiffs, by means of consolidating this action with the Dodd action. In addition, the consolidation of the two actions would result in the impermissible tolling of the limitation period. Finally, it was an abuse of process for a plaintiff to have multiple actions seeking the same relief against the same defendant. Although the plaintiffs in this and the Dodd action were nominally, different, they were clearly associated in that two of the plaintiffs in this action had already attempted to join the Dodd action and two other plaintiffs had an outstanding application to join the Dodd action.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, SBC 2004, CHAPTER 2,

Supreme Court Civil Rules, Rule 6-1(1)(a), Rule 6-2(7), Rule 9-5, Rule 9-5(1)(b), Rule 9-5(1)(d)

Counsel

Counsel for Plaintiffs / Respondents: D. Williams, A. Sadaghianloo.

Counsel for Defendants / Applicants, Stork Craft Manufacturing Inc., Sears Canada Inc., Wal-Mart Canada Corporation and Toys "R" Us (Canada) Ltd., Toys "R" Us (Canada) Ltee.: A. Wilkinson, Q.C., P. Morrow.

Counsel for the Defendant, Fisher-Price Inc.: M. Brown.

Reasons for Judgment

G.R.J. GAUL J.

INTRODUCTION

1 This proposed class action litigation relates to the alleged negligent design, manufacture, distribution and sale of baby cribs in Canada.

2 The plaintiffs, represented by legal counsel with the Merchant Law Group ("MLG"), commenced their lawsuit on 4 November 2011. It comes subsequent to numerous other actions across Canada involving essentially the same defendants and allegations. For simplicity and clarity, I will refer to this action as the "*Dixon Action*".

3 The defendants, Stork Craft Manufacturing Inc. ("Stork Craft"), Sears Canada Inc. ("Sears"), Wal-Mart Canada Corporation ("Wal-Mart), and Toys "R" Us (Canada) Ltd., Toys "R" Us (Canada) Ltée. ("Toys "R" Us"), seek an order pursuant to Rule 9-5 of the *Supreme Court Civil Rules* staying the *Dixon Action* or in the alternative striking the plaintiffs' claim on the basis that it is vexatious or an abuse of the court's process.

4 The defendant Fisher-Price Inc. ("Fisher-Price") supports the application and the relief sought by the other defendants.

Facts

5 The plaintiff Jane Dixon is a resident of Victoria, British Columbia. The plaintiff Dana Miller is a resident of Edmonton, Alberta. The plaintiff Loretta McFadzean is a resident of Regina, Saskatchewan and the plaintiff Lisa Elliot is a resident of Toronto, Ontario.

6 The defendant Stork Craft is a company incorporated in British Columbia. Stork Craft's principle business is the design, manufacture and distribution of baby cribs. The remaining defendants are companies whose business includes the marketing and sale of Stork Craft baby cribs.

7 On 24 November 2009, Stork Craft issued a nation-wide recall of certain baby cribs it had manufactured between 1993 and 2009 (the "Recall"). Each plaintiff in the *Dixon Action* claims to own a Stork Craft crib that is the subject of the Recall.

8 On the same day the Recall was issued, Mr. Cedar Dodd, a resident of Victoria, British Columbia, represented by counsel with the MLG, launched a proposed class action lawsuit in the British Columbia Supreme Court against Stork Craft, Fisher-Price Canada Inc., Fisher-Price, Sears Holding Corporation, Sears, Wal-Mart Stores Inc., and Wal-Mart relating to the baby cribs in question (the "*Dodd Action*"). The proceedings against Fisher-Price Canada Inc., Sears Holding Corporation, and Wal-Mart Stores Inc. have been discontinued.

9 Other proposed class action lawsuits were launched on 24 and 25 November 2009 by plaintiffs in the following other Canadian jurisdictions, all of whom are represented by counsel with the MLG:

a) Ontario: *Duong, Singh and Woof v. Stork Craft Manufacturing Ltd. et al.*, Ontario Superior Court of Justice, No. 09-4962, (the "*Ontario Action*"), filed 25 November 2009;

b) Quebec: *Santella v. Stork Craft Manufacturing Ltd. et al.,* Québec Superior Court, action No. 500 06-000488-094, filed 25 November 2009 (the "*Québec Action*");

c) Saskatchewan: *Riel v. Stork Craft Manufacturing Ltd. et al.*, Court of Queen's Bench of Saskatchewan, action No. 1794, filed 25 November 2009 (the "*Saskatchewan Action*");

d) Alberta: *St. Pierre, Loubert, Kalcounis and McLaughlan v. Stork Craft Manufacturing Ltd. et al.*, Court of Queen's Bench of Alberta, filed 24 November 2009 (the "*Alberta Action*");

e) Manitoba: *Russell v. Stork Craft Manufacturing Ltd. et al.*, Court of Queen's Bench of Manitoba, No. C10901-63980, filed 25 November 2009 (the "*Manitoba Action*").

10 Stork Craft, as the lead defendant in all of the above-noted lawsuits, is represented by counsel with the law firm of McCarthy Tétrault.

11 Counsel for the parties in the *Dodd Action* appeared before me, as the assigned case management judge, on 30 September 2010. During the course of that hearing, counsel for the plaintiff informed the court that the plaintiffs in the *Alberta Action* and the *Manitoba Action* would be discontinuing their respective lawsuits and that the plaintiffs in the *Ontario Action* would be applying to the Ontario Superior Court of Justice, in compliance with practice in that province, for approval of the discontinuance of that action. At the conclusion of the hearing, I directed that a Case Planning Conference take place in the early 2011.

12 On 29 October 2010, counsel for the plaintiffs in the *Alberta Action* filed their Notice of Discontinuance. A similar notice was filed by counsel for the plaintiff in the *Manitoba Action* on 29 November 2010.

13 During the late fall and early winter of 2010, counsel for the plaintiffs and counsel for the defendants in the *Ontario Action* corresponded with respect to the terms of the proposed agreement to discontinue the action and the steps necessary to obtain the court's approval. By late 2010, counsel for the defendants in the *Ontario Action* believed an agreement had been reached. Although counsel for the plaintiffs had agreed to discontinue the *Ontario Action*, they did so without fully considering all of the implications of such a move and in particular its impact on potential limitation dates. At some point, counsel with the MLG realized that the limitation period in Ontario may not have been suspended by the commencement of the *Dodd Action* in British Columbia. More importantly they concluded there would be prejudice to the Ontario class members if the *Ontario Action* was discontinued and the limitation period expired before those plaintiffs could opt into the *Dodd Action*. Having realized this, counsel for the plaintiffs in the *Ontario Action* advised counsel for the defendants in that action, as well as counsel in the *Dodd Action,* that they no longer agreed to discontinue the *Ontario Action*. Counsel for the plaintiffs also informed counsel for the defendants that they would oppose any application to confirm the purported settlement agreement in the *Ontario Action*.

14 In early 2011, counsel for the defendants in the *Ontario Action* sought an order of the Ontario Superior Court of Justice to enforce the agreement to discontinue the action that they alleged existed between the parties. The defendants' motion was heard by Mr. Justice Smith on 8 February 2011, and at the conclusion of the hearing the court reserved its decision.

15 On 4 March 2011, counsel in the *Dodd Action* appeared before me at a Case Planning Conference. A number of issues were addressed at this conference, including the scheduling of the certification hearing. Counsel also addressed the issue of the plaintiff's desire to amend his pleadings. The only substantive order made at the Case Planning Conference related to the scheduling of the certification hearing. I also directed that another Case Planning Conference take place in July 2011.

16 On 7 March 2011, the plaintiff in the *Dodd Action* filed an Amended Notice of Civil Claim, amending his pleadings pursuant to Rule 6-1(1)(a). In doing so, the plaintiff purported to remove himself as the representative plaintiff in the *Dodd Action*. In his stead, the plaintiff substituted Ms. Dixon as the representative plaintiff for the British Columbia resident class and Ms. McFadzean, as the representative plaintiff for the out-of-province or non-resident class. I note parenthetically that Ms. Dixon and Ms. McFadzean are also two of the plaintiffs in the *Dixon Action*.

17 In reasons for judgment delivered on 21 April 2011 and amended on 12 May 2011, indexed as *Duong v. Stork Craft Manufacturing Inc.*, 2011 ONSC 2534, Mr. Justice Smith denied the defendants' application to discontinue the *Ontario Action*. In his reasons, Smith J. addressed two questions. The first was whether the parties had reached a settlement agreement to discontinue the action. The second question was whether a discontinuance should be judicially approved, without notice to class members. In response to the first question, Smith J. found that a settlement agreement had been reached between the parties. On the second question, Smith J. concluded the potential expiry of the Ontario class members' limitation period before they could opt in to the *Dodd Action* would be prejudicial to their interests, and for that reason he declined to approve the discontinuance of the *Ontario Action*.

18 On 20 May 2011, counsel for the defendants in the *Dodd Action* filed an application seeking an order striking the portions of the plaintiff's Amended Notice of Civil Claim that purported to substitute Ms. Dixon and Ms. McFadzean in place of Mr. Dodd as the representative plaintiffs. The defendants filed a second application that same day, seeking an order directing Mr. Dodd to make his baby crib available for inspection and examination by an expert retained by Stork Craft.

19 On 24 May 2011, counsel for the plaintiff in the *Dodd Action* filed an application seeking to have Mr. Dodd removed as the representative plaintiff and to have Ms. Dixon and Ms. McFadzean added as the plaintiffs in his place.

20 I heard all three applications on 6 June 2011, and in reasons delivered on 16 June 2011, I allowed the defendants' applications and denied the plaintiff's application.

21 On 14 July 2011, the plaintiff in the *Dodd Action* filed a notice seeking leave to appeal my order dismissing his application and my order granting the defendants' application to strike out portions of the Amended Notice of Civil Claim. That application for leave to appeal is still pending.

22 On 15 September 2011, the defendants' application for leave to appeal Smith J's decision in the *Ontario Action* was heard by Kealey J. of the Ontario Superior Court of Justice. On 7 October 2011 leave was denied: *Duong v. Stork Craft Manufacturing Inc.*, 2011 ONSC 5618.

23 On 12 October 2011, counsel in the *Dodd Action* appeared before me to settle the terms of my 16 June 2011 order. The order was settled on the following terms:

1. The Plaintiff's application pursuant to Rule 6-2(7) that Cedar Dodd cease to be a plaintiff in this action be and is hereby dismissed;
2. The Plaintiff's application pursuant to Rule 6-2(7) to add Jane Dixon and Loretta McFadzean as plaintiffs be and is hereby dismissed;
3. Paragraphs 1.1 and 1.2 of the Amended Notice of Civil Claim be and are hereby struck out.

24 On 25 October 2011, counsel for the plaintiff in the *Dodd Action* filed an application to amend the Notice of Civil Claim and to add Ms. Miller and Ms. Elliott as proposed representative plaintiffs in the action. Ms. Miller and Ms. Elliot are the other two plaintiffs in the *Dixon Action*. This application has not been set for hearing.

25 On 4 November 2011, the same counsel with the MLG who is acting for the plaintiff in the *Dodd Action*, filed the Notice of Civil Claim and Notice of Application for Certification in the *Dixon Action*. In their Notice of Application for Certification, the plaintiffs seek an order joining their action with the *Dodd Action* "for the purposes of certification and trial of the common issues".

26 A review of the Notices of Civil Claim in the *Dodd Action* and the *Dixon Action* discloses that the facts alleged and the claims being advanced are practically identical. The only noticeable differences between the two actions are:

a) Toys "R" Us (Canada) Ltd., Toys "R" Us (Canada) Ltée is a named defendant only in the *Dixon Action*;

b) Ms. Dixon and Ms. McFadzean, the two individuals who unsuccessfully sought to be added as plaintiffs in the *Dodd Action*, are named plaintiffs in the *Dixon Action*;

c) Ms. Miller and Ms. Elliot, the two individuals whose application to be added as plaintiffs in the *Dodd Action* remains outstanding, are named plaintiffs in the *Dixon Action*; and

d) there are three new causes of action pleaded in the *Dixon Action*:

   I. deceptive trade practices under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2;

   II. breach of an alleged contractual duty and duty of care to protect the "peace of mind of class members"; and

   III. negligent design and implementation of the recall of the cribs in question.

27 On 23 November 2011, counsel for the defendants Stork Craft, Sears, Wal-Mart and Toys "R" Us filed the present application seeking a stay of the *Dixon Action* or in the alternative, an order striking out the entirety of the plaintiffs' pleadings in the action.

Issue

28 The question to be determined on this application is whether the *Dixon Action* is vexatious and or an abuse of the court's process.

The Law

29 The defendants rely upon Rule 9-5 and specifically sub-rules 9-5(1)(b) and (d) as the foundation for their application. Those two provisions read as follows:

> Rule 9-4 - Striking Pleadings
>
> (1) At any state of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> ...
>
> (b) it is unnecessary, scandalous, frivolous or vexatious;
>
> ...
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceedings to be stayed or dismissed and may order the costs of the application to be paid as special costs.

30 In *Re Lang Michener et al. v. Fabian et al*. (1987), 59 O.R. (2d) 353 (Ont. H.C.J.), Henry J. described the nature of a vexatious action at 358 - 359:

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious; and
>
> (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

31 The above-noted observations from *Re Lang Michener* were referred to approvingly by the British Columbia Court of Appeal in *Dempsey v. Casey*, 2004 BCCA 395.

32 In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, Arbour J. explained the concept of abuse of process as follows at para. 37:

> ... the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would...bring the administration of justice into disrepute" (*Canam Enterprises Inc.*

v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engaged the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.LR. 347 at p. 358, [1990] All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis in the original.]

33 What little distinction exists between a vexatious action and one that is an abuse of process is often not clear as the two concepts have strikingly similar features. Macaulay J. noted this in *Freshway Specialty Foods v. Map Produce LLC, et al.*, 2005 BCSC 1485, at para. 52:

> [52] There is no bright line dividing a vexatious proceeding from one that is an abuse of the court's process. In my view, the factors that signal a vexatious proceeding also signals an abusive process. Abuse of process is a wide concept however and may extend beyond vexatious proceedings to capture any circumstance in which the court's process is used for an improper purpose. As pointed out by Baker J. in *Babavic* v. *Babowech*, [1993] B.C.J. No. 1802 (S.C.), a decision not referred to by counsel, the categories of abuse of process remain open and include, for example, "proceedings which are without foundation or serve no useful purpose and multiple or successive proceeding which cause or are likely to cause vexation or oppression" (para. 18).

Discussion

Preliminary Matter: The Settlement Agreement

34 The plaintiffs complain that the progress of this important class-action litigation has been unnecessarily complicated and protracted by the inconsistent positions the defendants have adopted and advanced in the *Dodd Action* and the *Ontario Action*. Counsel for the plaintiffs points to what he says was the settlement agreement between himself as counsel with the MLG representing Mr. Dodd and the plaintiffs in the Ontario, Alberta and Manitoba actions and counsel for the defendants in the *Dodd Action*, who is a member of the law firm representing the defendants in those other actions. Counsel for the plaintiffs claims all of the parties agreed that in return for the discontinuance of the Ontario, Alberta and Manitoba actions, the defendants in the *Dodd Action* would agree to proceed with a certification application in British Columbia with proposed representative plaintiffs for each of a resident class and a non-resident sub-class. Counsel for the plaintiffs further asserts that the defendants have breached the settlement agreement by seeking a discontinuance of the *Ontario Action* while at the same time opposing the addition of non-resident plaintiffs in the *Dodd Action*. Counsel for the plaintiffs says the defendants should not be permitted to have it both ways and that these contradictory positions amount to an abuse of the court's process justifying the dismissal of their application.

35 In his written submission, counsel for the plaintiffs explained the plaintiffs' position on the settlement agreement as follows:

> In reliance on the agreement with the Defendants, the plaintiffs in Manitoba and Alberta discontinued those actions. The B.C. action [the *Dodd Action*] was moved forward, with the expectation that non-residents would be able to opt-in, in reliance on the agreement and the Defendant's representations.
>
> ...
>
> While there are proposed class actions in three other jurisdictions (Saskatchewan, Ontario and Quebec), the actions are not going forward in those jurisdictions pursuant to the parties' agreement. Moreover, the Alberta and Manitoba actions (where court approval of discontinuance is not required) were discontinued pursuant to the agreement and class members resident in those provinces, such as Ms. Miller, do not have

> remedies in their own provinces. ... On the other hand, it has always been the Defendants' expectation that the B.C. action would proceed and proceed with non-resident claimants.

36 In support of the argument that there is an agreement between the parties and that it includes the defendants in the *Dodd Action* agreeing to have the action proceed with non-resident plaintiffs, counsel for the plaintiffs relies on the findings of Smith J. in *Duong, supra*, that the ability of Ontario class members to opt into the *Dodd Action* was an essential term of the parties' agreement to discontinue the *Ontario Action*.

37 The defendants maintain that the plaintiffs' position regarding the settlement agreement is incorrect on a number of fronts. First, the defendants point to the fact that the plaintiffs argued before Smith J. that the parties had been unable to agree on the terms of a settlement agreement and consequently no such agreement existed. According to the defendants, if any party has adopted inconsistent positions in the *Dodd Action* and the *Ontario Action* it is the plaintiffs and not the defendants. Second, the defendants submit there is no evidence before this court to support any finding that the parties have agreed not to go forward with the *Saskatchewan Action* or the *Québec Action*; that "it has always been the defendants' expectation that the B.C. action [the *Dodd Action*] would proceed and proceed with non-resident claimants"; or that the defendants have agreed that non-resident plaintiffs would be added to the *Dodd Action*.

38 On the issue of the existence of a settlement agreement, Smith J. explained his findings at paras. 35, 36 and 39 of his reasons in *Duong*:

> [35] In her reply of November 1, 2010, counsel for the plaintiffs agreed to amend her motion materials to remove the statement that the discontinuance was made "on consent" of Stork Craft. She also agreed to remove the statement that Stork Craft agreed that notice was not required and advised the defendants that she was preparing affidavits for the other two representative plaintiffs. Finally, she confirmed that the three representative plaintiffs were prepared to discontinue "with prejudice" to themselves only.
>
> [36] I find that at this point in time, viewed objectively, the parties had reached an agreement on all of the essential terms. Plaintiffs' counsel had agreed to the proposed amendments of counsel for the defendants. As a result, I find the parties reached an agreement on all of the essential terms of the discontinuance of the class proceeding in Ontario, provided the discontinuance was without costs and that notice was not ordered. This settlement agreement was an amendment to the original agreement between Mr. Williams, plaintiffs' counsel in British Columbia and counsel for the defendants wherein it was mutually agreed that the plaintiffs would proceed with the class action in British Columbia and discontinue in Alberta, Manitoba and Ontario.
>
> ...
>
> [39] For the above reasons, I find that a settlement agreement was reached between the parties on all of the essential terms to discontinue the class proceeding in Ontario and to proceed with the class proceeding in British Columbia, with prejudice to the three representative plaintiffs and provided notice was not given to Ontario class members. I also find that before the motion for discontinuance was brought, the plaintiffs' counsel became aware of the potential prejudice to Ontario class members as a result of the possible expiry of the limitation periods for the Ontario class members before the class in British Columbia was certified. The representative plaintiffs ultimately opposed the motion for discontinuance for this reason.

39 In reaching his conclusion about the parties' settlement agreement, Smith J. inferred that an "essential term" of the agreement was that the parties would proceed to a certification hearing in the *Dodd Action* and that the Ontario class members would have the opportunity to opt into the action if it was certified.

40 I do not know what evidence was before Smith J. that permitted him to find the defendants had agreed to allow a non-resident sub-class of plaintiffs from Ontario to opt into the *Dodd Action*. Neither side presented me with any evidence relating to such an agreement. In my view, if such an agreement did exist, it would have rendered the defendants' application of 20 May 2011 redundant. I am also puzzled by the fact that counsel for the plaintiff in the *Dodd Action* did not bring Mr. Justice Smith's reasons for judgment to my attention at the hearing in June 2011. The plaintiffs suggest they were unable to use Smith J.'s decision at that hearing because the defendants' application for leave to appeal had not yet been determined. That submission is unconvincing. The reasons for judgment of Smith J. were delivered on 21 April 2011 and amended on 12 May 2011 and I see no valid reason why counsel for Mr. Dodd could not have brought Mr. Justice Smith's findings and judgment to my attention. Had counsel done so, he could have addressed the question of what evidence was before the court that led Mr. Justice Smith to infer that allowing the *Dodd Action* to proceed with non-resident sub-class plaintiffs was an essential term of the agreement.

41 Given the lack of evidence before me on this issue, an issue that may have had a critical impact on this application, I find myself unable to conclude that the defendants have agreed to allow a non-resident sub-class to join the *Dodd Action*. It would appear that Mr. Justice Smith had some evidence before him that allowed him to infer that fact. I do not and therein lies the dilemma. In my view I should be cautious about accepting the factual findings of an extra-provincial court unless the parties have squarely addressed before me the same issue. Given the parties' decision not to raise or argue the question of the settlement agreement when they appeared before me in June 2011, I say with the greatest of respect for my colleague in Ontario, that I cannot adopt the factual findings he made in the *Ontario Action*, and in particular I cannot not find either directly or inferentially that the defendants have agreed to proceed with the certification application in the *Dodd Action* with a non-resident sub-class represented.

42 I now turn to the principal issue before me. The defendants have advanced a number of arguments why the *Dixon Action* is vexatious and or an abuse of the court's process. I have reframed those arguments into questions and will deal with each of them in turn.

Does the *Dixon Action* re-litigate the issue of adding new representative plaintiffs to the *Dodd Action*?

43 The defendants assert that the *Dixon Action* is an improper second attempt to have Ms. Dixon and Ms. McFadzean added as plaintiffs in the *Dodd Action*, after their first attempt to do was dismissed by this court.

44 The plaintiffs deny that the *Dixon Action* is a re-litigation of the failed attempt to add Ms. Dixon and Ms. McFadzean as proposed representative plaintiffs in the *Dodd Action*. Counsel for the plaintiffs points to the fact that my order of 16 June 2011 denied the application to add the plaintiffs and did not address the possibility of consolidating the *Dodd Action* with another action. As the rules and tests for adding parties are different from those applicable to the consolidation of actions, the plaintiffs maintain that my order of June 2011 does not foreclose them from attempting to join their action with the *Dodd Action*.

45 The plaintiffs also point out that the defendants have always known of the plaintiffs' intention to have their claims joined with Mr. Dodd's claims and consequently there can be no suggestion that the defendants have been surprised or suffered any prejudice.

46 In my opinion, there is merit in the defendants' position on this question. The issue of Ms. Dixon's and Ms. McFadzean's participation as plaintiffs in the *Dodd Action* was addressed and determined in June 2011. Unless varied or overturned on appeal, I am of the view that my order resolves the issue. Ms. Dixon's and Ms. McFadzean's lawsuit is in my opinion a mirror image of the *Dodd Action*. To allow the *Dixon Action* to stand and be consolidated with the *Dodd Action* would unfairly and improperly allow Ms. Dixon and Ms. McFadzean to obtain the result they initially sought in the *Dodd Action* (i.e., becoming representative plaintiffs) without Mr. Dodd having to proceed with his appeal of my 16 June 2011 order.

47 The fact that the rules and tests applicable to an application to consolidate two actions may be different from those that govern an application to add plaintiffs to an action is, in my respectful view, of no consequence in the present instance. On the evidence before me it is clear that one of the purposes of the *Dixon Action* is to get Ms. Dixon and Ms. McFadzean added as representative plaintiffs in the *Dodd Action*. I agree with the defendants that this is an impermissible attempt to re-litigate an issue that has already been resolved.

Does the *Dixon Action* circumvent the appeal process in the *Dodd Action*?

48 The defendants argue that by initiating the *Dixon Action* and seeking to have it consolidated with the *Dodd Action*, the plaintiffs are enabling Mr. Dodd to avoid having to proceed with his appeal of my 16 June 2011 order. With the two actions consolidated, Ms. Dixon and Ms. McFadzean will become plaintiffs in the litigation, notwithstanding my order of 16 June 2011. In short, the defendants argue that the *Dixon Action* results in an impermissible collateral attack on my order in the *Dodd Action*.

49 The plaintiffs maintain that one of the principal reasons they launched their action was because the appeal materials in the *Dodd Action* could not be prepared until the terms of my order of 16 June 2011 had been settled. That occurred on 13 October 2011. By that date, the plaintiffs say it was too late to schedule and have the appeal heard before the expiry of the non-resident plaintiff's limitation date of 23 November 2011. Consequently, in order to avoid any prejudice to members of a non-resident sub-class of plaintiffs, they started their action (i.e., the *Dixon Action*).

50 In his written submissions, counsel for the plaintiffs addresses the issue of the appeal in the *Dodd Action* as follows:

> It is not necessary for a party to go forward with an appeal simply because they at one time intended to appeal and under the doctrine of mootness, if an issue is moot the Court of Appeal will decline to hear the matter. If the plaintiffs' application to consolidate is successful, the appeal will be moot.

51 In my view, the plaintiffs' arguments are unpersuasive. I find the defendants are correct when they argue that consolidation of the *Dixon Action* with the *Dodd Action* would essentially permit the plaintiffs in both actions to evade the order I made on the issue of adding Ms. Dixon and Ms. McFadzean as non-residence representative plaintiffs in the *Dodd Action*. This, in my opinion, would amount to a collateral attack on my order of 16 June 2011 and an impermissible circumvention of the *Rules of Court*.

Was the Dixon Action commenced for an improper purpose?

52 The defendants say the purposes underlying the initiation of the *Dixon Action* are improper and consequently make the action an abuse of process. The defendants list three such improper purposes:

a) an improper attempt to add new causes of action to the *Dodd Action*;

b) an improper attempt to add new representative plaintiffs in the *Dodd Action*; and

c) an improper attempt to toll the limitation period applicable to the proposed new plaintiffs.

53 In his written submissions, counsel for the plaintiffs explains the purpose of the *Dixon Action* as follows:

> The Dixon action was necessitated by the Defendants'' failure to honour their agreement that the actions in Alberta, Manitoba and Ontario would be discontinued in favour of the class action in British Columbia, which included a non-resident class, proceeding to the hearing of the certification application and by their decision to argue that the limitation period for the non-resident class has not been preserved.
>
> ...
>
> The Dixon action was filed out of caution to preserve the rights of Ms. Miller and Ms. Elliot on behalf of other non-resident plaintiffs as part of an active litigation plan (that from the outset included consolidating the Dixon action with the Dodd action and moving it to certification), not to simply "toll" the limitation period and have the action sit.
>
> ...
>
> It was never intended that the Dixon action and the Dodd action would co-exist.

54 The plaintiffs assert that they could not have proceeded with the application filed on 24 October 2011 to add Ms. Miller and Ms. Elliot to the *Dodd Action* prior to the expiry of the November 2011 limitation date. Counsel for the plaintiffs explains this position in his written submissions as follows:

> there is ample evidence that Mr. Dodd and Ms. Miller and Ms. Elliot ... filed and served application on 25 October 2011 under Rule 6-2(7) to add Ms. Miller and Ms. Elliot to the Dodd action, but this application could not be heard before the November 23, 2011 potential limitation date, so the Dixon action was filed with Ms. Miller and Ms. Elliot as plaintiffs as a precautionary measure.

55 As already noted in these reasons, the *Dixon Action* includes new allegations of deceptive trade practices, breach of a contractual duty and duty of care and negligent design and implementation of the Recall. The defendants submit that if the *Dixon Action* is allowed to stand and is consolidated with the *Dodd Action*, then these new claims will be incorporated into the *Dodd Action* without Mr. Dodd having had to make the necessary application to amend his pleadings. In his affidavit sworn 10 November 2011, Mr. Dodd explains that his counsel inadvertently omitted to include unjust enrichment from the common issues for which certification is being sought in the *Dodd Action*. Mr. Dodd explains at para. 23 of his affidavit:

> These are the same proposed common issues that I would seek to have certified in the amended Application for Certification that was prepared for this action, with the exception that the Dixon Application for Certification seeks to certify as a common issue whether the Defendants were unjustly enriched. Unjust enrichment is a cause of action pled in this action, though I am advised by my counsel it was inadvertently left out of the Amended Application for Certification in this action.

56 I agree with the defendants that if the plaintiff in the *Dodd Action* wishes to amend his pleadings then he should seek the defendants' consent to do so or obtain a court order permitting it. It is improper in my view to secure these amendments, by means of a consolidation of the *Dodd Action* with the *Dixon Action*. The same can be said about the fact that a consolidation of the *Dixon Action* with the *Dodd Action* would result in Ms. Dixon and Ms. McFadzean joining this class action litigation notwithstanding the fact that I denied their application to join the *Dodd Action*.

57 The defendants also claim that the initiation of the *Dixon Action* was for the purpose of tolling the applicable limitation period. In support of this contention, the defendants point to the affidavit of Mr. Dodd sworn 10 November 2011 and filed in both the *Dodd Action* and the *Dixon Action*, wherein Mr. Dodd swears the following, at paras. 18 and 19:

> [18] On or about November 3, 2011 Stork Craft advised my counsel that they would oppose the addition of the non-resident representative plaintiffs in this, the Dodd action. I was concerned that the application to add these non-resident representative plaintiffs [Ms. Miller and Ms. Elliot] would not be heard before the limitation period governing their right to commence an action in B.C. expired on November 23, 2011. I am aware that the plaintiffs proposed to be added to this action as non-resident representative plaintiffs commenced a similar action on November 4, 2011 in order to preserve the rights of non-resident claimants in B.C. This new action is the Dixon action.
>
> [19] I have reviewed the Notice of Civil Claim in the Dixon Action ... and it is my conclusion that the claim asserts the same type of claims, regarding the same cribs, over the same time period, as made in the proposed Amended Notice of Civil Claim in my case. I have also reviewed the affidavits of Jane Dixon (sworn November 6, 2011), Dana Miller (sworn November 9, 2011), Lisa Elliott (sworn November 8, 2011), and Loretta McFadzean (sworn November 7, 2011). I conclude the complaints set out in those affidavits are very similar to my complaints.

58 As a general response, the plaintiffs maintain that the *Dixon Action* was not designed for the improper purpose of tolling any limitation period. In his written submission, counsel for the plaintiff explains:

> Regarding the allegation that the Dixon action is an abuse as effort (sic) to 'retroactively toll the limitation period', the plaintiffs submit that commencing the Dixon action was a legitimate precautionary measure in response to the Applicants maintaining their right to a limitation defence, while simultaneously refusing to consent to addition of a non-resident representative claimant.
>
> Moreover, the Dixon action was not commenced as a lone notice of civil claim, as one might imagine a party to do if the objective was simply to toll the limitation period. Rather, the Dixon action was filed and served with an application (and supporting affidavits) seeking, firstly, immediate joinder with the Dodd action, and secondly certification with the joined Dodd action.

59 In his written submissions counsel for the plaintiffs explains:

> There is ample evidence that Mr. Dodd and Ms. Miller and Ms. Elliot (and not Ms. Dixon or Ms. McFadzean) filed an served applications on October 25, 2011 under Rule 6-2(7 to add Ms. Miller and Ms. Elliot to the

Dodd action, but this application could not be heard before the November 23, 2011 potential limitation date, so the Dixon action was filed with Ms. Miller and Ms. Elliot as plaintiffs as a precautionary measure.

60 In my view, the consolidation of the *Dixon Action* with the *Dodd Action* necessarily will result in the impermissible tolling of the limitation period. Moreover, while it may have been challenging to schedule a hearing and have the application to add Ms. Miller and Ms. Elliot to the *Dodd Action* resolved before 23 November 2011, I find it was possible had counsel truly wanted to do so. My limited availability to hear the application before the November deadline was one reason counsel for the plaintiffs cites for not proceeding with the application. As far as I can determine, no serious effort was made to have the application scheduled before the November deadline. If it had turned out that I was not available to hear the matter in the time required, then counsel could have requested that another judge hear and decide the application in my place; however, no such request was made. While the issue of adding Ms. Miller and Ms. Elliot to the *Dodd Action* was made more complicated by the dispute that arose between counsel regarding the terms of the settlement agreement in the *Ontario Action*, I still remain of the opinion that the application could have been addressed prior to 23 November deadline had counsel wanted to pursue the issue.

Is it an abuse of process to have both the *Dodd Action* and *Dixon Action* active at the same time?

61 It is an abuse of process for a plaintiff to have multiple actions seeking the same relief outstanding against the same defendant: *Boehringer Ingelheim (Canada) Ltd. v. Englund et al.*, 2007 SKCA 62. To a similar effect, in *Balm v. BHC Securities Inc*., 2003 ABQB 773, the court concluded that two actions brought by the same plaintiff against the same defendant seeking essentially the same relief constituted an abuse of process. A similar conclusion was reached in *Marandola v. General Motors du Canada Ltée*, [2004] Q.J. No. 9795 (S.C.), where three actions were commenced against the same defendants and there was no attempt on the part of the plaintiffs to seek consolidation of the cases.

62 The *Dodd Action* was commenced on 24 November 2009. The *Dixon Action* was commenced on 4 November 2011. Clearly two actions have been commenced in British Columbia for essentially the same relief against the same defendants. Mr. Dodd acknowledges this fact at para. 19 in his affidavit sworn 10 November 2011.

63 Although the plaintiffs in each of the actions are nominally different, in my view they are clearly associated in that two of the *Dixon Action* plaintiffs have already attempted to join the *Dodd Action* and the other two plaintiffs have an application to join that action pending. Moreover, they are represented by the same legal counsel.

64 Counsel for the plaintiffs distinguishes the cases the defendants cite in support of their argument by highlighting the fact that at the same time as the *Dixon Action* was filed, an application seeking an order consolidating it with the *Dodd Action* was filed. This, says counsel for the plaintiffs, addresses the concerns expressed in the jurisprudence about the multiplicity of proceedings against the same defendant for essentially the same relief being an abuse of process.

65 Counsel for the plaintiffs also argues that the expectation that the *Dixon Action* will be successfully consolidated with the *Dodd Action* is a reasonable one. In support of this position, the plaintiffs rely upon a number of case authorities including: *Iverson v. Canada (Fisheries and Oceans)*, 2011 BCSC 1619; *Heron v. Guidant Corp.*, [2007] O.J. No. 3823 (S.C.), leave to appeal refused [2008] O.J. No. 48; *Logan v. Canada (Minster of Health),* [2003] O.J. No. 418 (S.C.), aff'd [2004] O.J. No. 2769 (C.A.); *Birrell v. Providence Health Care Society*, 2007 BCSC 668, aff'd 2009 BCCA 109; *Gregg v. Freightliner Ltd. et al.*, 2003 BCSC 241; *Goodridge v. Pfizer Canada Inc.*, 2010 ONSC 1095; and *Haddad v. The Kaitlin Group Ltd.*, [2008] O.J. No. 5127 (S.C.).

66 In my opinion, the case authorities cited by the plaintiff are of limited assistance as they fail to address a situation such as the one presently before me where the initiation of a second parallel action with an accompanying application to consolidate it with the first action results in the tolling of an applicable limitation period. All of the above-noted cases relate to the substitution of proposed representative plaintiffs or the addition of proposed representative plaintiffs for reasons much different than those in the present action.

Decision

67 For the defendants to be successful on this application, I must be satisfied that the *Dixon Action* is plainly and obviously vexatious or an abuse of process: *Freshway, supra*.; *Shushwap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176.

68 On the evidence before me, I find the claims being advanced in the *Dixon Action* are practically a mirror image of the *Dodd Action* in that they essentially repeat and expand upon the claims made in the *Dodd Action*. The facts alleged in both actions are essentially the same as are the principal defendants. While the plaintiffs in each action are nominally different, I find they are clearly associated and working in concert to advance overlapping claims in this jurisdiction.

69 The stated intention of the plaintiffs in the *Dixon Action* and the plaintiff in the *Dodd Action* is to have both actions consolidated. In my opinion, consolidation of these two actions would impermissibly and improperly permit the plaintiffs to circumvent the rules governing the adding of parties to an action and the amendment of pleadings. The same concern applies to the appeal process that the plaintiff in the *Dodd Action* has initiated. If the two actions are permitted to be consolidated, then the plaintiff in the *Dodd Action* will have obtained what he initially sought and therefore there would be no need for him to pursue his appeal. Finally, I find the joining of the *Dixon Action* to the *Dodd Action* would improperly toll a limitation period and this on its own creates a measurable prejudice for the defendants.

70 Counsel for the plaintiffs explained the plaintiff's view of the consequences that will result if the defendants' application is granted as follows:

> If the Dixon [Action] is struck or stayed and not consolidated with the *Dodd Action*, non-resident class members will face an unfair and lengthy delay, which will cause prejudice. They will have to await the outcome of the B.C. certification application and then wait for the process to start anew in one of the other provinces that allows a national class. On the other hand, it has always been the Defendants' expectation that the B.C. action would proceed and proceed with non-resident claimants.

71 Counsel for the plaintiffs urges the court not forget or dismiss the interests of the class of plaintiffs Ms. Dixon, Ms. Miller, Ms. McFadzean and Ms. Elliot wish to represent in this litigation. I agree those interests need to be assessed on this application; however, having considered all of the evidence presented, I do not agree that any delay resulting from the granting of the defendants' application will result in undue prejudice or harm to any of the plaintiffs. Moreover, as I have already noted, there is no evidence before me that supports the assertion that the defendants expected to have the *Dodd Action* proceed with non-resident plaintiffs.

72 In my view, the position taken by the defendants on this application is the correct one. The *Dixon Action* attempts to re-litigate an issue that has already been adjudicated upon; it evades the appeal process that the plaintiff in the *Dodd Action* has initiated; it circumvents the rules of court that govern the adding of parties to an action and the amendment of pleadings; and it results in the improper tolling of a limitation period. For all of these reasons, I find the *Dixon Action* is vexatious and an abuse of the court's process.

Order

73 The defendants' application is granted and the plaintiffs' action is hereby stayed.

74 The defendants are entitled to their costs.

G.R.J. GAUL J.

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Fowler v. Canada (Attorney General), [2012] B.C.J. No. 508

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

A.F. Cullen A.C.J.S.C.

Heard: February 7, 2012.

Judgment: March 14, 2012.

Docket: S113212

Registry: Vancouver

[2012] B.C.J. No. 508 | 2012 BCSC 367

Between William Fowler, Plaintiff, and The Attorney General of Canada, Defendant

(62 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Material facts — Application by Attorney General for an order striking plaintiff's pleadings as disclosing no reasonable cause of action and being unnecessary, scandalous, frivolous or vexatious, allowed — Plaintiff was incarcerated at Mountain Institution — Plaintiff attempted to assert claims in negligence, defamation and harassment — However, no coherent cause of action could be discerned from pleadings, as they were so prolix, over-broad and reliant on irrelevant recitations of evidence or narrative as to be impossible to have responded to in any meaningful way — Harassment and defamation claims struck without leave to amend — Negligence claim struck with leave to amend — Supreme Court Civil Rules, Rule 9-5.

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Application by Attorney General for an order striking plaintiff's pleadings as disclosing no reasonable cause of action and being unnecessary, scandalous, frivolous or vexatious, allowed — Plaintiff was incarcerated at Mountain Institution — Plaintiff attempted to assert claims in negligence, defamation and harassment — However, no coherent cause of action could be discerned from pleadings, as they were so prolix, over-broad and reliant on irrelevant recitations of evidence or narrative as to be impossible to have responded to in any meaningful way — Harassment and defamation claims struck without leave to amend — Negligence claim struck with leave to amend — Supreme Court Civil Rules, Rule 9-5.

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Limitation Act, RSBC 1996, CHAPTER 266, s. 3

Supreme Court Civil Rules, Rule 9-5, Rule 9-5(1), Rule 9-5(1) (a), Rule 9-5(1)(b)

Counsel

The Plaintiff: Appeared by video, on his own behalf.

Counsel for the Defendant: S.D. Norris.

Reasons for Judgment

A.F. CULLEN A.C.J.S.C.

1 This application brought under Rule 9-5 of the *Supreme Court Civil Rules* seeks an order striking the pleadings in the Notice of Civil Claim as (1) disclosing no reasonable claim, and (2) being unnecessary, scandalous, frivolous or vexatious. The action at issue was launched by a Notice of Civil Claim filed on May 16, 2011. The plaintiff, William Fowler, is a prisoner presently incarcerated at the Mountain Institution in Agassiz, British Columbia, serving a sentence of life imprisonment following his conviction for second degree murder. The defendant Attorney General of Canada is sued in his representative capacity.

2 The statement of civil claim is relatively brief. In Part I under Statement of Facts, it asserts the AG Canada represents "Correctional Service of Canada (CSC) Treasury Board of Canada, and the Ministry for Public Safety of Canada - all being part of this civil claim."

3 It asserts the "defendants have subjected the plaintiff to harassment for the use of the inmate grievance procedure, resulting in negative consequences of the same." The claim goes on to allege that CSC and/or its employees "have initiated an attack on the plaintiff by submitting false and derogatory comments in their written reports, cross-contaminating file information with other inmates' files" while in effect denying and covering up the alleged frauds causing "undue delay for release on a structured day parole"; recklessness that could unnecessarily result in serious harm or death; loss of family and community support and undue physical and psychological harm".

4 The Notice of Civil Claim refers to "rampant computer abuse" since November 8, 2006. It alleges discrimination in 2010 because of allegations that the inmate was unwilling to take responsibility for his crime and thus was unsuitable for any sort of release. The plaintiff asserts that discrimination was the cause or motive for the inaccurate information in his file.

5 The Notice of Civil Claim asserts a duty of care and a failure to meet "the expected reasonable standard of care".

6 Part I concludes:

> The cause of action is a valid reason to start a lawsuit and the facts that give the plaintiff this right.

7 And in Part II, Relief Sought, paragraphs 1 and 2, the Notice of Civil Claim reads as follows:

> 1. A criminal investigation into the alleged illegal activities of the following named persons or government agencies that have been involved in either writing false reports, adjoining different inmates' file information or attempting to remove evidence of the infractions through breaching the security of the electronic data processing system of Correctional Service Canada.
> 2. Treasury Board President, formally Minister for Public Safety, the Honourable Stockwell Day has had the opportunity to end the iniquitous actions of Correctional Service Canada, but arbitrarily has failed to do so.

8 In paragraph 3 of Part II, the pre-amble reads:

> The plaintiff seeks the listed monetary damages from, but not limited to the following parties and/or Harper Government of Canada Agencies:"

9 The Notice of Civil Claim then lists 30 people by name and/or position each with a separate monetary claim or sum referred to which in the aggregate amounts to $3,333,333. The Notice seeks the same amount from the CSC for a total of $6,666,666.

10 In its response to the plaintiff's Notice of Civil Claim, the defendant pleaded in part as follows:

Division 2 - Defendant's Version of Facts

1. The Notice of Civil Claim pleads no material facts disclosing a reasonable claim, is scandalous, frivolous or vexatious and is otherwise an abuse of process of this Court.
2. In the absence of further and better particulars, the Defendant is unable to discern the basis of the claim and therefore unable to provide a version of the facts.

Division 3- Additional Facts

1. The Notice of Civil Claim pleads no material facts disclosing a reasonable claim, is scandalous, frivolous or vexatious and is otherwise an abuse of process of this Court.
2. In the absence of further and better particulars, the Defendant is unable to discern the basis of the claim and therefore unable to provide additional facts.

LEGAL BASIS

1. The Notice of Civil Claim pleads no material facts disclosing a reasonable claim, is scandalous, frivolous or vexatious and is otherwise an abuse of process of this Court,
2. In the absence of further and better particulars, the Defendant is unable to discern the legal basis of the claim and therefore unable to respond to it.

11 On July 11, 2011, the defendant filed and served a demand for further and better particulars in relation to the plaintiff's Notice of Civil Claim. The plaintiff filed his response on August 11, 2011. It consisted of 50 pages detailing a broad variety of interactions between the plaintiff and various CSC employees, referring to various CSC reports and portions of the contents of those reports and providing a running commentary or narrative of the plaintiff's views of the various interactions and reports referred to. The narrative set out in the initial response to the demand for particulars refers to events occurring between 2006 and 2010.

12 The plaintiff subsequently filed two amended responses to the defendant's demand for particulars: the first was filed on August 29, 2011 amending the initial response by asserting "the duty of care referred to in the claim is not to be subjected to cruel and unusual treatment or punishment ..." It went on to refer to a CSC Bulletin dated 2007-05-07 noting conduct of a CSC staff member is subject to the *Charter*. It then went on to refer to the Neighbour Principle from *Donoghue v. Stevenson*, [1932] A.C. 562.

13 The second amendment was filed on October 7, 2011 and purported to add names to the Notice of Civil Claim arising from matters that post-dated the Notice of Civil Claim. It also referred to the contents of certain reports alleging they were "inaccurate, out of date and incomplete" and amount to "acts of defamatory liable". The amended response also made reference to the plaintiff's dealings with other CSC employees respecting access to information, a letter from the Privacy Commissioner, assertions that "Mountain Institution has deliberately and deceitfully withheld the requested access to personal or other information".

14 The second amended response also referred to assertions that two CSC employees had been dismissed from employment at another institution "for not supporting the institution's decision to involuntary transfer an inmate to higher security because of his use of the inmate complaint/grievance procedure". The plaintiff asserts affidavits of those circumstances "will be introduced as similarity evidence for the facts".

15 The plaintiff also indicated he "will ask the ... court to consider criminal charges of obstruction of justice."

16 The applicant's argument in support of his application to strike the pleadings is based on Rule 9-5(1) (a) and (b) which read as follows:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious, ...

17 It is clear from the context of Rule 9-5(1) as a whole that subsections (a) and (b) are disjunctive. Satisfying either test merits striking the pleading.

18 The applicant concedes that on a motion to strike the pleadings the court assumes the truth of the facts pleaded, and that there is no requirement to refer to a particular cause of action, although where as here, there appear to be a number of causes of action the plaintiff must relate the material facts asserted to the cause of action relied on. In support of those submissions, the applicant relied on *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 and *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 27.

19 The applicant emphasizes that the purpose of pleadings is to clearly define the issues of fact and law not to be determined by the court citing *Homalco Indian Band v. British Columbia* (1988), 25 C.P.C. (4th) 107 (B.C.S.C.) and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42.

20 The applicant submits that the purpose of particulars is to require a party to clarify the issues raised by the pleadings so that the opposite party may be able to respond properly and to prepare for discovery and for trial. The applicant relies on *Yewdale v. ICBC*, [1994] B.C.J. No. 1892 (S.C.) at para. 68.

21 The applicant contends that in the present case the particulars provided by the plaintiff, rather than clarifying the issues, exacerbates the difficulty in understanding them because the responses are so "prolix and confusing". The applicant submits that in that way, this case is similar to the *Owners, Strata Plan LMS 3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473.

22 The applicant says it is impossible to respond to the pleadings; they do not identify or disclose a reasonable claim.

23 In the alternative, the applicant submits that even if on "a generous reading of the pleadings" a claim in negligence, in defamation and/or harassment, can be discerned, the pleadings nonetheless establish no cause of action in support of those claims.

24 So far as negligence is concerned, the applicant notes the necessary elements which must be established are (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of the duty of care by a failure to exercise the standard of care of a reasonable and careful person in the circumstances, and (3) that the plaintiff suffered damages thereby. The applicant cites *Micka v. Oliver & District Community Economic Development Society*, 2008 BCSC 1623.

25 The applicant notes the Notice of Civil Claim "appears to suggest a civil claim in negligence" in the following passage:

> The Correctional Service of Canada has a duty of care owed to a convicted prisoner. The defendants have failed to meet the expected reasonable standard of care of a person.

26 The applicant submits that the plaintiff's failure to plead facts in support of his assertion of a duty of care or to establish the circumstances in which it was owed are deficiencies in his pleadings as is his failure to specify who owed him a duty of care.

27 The defendant also submits that the plaintiff's failure to plead facts to support his allegation that the defendant failed to meet the standard of care, or that the person alleged to have done so was a servant of the Crown acting within the course of his employment, deprive the pleadings of a viable cause of action.

28 The applicant also refers to the plaintiff's failure to plead any material facts in support of any actionable damages. The applicant notes that while referring to physical and psychological damage in his Notice of Civil Claim the plaintiff "has not particularized any physical damage nor ... psychological injury" in any way sufficient to establish liability.

29 The applicant similarly submits the plaintiff has failed to plead sufficient facts to establish a claim in defamation referring to his pleading that "the CSC or its employees have initiated an attack against the plaintiff of this action by promoting false and derogatory comments in their written reports, cross-contaminating file information with other inmates' files ..."

30 The applicant says pleadings in defamation "are in a special category and must be prepared with great skill and scrutiny ..." fully and precisely setting out the words used.

31 The applicant also submits on the basis of *Grant v. Torstar Corp.*, 2009 SCC 61 that the elements of defamation that must be pleaded are that: "(a) the impugned words were defamatory in the sense that they tend to lower the plaintiff's reputation in the eyes of a reasonable person; (b) the words in fact referred to the plaintiff; and (c) that the words were published, meaning that they were communicated to at least one person other than the plaintiff" (para. 28).

32 The applicant further submits that if liability for re-publication is claimed, the plaintiff must set out the exceptions to the general rule that the defendant is not liable for re-publication by others citing *Cooper v. Hennan*, 2005 ABQB 709.

33 The applicant further submits that none of the required details for a defamation claim have been set out in the plaintiff's Notice of Civil Claim and in his particulars, while setting out facts which he relates to harassment, it is difficult to discern whether those allegations also "speak to defamation allegations".

34 At any rate, the defendant submits the response to its request for particulars fails to set out the precise words alleged as defamatory, makes it unclear whether some of the alleged statements refer to the plaintiff, makes it unclear to whom and how the statements at issue were published, and makes it unclear how some of the statements are defamatory.

35 The applicant also submits that to the extent that the allegations related to harassment and false statements if defamatory occurred between December 2005 and November 2007, they are barred by s. 3 of the *Limitation Act*, R.S.B.C. 1996, c. 266.

36 As to the allegation of harassment, the applicant submits that in Canadian law there is no tort of harassment and further submits the claim insofar as it is based on harassment must be struck as disclosing no cause of action in law.

37 The applicant relies on *Total Credit Recovery (B.C.) Ltd. v. Roach*, 2007 BCSC 530 at para. 45 and *Prince George (City) v. Riemer*, 2010 BCSC 118 at paras. 58-60.

38 The applicant acknowledged that acts of harassment have been held to form the conduct required for the tort of intentional infliction of mental suffering, but submits that the plaintiff has pleaded no facts in support of such a cause of action citing the need "to plead facts establishing actual harm resulting in the form of a visible and provable illness, or behaviour calculated to produce that effect." The applicant relies on *Prinzo v. Bay West Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.) at para. 48 for that proposition.

39 The applicant says even if I am unwilling to strike the pleadings on the basis of there being no tort of harassment, the pleadings do not satisfy the elements of the hypothetical tort of harassment referred to by Sinclair

Prowse J. in *Mainland Sawmills Ltd. et al v. IWA-Canada et al*, 2006 BCSC 1195 at para. 17 where she held as follows:

> To determine the issues raised in this application, I decided rather than addressing the issues of whether the tort of harassment is a recognized cause of action in Canada or, if not, whether the law has developed to the point wherein it should be recognized at the outset, to first address whether the evidence of these Plaintiffs established the tort of harassment, the elements of that tort being as the Plaintiffs claimed. That is, I began my analysis of the issues raised in this application by assuming the tort of harassment does or should exist in Canada and that the elements of this tort are outrageous conduct by the defendant, the defendant's intention of causing or reckless disregard of causing emotional distress, the plaintiff's suffering of severe or extreme emotional distress, and the actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

40 Finally, the applicant submits the pleadings should be struck as unnecessary, scandalous, frivolous or vexatious, relying on definitions of those terms in the case law. The applicant refers to a definition of frivolous in *Jerry Rose Jr. v. The University of British Columbia*, 2008 BCSC 1661 at para. 9 quoting from *McNutt v. A.G. Canada et al*, 2004 BCSC 1113 at para. 40 as "without substance, groundless, fanciful, trifles with the court or wastes time". The applicant also refers to a definition of vexatious as not going "to establish the plaintiff's cause of action or does not disclose a claim known to law, relying on *Citizens for Foreign Aid Reform v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (B.C.S.C. Chambers). The applicant also refers to a definition of scandalous as "so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving the parties in a dispute apart from the issues." The applicant relied on *Citizens for Foreign Aid Reform v. Canadian Jewish Congress*, *supra*, at para. 47 in that connection.

41 The applicant submits in the case at bar there are numerous irrelevant pleadings which will draw the parties into unproductive, expensive litigation and the plaintiff has asked for relief against a large number of parties whom he has not named and made allegations in his particular responses that are clearly outside the Notice of Civil Claim and further confuse the issues.

42 The plaintiff respondent relies on his Notice of Civil Claim and his responses to the demand for further and better particulars. In his response to the defendant's application, he reviewed and relied on his allegations made in those documents as an answer to the defendant's application and referred to references therein to specific individuals involved in the alleged wrongdoing. He also referred to portions of his initial response to the demand for further and better particulars in which he referred to the "dramatic effect" of the defendant's allegedly defamatory information on him.

43 The plaintiff also made reference to a package of materials he sent to be filed in support of a default judgment and questioned why it was not responded to except by an application to strike his pleadings. He maintained in his argument that he has complied with the defendant's demand for further and better particulars and submits that for him to list "all the individuals listed as co-defendants would be unnecessary and too expensive for the plaintiff". He maintains "the defamation written against the plaintiff into the information stored by and is available for use by the Correctional Service of Canada was done by the persons mentioned in the plaintiff's response to the demand for further and better particulars". He also made reference to his reliance on evidence from another institution in relation to another inmate. The plaintiff maintains his responses to the defendant's demand for further and better particulars enable the defendant to respond with a pleading and that this application should be dismissed.

44 In his oral submissions, the plaintiff further submitted that one of the main reasons for his Notice of Civil Claim was a psychological assessment dated October 17, 2007 in which it was noted he was assessed for risk of future sexual offending and found to be "a moderate-high risk of re-offence". He asserted in his response to the demand for further and better particulars that that assessment endangered his life and his psychological well-being. In oral argument, he asserted that he was not a sexual offender. In his response to the demand for particulars, his objection to the psychological assessment appeared to be that his level of risk was assessed on the basis of some wrong information the psychologist had about his medical condition, and her corresponding assessment of the realism of his plans and job goals for the future.

45 In his authorities, the plaintiff included a decision of the Federal Court Trial Division, *Spidel v. Her Majesty the Queen*, 2011 FC 1448. In that case, the plaintiff, an inmate at Ferndale Institution, a minimum security penitentiary, alleged a cause of action arising from a decision of the Warden to reject his nomination to run for election for the inmate committee and for his subsequent transfer out of Ferndale. The defendants brought an application to have the statement of claim struck in its entirety or alternatively, to dismiss the action as against the individuals named as defendants and to strike out the claim for aggravated and punitive damages. In the result, the application was granted in part only, striking the style of cause and dismissing the action against the individual defendants. The balance of the application was dismissed.

46 In that case, the statement of claim alleged a breach of the plaintiff's *Charter* rights and other causes of action. He alleged his freedom of assembly rights were violated and that he suffered "domestic hardship, humiliation, shame, dishonour, embarrassment, degradation and injury to his self respect and esteem". He alleged the decision to prevent him from running for office was "allegedly maliciously false and misleading and intended to and did cause correctional setbacks, loss of reputation, mental suffering and other damage".

47 That case involved parallel proceedings also brought by the plaintiff by way of judicial review in which findings adverse to the institution were made.

48 In declining to strike the pleadings, the learned Federal Court Judge held that in his opinion "If substantiated there is a real possibility a cause of action exists which extends to special damages."

49 He concluded as to the *Charter* breaches alleged at paras. 15 and 16:

> It is far too early to determine how the matter will develop, and at what stage, if any, Mr. Spidel may have to elect between private law damages and *Charter* damages.
>
> If there is chance that the plaintiff might succeed then he should not be driven from the judgment seat as per *Hunt* above.

50 The case cited by the plaintiff is not of much assistance in the present case; it simply illustrates the application of broad principles to circumstances that are different from the present case and not wholly discernible from the Reasons for Judgment.

51 The present case in my view represents the circumstance in which no coherent cause of action can be discerned from the pleadings or responses to the demand for further and better particulars and, in any event, those documents are so prolix, over-broad, and reliant on irrelevant recitations of evidence or narrative as to be impossible to respond to in any meaningful way. In the result, I conclude that the plaintiff's pleadings fall afoul of Rule 9-5(1)(a) and (b).

52 While it appears that the plaintiff is seeking to make claims of negligence, harassment and/or defamation, even assuming the tort of harassment, or the conduct said to constitute it can amount to a cause of action in British Columbia, as the applicant notes, the plaintiff has not pleaded material facts which would in any event establish any such cause of action whether framed as harassment or as the intentional infliction of mental suffering.

53 As to the prospect of the defamation claim being successful, I agree with the applicant's submissions that the plaintiff's pleadings and responses simply do not reach the standard of particularity, clarity or care necessary to establish such a cause of action or even enable a reasonable response.

54 The apparent claim in negligence is similarly compromised as it relies on the plaintiff's lengthy narrative-like response to demand for particulars in which it is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from that of another, and the conjecture and opinion from the asserted fact.

55 In short, the plaintiff's pleadings and responses simply do not meet any standard which enables or requires them to be responded to. They fall far short of their requirement in set out in *Pellikaan v. Canada*, 2002 FCT 221, which quoted from the judgment of McKay J. in *Kelly Lake Cree Nation v. Canada*, [1998] 2 F.C. 270 (TD):

> The rules governing pleadings establish the fundamental rule that a plaintiff is under an obligation to plead material facts that disclose a reasonable cause of action. This very basic rule of pleadings involves four separate elements. One, every pleading must state facts and not merely conclusions of law; two, it must include material facts; three, it must state facts and not the evidence by which they are to be proved; and, four, it must state facts concisely in a summary form.

56 In my view, this is a case similar to that faced by K. Smith J. (as he then was) in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), in which he characterized the pleadings as "prolix and convoluted" (para. 4) requiring a "tortuous analysis of the document" to discern its nature and effect (para. 8). In the result Smith J. concluded as follows at para. 11:

> In my view, the statement of claim is an embarrassing pleading. It contains much that appears to be unnecessary. As well, it is constructed in a manner calculated to confuse the defendants and to make it extremely difficult, if not impossible, to answer. As a result, it is prejudicial. Any attempt to reform it by striking out portions and by amending other portions is likely to result in more confusion as to the real issues. In the interests of all parties, it must be set aside with leave to the plaintiffs to substitute a statement of claim prepared in accordance with the principles set out in these reasons: see *Gittings v. Caneco Audio-Publishers Inc.*, [1988] B.C.J. No. 532, *supra*, at 352-53.

57 In *Micka v. Oliver & District Community Economic Development Society*, *supra*, Ross J. held as follows as para. 23:

> The defendants submitted that the Statement of Claim does not contain any of the necessary elements to support a claim for damages for defamation. I agree with that submission; however, it does not appear to me from my review of the Statement of Claim that the plaintiff intended to allege that the defendants have defamed him. If I am wrong, then it is clear that the pleadings do not contain the defamatory words, the derogatory sense of the words alleged, or the material fact that the defamatory statement was published to a third party, see *LaPointe v. Summach*, [1999] B.C.J. No. 1459 (B.C. Master), *Gaskin v. Retail Credit Co.*, [1965] S.C.R. 297.

58 In my view, essentially the same reasoning prevails in the present case and I would order the pleadings struck with respect to defamation on the basis that they disclose no cause of action under Rule 9-5(1)(a).

59 I would similarly hold with respect to the plaintiff's apparent claim in harassment. Even if the tort of harassment or the conduct said to underlie it could be said to give rise to a cause of action, the plaintiff's pleadings fall short of alleging facts capable of establishing such a cause of action and I therefore strike the pleadings in that regard as showing no cause of action under Rule 9-5(1)(a).

60 Insofar as the claim apparently framed in negligence is concerned, it appears to rest on assertions of "contamination of [his] file with other inmates' information" and/or the insertion of inaccurate information in the plaintiff's file.

61 While on the pleadings as constituted, it is impossible to discern what the material facts underlying the alleged negligence are or what damages have flowed from it, I do not think it could be said that if amended the pleadings could not disclose a cause of action in negligence (assuming the facts to be true).

62 In the result, I will strike the plaintiff's pleadings insofar as they appear to claim in harassment or defamation as disclosing no cause of action, without leave to amend, but will strike the plaintiff's claim in negligence as being unnecessary, scandalous, frivolous or vexatious under Rule 9-5(1)(b) but with leave to amend. The proceedings will be stayed pending the filing of an amended statement of claim that comports with the *Rules* and principles of pleadings as discussed in these Reasons. If no adequately amended statement of claim has been filed within 60 days of this order, the applicant has liberty to reset its application to dismiss the plaintiff's action against it.

A.F. CULLEN A.C.J.S.C.

End of Document

Gill v. Canada, [2013] B.C.J. No. 2036

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P. Rogers J.

Heard: August 30, 2013.

Judgment: September 16, 2013.

Docket: S116960

Registry: Vancouver

[2013] B.C.J. No. 2036 | 2013 BCSC 1703

Between Harjit Singh Gill, "Legal fiction", for Harjit Singh Gill, Man, Plaintiff, and Government of Canada, Attorney General of Canada, TSX Venture Exchange, Attorney General of British Columbia, City of Surrey, City of Delta, Rani Kaur Gill, Swinder Singh Gill, Harbans Senghera, Amarjit Mann, Eclipse Medical Inc., Rotary International, Rotary District 5040, Salvation Army, Royal Bank of Canada, Bank of Nova Scotia, AMS Homecare Inc. et al, Defendants

(23 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Application by defendants to strike plaintiff's pleadings on ground they were scandalous, frivolous, or vexatious allowed — Plaintiff's notice of civil claim was impenetrable as description of cause of action — No orders were made on applications for stay of proceedings or summary dismissal; pleadings did not permit proper understanding of claims and it was thus injudicious to dismiss on merits — Leave of court was required before plaintiff filed further pleadings against defendants.

Application by the defendants to strike the plaintiff's pleadings on the ground they were scandalous, frivolous, or vexatious. Application by the Attorney General of Canada for an order dismissing the proceeding against the RCMP and CSIS. Application by the defendant Salvation Army to stay the proceedings on the ground the plaintiff was an undischarged bankrupt. Application by the defendant Royal Bank of Canada for summary dismissal of the proceeding and to declare the plaintiff a vexatious litigant. The plaintiff had attempted to amend his original pleadings to add the RCMP and CSIS as defendants; the amended notice was ordered struck and an appeal was stayed. The plaintiff made various allegations against the defendants, seemingly involving a conspiracy against the plaintiff.
HELD: Applicant by defendants allowed.

Pleadings were struck. The plaintiff's notice of civil claim lacked discipline and structure, was prolix, was extremely difficult to follow and as a description of a cause of action was impenetrable. The plaintiff's notice of civil claim offended Rule 9-5(1)(a) and (b) and the pleadings were struck. The Attorney General's application to strike the proceeding against the RCMP and CSIS was superfluous as the amended notice of claim had been struck. No orders were made on the Salvation Army or Royal Bank's applications; the plaintiff's pleadings did not permit a proper understanding of his claims and it would thus be injudicious to dismiss the claim on the merits. The application to declare the plaintiff a vexatious litigant was premature as he had not demonstrated he would advance

facetious litigation. However, as there was a substantial risk of the plaintiff re-filing his claims, leave of the court was required before the plaintiff filed further pleadings against the defendants.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 71

Supreme Court Civil Rules, Rule 9-5(1), Rule 9-5(1)(a), Rule 9-5(1)(b), Rule 9-5(2)

Counsel

Appearing on his own behalf: H.S. Gill.

Counsel for the Defendant, Government of Canada: J.S. Basran, A.S. Sanghera.

Counsel for the Defendant, City of Delta: M. Van Nostrand.

Counsel for the Defendant, Salvation Army: J.A. Bastien.

Counsel for the Defendant, Royal Bank of Canada: M.D. Parrish.

No other appearances.

Reasons for Judgment

P. ROGERS J.

Introduction

1 The main thrust of the defendants' applications is to strike the plaintiff's pleadings on the ground that they offend Rule 9-5(1).

The Applications

2 The Attorney General of Canada, on behalf of the Government of Canada, the Royal Canadian Mounted Police and the Canadian Security Intelligence Service, the City of Delta, the Royal Bank of Canada, and the Salvation Army have all applied for an order that Mr. Gill's pleadings be struck because they do not disclose a reasonable claim against the defendants; they are unnecessary, scandalous, frivolous, or vexatious; and the pleadings are so badly drawn that they would prejudice, embarrass or delay a fair trial of the proceeding.

3 The Attorney General of Canada also applies for an order dismissing the proceeding against the RCMP and CSIS on the ground that they are not legal entities which can be sued.

4 In addition to an order striking Mr. Gill's pleadings, the Royal Bank of Canada seeks orders declaring that Mr. Gill is a vexatious litigant, that he be enjoined from amending his notice of civil claim or commencing further proceedings against the Royal Bank without the court's leave or, in the alternative, that the Royal Bank be granted summary judgment against Mr. Gill. The Royal Bank also seeks special costs of the application in any event of the cause.

5 The Salvation Army, in addition to its application to strike Mr. Gill's pleadings, seeks an order that Mr. Gill's action be stayed on the ground that Mr. Gill has no capacity to prosecute this proceeding owing to his status as an un-discharged bankrupt.

The Law

Striking Pleadings

6 Rule 9-5(1) of the *Rules of Court* governs an application to strike pleadings:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

7 Rule 9-5(2) stipulates that no evidence is admissible in the context of an application under Rule 9-5(1)(a). Another way of putting this stipulation is that the court should assume that the facts plead or true as it considers whether those facts disclose a reasonable claim. A common sense exception to this stipulation exists when the pleadings assert some bizarre or impossible proposition. The purpose of Rule 9-5(1)(a) is to ensure that the parties and the court have a clear understanding of the nature of the claims advanced. A clear understanding of the claims will allow the parties to efficiently litigate the issues and will allow the court to make considered and judicious findings on those issues. Prolix, convoluted, and incomprehensible pleadings do not lend themselves to permit in the parties to achieve a clear understanding of the claims advanced. Further, a party pleading a particular type of claim must, at a minimum, plead assertions of fact which, if proven, would establish the essential elements of a successful claim.

8 A pleading is frivolous if it is without substance, is groundless or is fanciful. A pleading is vexatious if it is irrelevant to the plaintiff's cause of action (whatever that cause of action may be) or if it does not disclose a claim known to law.

9 The pleading is scandalous if it is so badly drawn that to litigate upon the pleading would require the parties to undertake useless expense or cause them to litigate matters irrelevant to the claim itself.

Bankruptcy

10 Upon making an assignment into bankruptcy, the bankrupt party transfers all of his property, including choses in action, to the trustee in bankruptcy: *Bankruptcy and Insolvency* Act. R.S.C. 1985, c. B-3, s. 71. However, the bankrupt may nevertheless retain the right to prosecute an action where the claim is personal in nature. Examples of claims that are personal in nature include claims for personal injury, defamation, or wrongful arrest. A claim for recovery of money owing to a breach of contract is not personal in nature.

The Pleadings

11 Mr. Gill commenced this proceeding on October 17, 2011. He attempted to amend his pleadings on October 15, 2012. The amendments asserted claims against a number of parties Mr. Gill wished to become the defendants. Those parties included the RCMP and CSIS. Mr. Gill did not seek or obtain the courts leave to amend or add parties to the proceeding. On October 30, 2012, Mr. Justice Savage ordered that the amended notice of civil claim be struck. Mr. Gill appealed that order. The Court of Appeal ordered that Mr. Gill's appeal be stayed pending his posting of security for costs. Mr. Gill has not posted security for costs. In the result, the appeal has not proceeded;

Justice Savage's order remains extent; the amended notice of civil claim is defunct; the RCMP and CSIS are not parties to the proceeding; and the only pleading to which the defendant's applications relate is the original October 2011 notice of civil claim.

12 I have reviewed Mr. Gill's original notice of civil claim. I note that at para. 1 of his notice, Mr. Gill pleads that Harjit Singh Gill is a legal fiction. At para. 2, Mr. Gill alleges that:

> 2. The defendants over the course of 40 plus years orchestrated events on the Plaintiff for the purpose to deceive and to harm, deceiving the Plaintiff for the purpose of monetary gain and to test Truths, tortured the plaintiff, mentally and physically, alienated the plaintiff's children from the plaintiff, robbed from the plaintiff, caused financial ruin, and held the plaintiff hostage.

13 The notice of claim contains 59 paragraphs. Paragraphs 16 and 40 are reasonably representative of the quality of Mr. Gill's drafting:

> 16. In 2003 -- Bank of Nova Scotia who had provided line of credit to the company pulls line of credit suddenly and no Bank would provide the line of credit during crucial spring season buying. The Plaintiff obtains funding privately (loan to the Plaintiff Mr. Gill) from third parties and gives funds to Rani Gill who deposited them into company at below the cost to the Plaintiff as TSX Venture would not approve a higher interest loan to company, the TSX Venture saying interest being paid to Rani Gill was too much even though it was less than the Plaintiff's cost of obtaining the funds. Hence the debt burden to the Plaintiff and too Rani Gill continued to climb and the risk grew as the Plaintiff had provided the personal guarantees. The funds injection enabled the company to obtain a line of credit from the Royal Bank of Canada. The Plaintiff then had to fund the interest on interest as Royal Bank who agreed to provide a line of credit demanded that the funds not be withdrawn at any time. The company grew nationally aggressively, resulting in more need for capital to meet the need of ordering more product. The Plaintiff began to realize that there was a continued conspiracy taking place and that the financial institutions and private lenders would not permit the Plaintiff to reduce the personal and company debt levels as funds were provided both through the financial institutions and privately to the Plaintiff but only enough to fund the ongoing interest on interest which continued to climb as more debt was required to fund the ongoing growth but not for repayment of the debt. I advised legal counsel of the growing conspiracy but had no way of stopping it. The cycle of debt and interest was maintained and created by the defendants

...

> 40. After the Plaintiff terminates all the Rotarians of the club in July 2009, the Plaintiff still continued to manage the rotary websites for sometime. The Plaintiff attempted to stay in touch with Rotarians but the terminated Rotarians wanted to continue to deceive everyone and ultimately the Plaintiff focused on attempting to uncover more truths and to improve his health. By August 2009 the Plaintiff had learned how to swim and had trained at the downtown Vancouver Steve Nash gym while the Plaintiff worked in construction, minimum wage, and was ready for IRONMAN Penticton, which he had registered for the previous year. The Plaintiff went to Penticton on little funds in his pocket. Still living homeless in Vancouver Shelters. The defendants continued creating more problems for the Plaintiff, the buses would not drive me -- greyhound were full they claimed and so the Plaintiff rode to Hope on his bike, and then when he realized it would take too long to get there by bike he took a taxi the rest of the way -- expensive and that's how the defendants wanted it to be -- they wanted the Plaintiff to drain his funds. IRONMAN Penticton starts at a park funded by PENTICTON Rotary. Hence Rotarians control and influence the city and the race to a large degree. The plaintiff completed the swim portion and was eight minutes after the cutoff on the bike portion of the IRONMAN and was not permitted to do the marathon (I had already completed two marathons by now). My bike was sabotaged during the race. My tire was half flat and the brakes rubbed against the tire as I rode. This was not the case the night before. In addition the Plaintiff believes that since the Plaintiff appeared to be the first after the cutoff that they lengthened the race as there was no one after or before the Plaintiff for miles. The Rotarians or conspirators could

> not afford that the Plaintiff would be successful in the IRONMAN. How could the defendants justify that an IRONMAN was not worthy. Hence the Plaintiff's suffering would continue. They had successfully sabotaged the Plaintiff's IRONMAN 2009 race, another victory for them.

Discussion

14 The examples reproduced above demonstrate that Mr. Gill's notice of civil claim lacks discipline and structure. It is prolix. As a history, the notice of civil claim it is extremely difficult to follow. As a description of a cause of action against any particular defendant, it is impenetrable.

15 It is clear that when he drafted the notice of civil claim, Mr. Gill was either unaware of the principles of proper legal pleading or, being aware of those principles, he ignored them. There is, in my view, no question that Mr. Gill's notice of civil claim offends Rule 9-5(1)(a) and (b) and that his pleadings must be struck. An order will go to that effect.

16 The Attorney General for Canada's application to strike the proceeding against the RCMP and CSIS is superfluous. That is because those entities were taken out of the action by operation of Justice Savage's October 2012 order.

17 I will make no order concerning the Salvation Army's application to stay the proceedings on the ground that Mr. Gill is an undischarged bankrupt. I have come to that conclusion because Mr. Gill's pleadings do not permit me to come to a proper understanding of the true nature of his claims. They may be personal in nature, in which case the claim may still accrue to Mr. Gill despite his bankruptcy, or they may be non-personal, in which case they ought to be stayed pursuant to the *Act*.

18 For substantially the same reason, I will make no order with respect to the Royal Bank of Canada's application for summary dismissal of Mr. Gill's proceeding. The pleadings do not reveal what it is that Mr. Gill is complaining of -- it would be injudicious to dismiss the claim on the merits without first knowing what the claim is about.

19 The Royal Bank of Canada has asked for an order that Mr. Gill be declared a vexatious litigant and that he be enjoined from filing further pleadings without leave of the court. In my view, the Royal Bank of Canada's application is premature -- Mr. Gill has not yet demonstrated that he will, against all odds and contrary to common sense, advance facetious litigation.

20 That said, Mr. Gill has demonstrated that he is incapable of composing a proper notice of civil claim. Given Mr. Gill's assertion in the course of the hearing of these applications -- he promised that if his pleadings are struck he will simply re-file them and press on with his claims -- I find that there is a substantial risk that if the order following these applications does nothing more than strike the pleadings, these defendants will be back in the same position they are at present and that this entire exercise will have to be repeated. Therefore, relying upon the court's inherent jurisdiction to control its process, an order will go enjoining Mr. Gill from filing further pleadings in this proceeding or in any other proceeding against the defendants named in the original and the defunct amended notice of civil claim without first obtaining leave of the court to do so. On an application for such leave, the question for the court to decide will be whether Mr. Gill's pleadings offend Rule 9-5.

Conclusion

21 The pleadings contained in the notice of civil claim filed October 17, 2011, are struck. Mr. Gill will be enjoined from filing further pleadings in this or any other proceeding against the defendants named in the original and the amended notice of civil claim without first obtaining leave from the court to file those pleadings.

22 It will not be necessary for Mr. Gill to approve the form of order.

23 The application defendants have been generally successful on their applications. Subject to a determination of whether Mr. Gill's claims are personal and therefore survive his bankruptcy, the application defendants shall be entitled to their costs on Scale B in any event of the cause.

P. ROGERS J.

End of Document

Grosz v. Royal Trust Corp. of Canada, [2020] B.C.J. No. 161

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

C.L. Forth J.

Heard: December 3-4, 2019.

Judgment: February 4, 2020.

Docket: S199755

Registry: Vancouver

[2020] B.C.J. No. 161 | 2020 BCSC 128

Between Robert W.G. Grosz, J.D., Plaintiff, and Royal Trust Corporation of Canada, West Coast Realty Ltd., Seasons Real Estate Services Corporation, Catherine Elliott, Ronald Elliott, Estate of Eleanor Elizabeth Bird (Deceased) Also Known As Elizabeth Eleanor Bird (Deceased) Also Known As Elizabeth Bird (Deceased), Michael Van Der Kooy, Jacqueline Eddy, Pauline Savoy, Boughton Law Corporation, James D. Baird, James Baird Law Corporation, Heather D. Craig, Heather Craig Law Corporation, Gregg E. Rafter, Gregg Rafter Law Corporation, Marcia C. Pedersen, The Owners, Strata Plan LMS 2002, City of Surrey, Tammy Esther Jones, Defendants

(127 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Judgments and orders — Summary judgments — No triable issue — To dismiss action — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties — Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Civil litigation — Limitation of actions — Time — Discoverability — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties — Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Real property law — Proceedings — Practice and procedure — Pleadings — Limitation periods — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties

— Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Application by all defendants, except Jones, to dismiss plaintiff's second claim against them allowed — In 2014, plaintiff commenced first action against same defendants alleging fraud and conspiracy regarding sale of property — First action was struck for want of prosecution — Plaintiff commenced second action in 2019 that expressly incorporated pleadings from first action and added new allegations and 19 new parties — Plaintiff discovered his claims against defendants on or before August 2014 — Under s. 6(2) of Limitation Act, limitation period expired well before second action was commenced — Supreme Court Civil Rules, Rule 9-6(5)(a).

Application by all defendants, except Jones, to dismiss the self-represented plaintiff's second claim against them. In 2014, the plaintiff entered into a contract of purchase and sale with the defendant Royal Trust, as executor of Bird's estate, to purchase a unit in a condominium complex in Surrey. After learning Bird had died in the unit, the plaintiff refused to waive or declare fulfilled the subject conditions. Jones subsequently purchased the unit. In his first action commenced in June 2014, the plaintiff alleged the defendants concealed the fact Bird had died in the property and fraudulently misrepresented the condition of the property. In 2019, the plaintiff commenced a second action that expressly incorporated the pleadings from the first action. In the second action, the plaintiff sought the same relief as the first action but added new allegations and claimed against 19 new parties. The first action was dismissed in 2019 for want of prosecution.
HELD: Application allowed.

The plaintiff discovered his claims against the defendants on or before August 2014. Under s. 6(2) of the Limitation Act, the limitation period expired well before the second action was commenced. There was no genuine issue for trial. In the alternative, it was plain and obvious that the claim disclosed no reasonable cause of action, was vexatious and was an abuse of process. The plaintiff had advanced wildly speculative theories against the defendants that were clearly embarrassing, scandalous and vexatious. Allowing the plaintiff to amend his pleadings would not cure the defects.

Statutes, Regulations and Rules Cited:

Business Corporations Act, S.B.C. 2002, c. 57, s. 46(5)

Law and Equity Act, R.S.B.C. 1996, c. 253, s. 10

Limitation Act, S.B.C. 2012, c. 13, s. 6(1), s. 8, s. 12(2)

Real Estate Services Act, S.B.C. 2004, c. 42, s. 35(1)(c)

Realtor's Code of Ethics,

Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 3-7(1), Rule 8-1(9), Rule 9-5, Rule 9-5(1), Rule 9-5(1)(a), Rule 9-5(1) (b), Rule 9-5(1)(c), Rule 9-5(1)(d), Rule 9-5(2), Rule 9-6, Rule 9-6(5)(a)

Trustee Act, R.S.B.C. 1996, c. 464, s. 87(2)

Wills, Estates and Succession Act, S.B.C. 2009, c. 13,

Counsel

Plaintiff appearing in person: R. Grosz.

Counsel for the Defendants, Royal Trust Corporation of Canada, Estate of Eleanor Elizabeth Bird, also known as Elizabeth Eleanor Bird (Deceased), also known as Elizabeth Bird (Deceased), Jacqueline Eddy, Michael Van Der Kooy, and Pauline Savoy (the "Royal Trust defendants"): N. Safarik.

Counsel for the Defendants, Boughton Law Corporation, James D. Baird, James Baird Law Corporation, Heather D. Craig, Heather Craig Law Corporation, Gregg E. Rafter, Gregg Rafter Law Corporation, and Marcia C. Pederson (the "Boughton defendants"): P. Arvisais.

Counsel for the Defendants, West Coast Realty Ltd, Seasons Real Estate Services Corporation, Catherine Elliott and Ronald Elliott (the "Realtor defendants"): N. Kamoosi.

Counsel for the Defendant, City of Surrey (the "Surrey defendant"): B. Lee.

Counsel for the Defendant, The Owners, Strata Plan LMS 2002 (the "Strata defendant"): M. Holmes.

Table of Contents

INTRODUCTION

FACTUAL BACKGROUND

THE CURRENT APPLICATIONS

ISSUES

- Issue 1: Should the claim against Royal Trust, Realtor, and the Strata defendants be dismissed under R. 9-6(5)(a) of the SCCR?
    - Legal Principles
    - Position of Royal Trust, Realtor, and the Strata Defendants
    - Position of the Plaintiff
    - Analysis
        - Are the claims statute-barred?
        - Should the claims be dismissed pursuant to R. 9-6?
- Issue 2: Should the pleadings be struck and the proceeding dismissed pursuant to R. 9-5(1) of the SCCR?
    - General Legal Principles
    - Positions of the Parties
- Rule 9-5(1)(a): Do the pleadings fail to disclose a reasonable claim against the applicant defendants?
    - Position of the applicant defendants
    - Position of the plaintiff
    - Submissions on damages
- Rule 9-5(1)(b), (c) and (d): are the pleadings frivolous, vexatious, embarrassing, or an abuse of process?
    - Position of the applicant defendants
    - Position of the plaintiff
- Analysis

Remedy

CONCLUSION

COSTS

Reasons for Judgment

C.L. FORTH J.

Introduction

1 These are the reasons for judgment on applications brought by the defendants in this action, with the exception of the defendant, Tammy Esther Jones ("applicant defendants"), to have the claims against them dismissed under R. 9-5 or 9-6 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*SCCR*]. The plaintiff, Robert W.G. Grosz, is self-represented.

2 I will begin by outlining the factual background and the history of the proceedings. I will then outline the specific applications brought by each of the applicant defendants. With respect to these, I will first address the applications to have the claims dismissed under R. 9-6(5). I will end with a consideration of the applications to have the pleadings struck and the proceeding dismissed under R. 9-5(1) and costs.

Factual Background

3 On June 19, 2014, the plaintiff, Mr. Grosz, through his company, The Matryx Corporation ("Matryx"), entered into a contract of purchase and sale (the "Contract") with the defendant, Royal Trust Corporation of Canada ("Royal Trust").

4 The Contract was for the purchase of a unit in a condominium complex in Surrey, BC (the "Property") which had been owned by Ms. Eleanor Bird prior to her death in July of 2013. Ms. Bird had no living relatives in Canada, and Royal Trust was named as the executor of her estate ("Ms. Bird's Estate"). It was in this capacity that Royal Trust entered into the Contract to sell the Property to Matryx. Matryx has since assigned its rights under the Contract to Mr. Grosz.

5 When Mr. Grosz entered into the Contract, he had recently returned to Canada after having obtained a law degree from a school in California. He and his partner were looking to purchase a property, and he arranged to view the Property through Catherine Elliott, a realtor with West Coast Realty Ltd., who was the listing agent.

6 Mr. Grosz first viewed the Property on June 18, 2014. Ms. Elliott did not attend the viewing, but her husband, Ronald Elliott, who is a realtor with Seasons Real Estate Services Corporation, attended in her place.

7 Mr. Grosz alleges that Mr. Elliott told him that Ms. Bird did not die in the Property and made other representations as to the condition of the Property, which Mr. Elliott denies.

8 The Contract was entered into the following day with a purchase price of $133,000. The Contract included a clause that "This Property is an estate sale", and the sale was "as is", without any legal warranties and/or representations from the seller.

9 The Contract also included subject conditions, which were for the sole benefit of the buyer and which were required under the Contract to be removed by July 4, 2014 (the "Subject Removal Date"). Some of the conditions included:

a) the buyer was to receive and approve certain documents with respect to information that could reasonably adversely affect the use or value of the Property;

b) the buyer would arrange and approve satisfactory financing;

c) the buyer would obtain, approve, or waive an inspection report against defects which might adversely affect the Property's use or value;

d) the buyer would search and approve title to the Property against the presence of any charge or other feature, registered or not, that might reasonably adversely affect the Property's use or value;

e) the seller would not unreasonably withhold its consent to a request from the buyer for an extension of a few days in order to complete property inspections and/or draft and file documents required to complete the sale; and

f) the buyer was aware that it had "no agency" and was advised to seek legal representation prior to removing subjects.

10 The Contract provided that it would be terminated on the Subject Removal Date unless the subject conditions were waived or declared fulfilled by written notice given by the buyer on or before that date.

11 A few days after entering into the Contract, on June 24, 2014, Mr. Grosz learned that Ms. Bird had died in the Property. Because her body was not immediately discovered, some decay was present which created defects to the Property requiring remediation. The remedial work was carried out in the summer and fall of 2013. No building permits were obtained from the City of Surrey.

12 On June 26, 2014, Mr. Grosz demanded documents relating to any engineering or remediation of the Property, the adjoining units, and the common property. He also demanded copies of all pleadings and orders relating to the probate of Ms. Bird's will and an unrelated personal injury action against the Strata Corporation. The following day, Ms. Elliott provided some, but not all, of the requested documents.

13 On June 30, 2014, Mr. Grosz commenced an action in the BC Supreme Court against Royal Trust, West Coast Realty Ltd., Seasons Real Estate Services Corporation, Catherine and Ronald Elliott, and the Estate of Eleanor Elizabeth Bird (the "First Action"). In it, he alleges that:

a) Royal Trust and Mr. and Ms. Elliott knew that Ms. Bird had died in the Property and that they conspired to conceal these facts from him and misrepresented the condition of the Property in order to maximize the sale price;

b) Ms. Bird's will was fraudulently created by Royal Trust and Mr. and Ms. Elliott in order to share the proceeds from the sale of the Property; and

c) Royal Trust and Ms. Elliott were in breach of the Contract for failing to provide relevant documents.

14 Mr. Grosz sought the following relief in the First Action:

a) consolidation of the action with the probate petition regarding Ms. Bird's Estate;

b) an injunction to prevent Royal Trust from further sales of Ms. Bird's real or personal property;

c) an injunction to compel Royal Trust to further remediate the Property;

d) an adjustment of the sale price in the Contract;

e) a declaration that Royal Trust, West Coast Realty Ltd., and Ms. Elliott are in breach of the Contract for refusing to produce relevant documents;

f) a declaration that Matryx has no duty to perform under the Contract until the documents are produced;

g) a declaration under s. 87(2) of the *Trustee Act*, R.S.B.C. 1996, c. 464 for fraud, wilful concealment, or misrepresentation against Royal Trust for its misrepresentations with respect to the Property;

h) a declaration under s. 35(1)(c) of the *Real Estate Services Act*, S.B.C. 2004, c. 42 that Mr. and Ms. Elliott engaged in professional misconduct and deceptive dealing by failing to disclose Ms. Bird's death in the Property and failing to produce documents;

i) a declaration under the Rules of the Real Estate Council of B.C. against Mr. and Ms. Elliott for failing to disclose latent defects, among other things;

j) a declaration that Mr. and Ms. Elliott were in breach of the *B.C. Realtor Code of Ethics* for failing to disclose information, intentionally misleading Mr. Grosz about matters pertaining to the Property, failing to discover facts to avoid an error or misrepresentation, being party to an agreement to conceal facts pertaining to the Property, and other allegations;

k) a revocation of the grant of administration of Ms. Bird's Estate to Royal Trust and a grant of the administration of the Estate to Mr. Grosz;

l) rectification or variation of Ms. Bird's will under Divisions 5 and 6 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13.

m) restitution from each of the defendants for services to Ms. Bird's Estate;

n) general, special, actual, compensatory, consequential, and incidental damages in tort from each of the defendants; and

o) punitive damages from each of the defendants for fraud, wilful concealment, or misrepresentation.

15 On July 4, 2014, the Subject Removal Date was extended to July 14, 2014, at Mr. Grosz's request. Royal Trust refused Mr. Grosz's further request to extend the Subject Removal Date, taking the position that it had "more than met" its disclosure obligations under the Contract.

16 On July 14, 2014, Mr. Grosz contacted the City of Surrey to inquire about whether building permits had been obtained for the remediation work done to the Property. Joseph Marian, Commercial Plan Reviewer for the City of Surrey, e-mailed Mr. Grosz to confirm that no building permit had been obtained and that a building permit would be required to replace plumbing fixtures, to do any structural work, or to do any work affecting fire and sound separations. Mr. Grosz forwarded this correspondence to James D. Baird, the solicitor for Royal Trust, and demanded that Royal Trust obtain a retroactive building permit and remedy any deficiencies with the remediation work performed.

17 Mr. Grosz took the position that he could not remove the subject conditions until his demands were met. He claims that he spoke to Mehran Nazeman, a manager in the building division at the City of Surrey, and learned that City of Surrey would retroactively enforce the building permit requirement on him if he purchased the Property. He says that this would likely require him to "demolish the work and start over", which would likely cost more than the fair market value of the Property. He further says that if he completed the subject conditions, he would be purchasing a property that was "stigmatized" and "a liability, and one that cannot be lived in".

18 In July 2019, Mr. Grosz learned that the City of Surrey had not retroactively enforced the building permit requirement on the current owner of the Property, Ms. Jones, who purchased the Property in March of 2015.

19 On July 15, 2014, after Matryx had failed to waive or declare fulfilled the subject conditions, Royal Trust and its lawyers took the position that the Contract had terminated in accordance with its terms. This was communicated to Mr. Grosz by way of a letter sent by Mr. Baird. In it, Mr. Baird informs Mr. Grosz of Royal Trust's position that it had no further obligations to him or to Matryx under the Contract.

20 In a letter to Mr. Grosz in August of 2014, Heather Craig, the lawyer for Royal Trust in the First Action, repeated this position and informed Mr. Grosz that Royal Trust intended to deal with the Property in the ordinary course as it deems appropriate in its capacity as the executor and trustee of Ms. Bird's Estate, which included listing it for sale.

21 Mr. Grosz claims that, since August 4, 2014, he has been renting property in mitigation of his damages while awaiting Royal Trust's performance of the Contract. He says that he can no longer afford to buy an alternative property.

22 Responses to civil claim were filed by the defendants in the First Action in July of 2014, with the exception of Ms. Bird's Estate. In August 2019, Ms. Craig amended Royal Trust's response to civil claim to include Ms. Bird's Estate. She also filed an affidavit in which she deposes that she initially failed to include Ms. Bird's Estate due to inadvertence. This amendment was triggered by an application brought by Mr. Grosz for default judgment against Ms. Bird's Estate.

23 Between July 2014 and July 2019, no steps were taken in the First Action. Mr. Grosz filed a notice of change of address in September 2015 and again in February 2019, which the defendants in the First Action say they never received.

24 On July 22, 2019, Royal Trust filed an application to have the First Action dismissed for want of prosecution (the "Dismissal Application"). It served the application by courier to Matryx's registered and records office at 1023 Expo Boulevard, and also served Mr. Grosz by email.

25 Upon receipt of this application, Mr. Grosz filed a notice of intention to proceed and a notice of address for service and served these documents on the defendants in the First Action. He also brought an application to strike the Dismissal Application (the "Strike Application"). In addition, without consulting the defendants, he secured a trial date in the First Action for January 4, 2021 for ten days.

26 On August 28, 2019, the parties to the First Action attended before me in chambers. Mr. Grosz indicated his intention to add further parties in the First Action, and as a result, I ordered:

a) the parties were not to file or serve any additional materials without seeking my leave to do so on September 24, 2019 (the date set for hearing the Dismissal Application); and

b) there were to be no chambers applications heard between August 28 and September 24, 2019, by any parties.

27 On September 3, 2019, while he was prevented from bringing an application to add parties to the First Action, Mr. Grosz started this action (the "Second Action"). In his notice of civil claim, he attaches as Appendix "A" the notice of civil claim from the First Action, and expressly re-pleads and incorporates it into the Second Action. He also describes the Second Action as a "parallel" proceeding to the First Action. He seeks the same relief as outlined above, but also seeks relief against 19 new parties for fraud and conspiracy arising from the same underlying allegations, as well as from their conduct in the First Action.

28 The parties who were added in the Second Action include:

a) several senior Royal Trust employees, being: Michael Van Der Kooy, Vice President; Jacqueline Eddy, Senior Trust Officer; and Pauline Savoy, Regional Client Service Manager (together with Royal Trust, the "Royal Trust defendants");

b) Boughton Law Corporation, the law firm representing Royal Trust in the First Action, and several of its lawyers and a staff member, being: James D. Baird, Estate solicitor; Heather Craig, lawyer for Royal Trust in the First Action; Gregg E. Rafter, lawyer for Royal Trust in the First Action; Marcia C. Pederson, legal assistant; and the law corporations of Baird, Craig, and Rafter (the "Boughton defendants");

c) the strata corporation for the complex in which the Property is located (the "Strata defendant");

d) the City of Surrey (the "Surrey defendant"); and

e) Tammy Esther Jones, who purchased the Property in March of 2015.

29 The five beneficiaries under Ms. Bird's will, all of whom reside in the United Kingdom, were also originally named as defendants in the Second Action, but have since been removed pursuant to an order of Justice Groves to which Mr. Grosz agreed on September 26, 2019.

30 The Second Action makes the following new allegations (in addition to those re-pleaded from the First Action):

a) Royal Trust and the Strata defendant knew or had a duty to know that the remediation work required a building permit, but failed to obtain one;

b) the Royal Trust defendants and Mr. Baird breached their duty to ensure that there was no "unrecorded encumbrance" on the Property, referring to the fact that remediation work was done on the Property without a building permit;

c) the Royal Trust defendants, Mr. and Ms. Elliott, and Mr. Baird conspired to conceal the "unrecorded encumbrance";

d) Royal Trust failed in its duty to remedy the "unrecorded encumbrance" as it constituted a defect in the Property's title;

e) the Royal Trust defendants, Mr. and Ms. Elliott, and Mr. Baird failed to disclose documents demanded by Mr. Grosz, including documents relating to remediation work done on the Property, in breach of the Contract;

f) Royal Trust unreasonably refused Mr. Grosz's requests for an extension of the time to complete the subject conditions, despite being in breach of the Contract for failing to disclose relevant documents;

g) Mr. Baird's statement to Mr. Grosz on July 11, 2014 that Royal Trust had met all of its disclosure obligations under the Contract was "a false statement intended to conceal";

h) Royal Trust and Mr. Baird falsely declared the Contract terminated on July 15, 2014;

i) the above allegations were done for the purpose of defrauding Mr. Grosz by preventing him from completing the Contract so that the applicant defendants could keep his deposit;

j) Mr. Baird and Ms. Craig, knowing that they had no defence as to the merits of the case, engaged in procedural tactics in an attempt to have the action dismissed on a technicality;

k) Ms. Pederson couriered the materials for the Dismissal Application to a "bogus address", being the registered and records office of Matryx, in an attempt to deceive the Court into believing Matryx had been properly served. She also "deliberately falsifies the truth by a combination of tactics" in her affidavit, including failing to number the pages to the exhibits, omitting one page of a letter exhibited, and failing to attach a relevant email;

l) Ms. Pederson conspired with Ms. Craig to damage Mr. Grosz and Matryx by compiling Ms. Pederson's affidavit in a misleading manner and by waiting to serve this affidavit, along with the other Dismissal Application materials, when it could have been served earlier;

m) Ms. Craig committed perjury in her affidavit when she asserted that she consented to Mr. Grosz's request for further time to file and serve his responses to the Dismissal Application;

n) Mr. Rafter failed to produce corporate records when Mr. Grosz attended at Boughton Law Corporation and demanded to inspect them pursuant to s. 46(5) of the *Business Corporations Act*, S.B.C. 2002, c. 57.

o) Mr. Rafter falsely claimed that Mr. Grosz was photographing him in public, threatened to have him removed from the premises of a private restaurant, threatened to call the police on grounds of criminal harassment, and instructed Mr. Grosz not to speak to anyone other than himself at Boughton Law Corporation;

p) Mr. Rafter, Mr. Baird, Ms. Craig, Ms. Pederson, Mr. Van Der Kooy, Ms. Eddy, and Ms. Savoy conspired to cause Mr. Grosz and Matryx economic harm and to cause Mr. Grosz criminal harm;

q) West Coast Realty Ltd., Seasons Real Estate Services Corporation, and Mr. and Ms. Elliott conspired through their counsel with Mr. Rafter, Mr. Baird, Ms. Craig, Ms. Pederson, Mr. Van Der Kooy, Ms. Eddy, and Ms. Savoy to cause Mr. Grosz and Matryx economic harm; and

r) the Surrey defendant dispensed false information to Mr. Grosz, tortiously interfered in a contract, was negligent in failing to enforce its building code, and "conceal[ed] on 13/Aug/2019 the foregoing acts and omissions".

31 No new allegations appear to be made against Ms. Bird's Estate in the Second Action.

32 There is no allegation made that the Boughton defendants acted for Mr. Grosz. I am satisfied that, at all times, the Boughton defendants were only acting for Royal Trust. At no time did they act for Mr. Grosz.

33 Mr. Grosz seeks the following relief in the Second Action:

a) all of the relief he sought in the First Action (including specific performance of the Contract);

b) consolidation of the Second Action with the First Action and with the Estate probate petition;

c) relief for breach of contract against Royal Trust between July 1, 2014 and February 10, 2015 (when the Property was sold to Ms. Jones);

d) relief for breach of trust against Royal Trust;

e) relief for fraud, conspiracy to damage, and conspiracy by unlawful means against Royal Trust, West Coast Realty Ltd., Seasons Real Estate Services Corporation, Mr. and Ms. Elliott, Mr. Van Der Kooy, Ms. Eddy, Ms. Savoy, Boughton Law Corporation, Mr. Baird and his law corporation, Ms. Craig and her law corporation, Mr. Rafter and his law corporation, and Ms. Pederson;

f) relief for breach of contract, "specific performance of the [Contract] if full consideration not paid by T. Jones", conspiracy to damage, and conspiracy by unlawful means against Ms. Bird's Estate;

g) relief for "negligence in not getting a building permit required by its Bylaws" against the Strata defendant;

h) relief for "dispensing false information; tortious interference in a contract; negligence, misfeasance, and nonfeasance by failing to enforce its Surrey Building Bylaw...", and "concealing the foregoing acts and omissions" on August 13, 2019, against the Surrey defendant; and

i) relief for tortious interference (inducement to breach and interference with a contract), public mischief, conspiracy to damage, and conspiracy by unlawful means against Ms. Jones.

34 On September 24, 2019, I heard the Dismissal and Strike Applications. Mr. Grosz had also brought an application to have the Boughton lawyers disqualified as counsel in the First Action (the "Disqualification Application"), but I did not hear that application.

35 On October 21, 2019, without consulting the defendants, Mr. Grosz secured a trial date in the Second Action for September 21, 2020 for 10 days.

36 On November 21, 2019, I issued reasons for judgment, indexed at 2019 BCSC 1993 (the "Reasons"), dismissing the First Action for want of prosecution. I found that the five-year delay was inordinate and that no reasonable excuse had been provided. I rejected Mr. Grosz's argument that the defendants were to be blamed for the delay and that the defendants' lawyers were acting in a threatening manner in an attempt to ambush him. I also rejected Mr. Grosz's argument that he was waiting for Royal Trust to take steps to fix the Property and sell it to him. I found that the defendants had suffered prejudice from the delay, especially when considering the serious nature of the claims, which include allegations of fraud and professional misconduct.

37 On balance, I held that justice required a dismissal of the First Action. I rejected Mr. Grosz's argument that the limitation period for his claims had yet to expire, holding instead that the default two-year limitation period in s. 6(1) of the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act*] applied to his claims in the First Action. I found that the claims advanced had little merit and very little chance of success, and that even if the allegations were made out, Mr. Grosz did not suffer any damages as a result.

The Current Applications

38 These reasons deal with the following applications:

- a) applications by Royal Trust, Realtor, and the Strata defendants to have the Second Action dismissed pursuant to R. 9-6(5)(a) of *SCCR* on the basis that there is no genuine issue for trial; and
- b) applications by the applicant defendants to have the Second Action dismissed pursuant to R. 9-5(1) of *SCCR*, on the basis that:
- i. the pleadings disclose no reasonable claim;
  - ii. the action is frivolous, vexatious, and embarrassing; and
  - iii. the action is an abuse of the court's process.

39 Mr. Grosz did not file any application responses. At the beginning of the hearing of these applications, I dismissed his application for an adjournment. I issued written reasons for that decision, indexed at 2019 BCSC 2195.

Issues

Issue 1: Should the claim against Royal Trust, Realtor, and the Strata defendants be dismissed under R. 9-6(5)(a) of the *SCCR*?

Legal Principles

40 Rule 9-6(5)(a) provides that the court must dismiss a claim if it is satisfied that it raises no genuine issue for trial.

41 An application to dismiss a claim as time barred by the operation of a statutory limitation period is properly brought under this Rule. If an action is clearly statute-barred, it can be struck under this Rule. However, if there are real issues concerning postponement of the limitation period under the *Limitation Act*, the defendant should not succeed: *Sime v. Jupp*, 2009 BCSC 1154 at para. 17.

42 Section 6(1) of the *Limitation Act* provides that a proceeding in respect to a claim must not be commenced more than two years after the day on which the claim is discovered. Pursuant to s. 8 of the *Limitation Act*, a claim is discovered when a person knew or reasonably ought to have known:

- (a) that injury, loss or damage had occurred;
  - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
  - (c) that the act or omission was that of the person against whom the claim is or may be made;
  - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

43 The trying of unmeritorious claims imposes a heavy price in terms of time and costs on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial: *McLean v. Law Society of British Columbia*, 2016 BCCA 368 at para. 36 (citing *Canada v. Lameman*, 2008 SCC 14 at para. 10).

Position of Royal Trust, Realtor, and the Strata Defendants

44 These defendants argue that Mr. Grosz's claims are governed by the basic two-year limitation period provided in s. 6(1) of the *Limitation Act*. The pleadings clearly disclose that the claims advanced against these defendants were discovered by Mr. Grosz on or before July 15, 2014. As such, the limitation period lapsed over three years ago.

45 These defendants argue that the claims against them are statute-barred and ought to be dismissed.

Position of the Plaintiff

46 Mr. Grosz's position is that he discovered new claims against Royal Trust, Realtor, and the Strata defendants on July 22, 2019, the day on which Royal Trust served him with the Dismissal Application, which means that the limitation period in the *Limitation Act* has not expired. On or after that date, he found out that:

a) the Property had been sold to Ms. Jones, which led him to believe that the Realtor and Royal Trust defendants had conspired with their counsel to "complete the fraud they had attempted to complete against Matryx" by selling the Property to Ms. Jones knowing that it contained an unrecorded encumbrance (the lack of building permit) which Ms. Jones would not remedy. He described this as an ongoing criminal conspiracy with Ms. Jones;

b) West Coast Realty Ltd. and Seasons Real Estate Services Corporation refused to allow full inspection of their corporate records "for the purpose of preventing discovery of other persons who conspired with Catherine and Ronald Elliott in their misrepresentation of the condo", which became part of the fraud allegation against them; and

c) the Strata defendant was responsible for hiring the contractors who performed the remediation work without obtaining a building permit.

47 Mr. Grosz further submits that s. 12(2) of the *Limitation Act* might apply. Section 12(2) provides the discoverability rules relating to trust claims or fraud claims involving trustees. To summarize in relevant terms, it provides that the fraud or trust claim is discovered when the beneficiary becomes fully aware that the injury, loss, or damage occurred; that it was caused by the fraud, act, or omission of the person against whom the claim is brought; and that, having regard to the nature of the injury, loss, or damage, a court proceeding was appropriate. Mr. Grosz conceded that he was not sure whether it applies because the term "beneficiary" is not defined, although he considers himself to be a beneficiary.

Analysis

Are the claims statute-barred?

48 The question of whether the claims are statute-barred turns on when Mr. Grosz discovered them. Although Mr. Grosz submitted that s. 12(2) of the *Limitation Act* might govern the analysis of when his claims were discovered, he provided no real reason for this aside from the bare assertion that he considers himself to be a beneficiary. While Royal Trust does act as a trustee in relation to the beneficiaries under Ms. Bird's will, there is no air of reality to Mr. Grosz's assertion that he is a beneficiary in relation to Royal Trust or any of the other applicant defendants in this action. I am satisfied that s. 12(2) does not apply. The general discovery rules under s. 8 of the *Limitation Act* apply.

49 I am also satisfied that Mr. Grosz had discovered his claims against Royal Trust, Realtor, and the Strata defendants on or before August 2014. By then, Mr. Grosz believed that the loss, being the failure to complete the Contract due to the alleged fraud, had occurred and that it was caused by the defendants who were named in the First Action, which was started in June 2014. Although the Strata defendant was not named in the First Action, Mr. Grosz wrote to Mr. Baird on July 15, 2014, threatening to add the Strata as a defendant if Royal Trust did not agree to settle the matter. Mr. Grosz was aware in July of 2014 that the Strata had been involved in the remediation efforts to the Property, but chose not to pursue them as a defendant until the fall of 2019 when he started the Second Action.

50 I also disagree with Mr. Grosz's assertion that he did not know he had a claim for conspiracy against Royal Trust and the Realtor defendants until he found out that the Property was sold to Ms. Jones. In his notice of civil claim in the First Action, he alleged:

> Royal Trust, Catherine and Ronald conspired to defraud plaintiffs, conceal the latent damages to the strata property of Bird, and misrepresent the strata property of Bird as to its condition, worth, and habitability.

51 Ms. Craig told Mr. Grosz in August 2014 that Royal Trust intended to continue to try to sell the Property. Even if it were true that a new fraud had been perpetuated with Ms. Jones when she purchased the Property, Mr. Grosz has not explained why this would give rise to any new injury, loss, or damage that he could claim. Furthermore, there are no facts pleaded in the notice of civil claim in the Second Action that support the Realtor defendants having been involved in the ultimate sale of the Property to Ms. Jones; in fact, Mr. Grosz names a different realtor as having listed the Property in the fall of 2014 at paragraph 57 of his notice of civil claim.

52 Finally, Mr. Grosz has not explained the actionable claim that was discovered by him when West Coast Realty Ltd. and Seasons Real Estate Services Corporation refused to allow him to inspect their corporate records. Even if this could be seen as evidence to support the fraud that he alleges on the part of the Realtor defendants, the discovery of additional evidence to support a claim is not the same thing as discovering a new claim.

Should the claims be dismissed pursuant to R. 9-6?

53 To summarize, I am satisfied that the claims against Royal Trust, Realtor, and the Strata defendants were all discovered on or before August 2014. Under s. 6(1) of the *Limitation Act*, the limitation period, therefore, expired over three years ago, well before the Second Action was commenced.

54 Accordingly, I am satisfied that there is no genuine issue for trial and that the claims against Royal Trust, Realtor, and the Strata defendants must be dismissed under R. 9-6(5)(a).

55 Despite this finding, given Mr. Grosz's indication that he intends to appeal any of the orders I make that go against him, I will go on to address all of the arguments raised by these defendants, including those under R. 9-5(1).

Issue 2: Should the pleadings be struck and the proceeding dismissed pursuant to R. 9-5(1) of the *SCCR?*

56 Each of the applicant defendants in this action apply to have the pleadings struck and the action dismissed pursuant to R. 9-5(1), which provides:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

57 Each of the applicant defendants relies on R. 9-5(1)(a), (b), and (d). The Surrey defendant also relies on R. 9-5(1)(c).

General Legal Principles

58 On a motion to strike for not disclosing a reasonable cause of action under R. 9-5(1)(a), the applicable test is whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17. However, where the facts pleaded are based purely on assumptions or wild speculations or are incapable of proof, they may be subject to scrutiny by the court, albeit with great caution: *Young v. Borzoni et al*, 2007 BCCA 16 at paras. 25-31; *McDaniel v. McDaniel*, 2009 BCCA 53 at para. 22.

59 The purpose of R. 9-5(1)(a) is to ensure the parties and the court have a clear understanding of the nature of the claims advanced. A party pleading a particular claim must plead assertions of fact which would establish the essential elements of a successful claim if proven. Prolix, convoluted, and incomprehensible pleadings do not lend themselves to permit the parties to have a clear understanding of the claims advanced: *Gill v. Canada*, 2013 BCSC 1703 at para. 7.

60 The Court is not required to assume as true wide-sweeping, inflammatory allegations of criminal conduct against the defendants. The court is entitled to subject them to "skeptical analysis" and not to assume they are true: *Stephen v. HMTQ*, 2008 BCSC 1656 at para. 60.

61 The case of *Ontario Consumers Home Services Inc. v. Enercare Inc.*, 2014 ONSC 4154 at paras. 24-29 [*Ontario Consumers*] provides a helpful summary of the applicable principles when a pleading of conspiracy is made. Such a pleading requires the facts to be stated with a heightened precision and clarity, being that conspiracy is an intentional tort and a serious allegation. It is insufficient to lump all of the defendants together into a general allegation of conspiracy, and bald or speculative conclusions are not sufficient to support a claim and must be struck.

62 In *Willow v. Chong*, 2013 BCSC 1083 at para. 20, Justice Fisher, as she then was, summarized the test for striking a pleading under R. 9-5(1)(b):

> Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (S.C.); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

63 In *Re Lang Michener and Fabian* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J.) at 691, the court outlined the following non-exhaustive list of principles to consider when determining whether an action is vexatious, which has been repeatedly endorsed by the B.C. Courts (see for example: *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at para. 97, aff'd 2016 BCCA 52 [*Simon*]):

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals form judicial decisions can be considered vexatious conduct of legal proceedings.

64 Under R. 9-5(1)(c), a pleading is "embarrassing" where it is so irrelevant that it will involve the parties in useless expense or where the pleadings are so confusing that it is difficult to understand what is being pleaded: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (S.C.) at para. 47. A pleading is prejudicial where it fails to identify the cause of action, contains irrelevant material, or is intended to confuse: *Camp Development Corporation v. Greater Vancouver (Transportation Authority)*, 2009 BCSC 819 at para. 27, aff'd 2010 BCCA 284.

65 The doctrine of abuse of process allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality, and integrity of the administration of justice: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37. When determining whether the proceedings constitute an abuse of process, the court may consider whether its process is being used dishonestly or unfairly, or for some ulterior or improper purpose, and whether there have been multiple or successive related proceedings that are likely to cause vexation or oppression: *Young* at paras. 65-66. Bringing a serious of successive related proceedings is an abuse of the court's process, even where the plaintiff sincerely believes that earlier decisions were wrong and that he has not been treated fairly: *Budgell v. Oppal*, 2007 BCSC 991 at para. 28, aff'd 2008 BCCA 349.

Positions of the Parties

Rule 9-5(1)(a): Do the pleadings fail to disclose a reasonable claim against the applicant defendants?

Position of the applicant defendants

66 The applicant defendants generally argue that the pleadings disclose no reasonable claim against them and that the allegations of fraud and conspiracy are based on assumptions and unprovable speculation without foundation. They also argue that Mr. Grosz has failed to plead facts that demonstrate he has suffered damages as a result of the allegations. I will outline the arguments made by each defendant about the specific issues with the allegations made against them.

67 Royal Trust and the Realtor defendants submit that the notice of civil claim fails to plead facts that, if true, would give rise to a claim of conspiracy against them, whether under predominant purpose conspiracy or unlawful means conspiracy. They cite *Cement LaFarge v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452 for the elements of each branch of the tort. In that case, Etsey J. defined the two branches of the tort of conspiracy at 471-72:

> ... the law of torts does recognize a claim against [individual defendants who have caused injury to the plaintiff] in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff.

68 Royal Trust and the Realtor defendants rely on *Can-Dive Services Ltd. v. Pacific Coast Energy Corp*. (1993), 96 B.C.L.R. (2d) 156 (C.A.), to argue that a sustainable claim for the tort of conspiracy must plead fully particularized allegations against each of the defendants who participated in the alleged conspiracy. They say that the allegations in the notice of civil claim fall well short of that requirement.

69 The Realtor defendants also argue that the notice of civil claim does not plead facts which, if true, could establish the elements required to prove a claim of misrepresentation. They cite *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110 for the following elements of a negligent misrepresentation claim: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making the representations; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

70 In particular, they say that Mr. Grosz has not alleged a relationship of special proximity between himself and the realtors which would found a duty of care, or pleaded facts which could establish such a relationship. Furthermore, even if the first four elements are met (which they deny), it is clear on the face of the pleadings that Mr. Grosz has not suffered any detriment from relying on the misrepresentations. He never removed the subject conditions, paid a deposit, or completed the Contract, meaning that he would have been in the same position whether he had heard the alleged misrepresentations or not.

71 The Realtor defendants make a similar argument with respect to the allegations of fraud against them. They cite *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21, for the elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss. As with the misrepresentation claim, the Realtor defendants argue that even if the first three elements were met (which they deny), Mr. Grosz has not pleaded any facts which would indicate that he suffered any loss in reliance on the alleged fraudulent statements, for the same reasons as stated above with respect to the misrepresentation claim.

72 Finally, with respect to the claims of breach of contract against the Realtor defendants, they submit that the claims are unfounded as Mr. Grosz does not plead that any of the realtors are parties to the Contract. The copy of the Contract attached as an exhibit to the notice of civil claim in the First Action clearly indicates that the realtors are not parties to the Contract.

73 The Strata defendant argues that the pleadings do not set out the essential elements of a claim in negligence, which include: (1) the Strata defendant owed Mr. Grosz a duty of care; (2) the Strata defendant's behaviour breached the standard of care; (3) Mr. Grosz sustained damage; and (4) the damage was caused by the Strata defendant's breach of the standard of care: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3. The Strata defendant points to the fact that Mr. Grosz does not set out the duty of care the Strata defendant owes him in relation to obtaining building permits to perform the remediation work on the Property, nor does he plead any facts or law that would establish a novel duty of care based on the elements set out in *Cooper v. Hobart*, 2001 SCC 79 at para. 30.

74 The Strata defendant further submits that the pleadings do not disclose any facts or law to support a breach of the standard of care, and that it was entitled to rely on the advice of the professionals performing the remediation work: *Hirji v. The Owners Strata Corporation Plan VR 44*, 2015 BCSC 2043 at para. 146. Finally, Mr. Grosz has not pleaded any facts relating to how the Strata defendant's alleged negligence caused his alleged loss; in other words, he suffered no damages. If Mr. Grosz was no longer able to afford to purchase property of equivalent value when the Contract failed to complete, such a consequence was not reasonably foreseeable.

75 The Surrey defendant also submits that Mr. Grosz's pleadings suffer a fatal defect in that they do not plead any facts relating to how the conduct of the City of Surrey caused his alleged loss, even if the allegations against it were taken to be true. By July 14, 2014, Mr. Grosz had already started the First Action and, by this date, it was clear that the sale would not have proceeded regardless of the information provided by the City of Surrey. The Surrey defendant further submits that several of the causes of action pleaded against it are either unclear or not known to law, including "tortious interference in a contract", "dispensing false information", and "concealing on 13/Aug/2019 the foregoing acts and omissions".

76 The Surrey defendant argues that if, by "tortious interference in a contract", Mr. Grosz was referring to the tort of interference with contractual relations or inducing breach of contract, he has not pleaded any material facts to support such a claim aside from the fact that a valid contract existed. If, by "dispensing with false information", Mr. Grosz was referring to negligent misrepresentation, he has not pleaded full particulars, including the existence of a "special relationship" between Surrey and himself.

77 With respect to the claims against it for "negligence, misfeasance and nonfeasance by failing to enforce its Surrey Building Bylaw, 2012, No. 17850", the Surrey defendant submits that it does not owe a duty of care to Mr. Grosz regarding the enforcement of a discretionary bylaw: *Westcoast Landfill Diversion Corp. v. CVRD*, 2009 BCSC 53 at para. 361. Municipalities owe a duty of good faith decision-making to the public as a whole and a duty to take reasonable care in the implementation of a regulatory scheme to those in sufficient proximity to merit that duty: *Froese v. Hik* (1993), 78 B.C.L.R. (2d) 389 (S.C.). The pleadings do not allege that any decision regarding the enforcement of its bylaw was due to bad faith, and as Mr. Grosz was neither an owner nor a neighbour and was in no way affected by the City of Surrey's alleged non-enforcement of its bylaws, there is no proximity to warrant a duty of care.

78 Finally, the Surrey defendant submits that it is unclear what cause of action Mr. Grosz alleges with respect to the allegation of concealing acts and omissions on August 13, 2019 and, in any event, no facts are pleaded in support of it.

79 The Boughton defendants argue that on their face, the allegations against them disclose no cause of action known to law. They argue that counsel owes no duty to an adverse party and, as such, allegations that counsel for the opposing party has misled or intentionally deceived the court resulting in decisions or rulings unfavourable to him do not found actionable breaches of a private duty owed to him: *Pearlman v. Critchley*, 2012 BCSC 1830 at para. 44; *Singh v. Nielsen*, 2016 BCSC 2420 at para. 20.

80 Furthermore, the Boughton defendants argue that any communications made by them in the course of or incidental to the First Action on behalf of their clients are protected by absolute privilege, which extends to statements made in documents used in the proceedings and statements contained in affidavits: *Hamouth v. Edwards & Angell*, 2005 BCCA 172 at paras. 2-3, 21-22, 29-40; *Lawrence v. Sandilands*, 2003 BCSC 211 at paras. 90-93; and *0976820 B.C. Ltd. v. Leung*, 2018 BCSC 1725 at para. 33.

Position of the plaintiff

81 Mr. Grosz concedes that the notice of civil claim, as it currently stands, is insufficient. However, he submits that the proper way to resolve this is to allow him to amend it. He did not submit a draft amended pleading for my review, but he explained his position to me in his oral submissions. He says that he will particularize the claims to provide that:

a) the Contract was not terminated, but was breached by Royal Trust for failing to provide documents;

b) the Boughton defendants and Royal Trust have conspired since before Matryx offered to purchase the Property to fraudulently sell the Property, and that fraud was completed against Ms. Jones' mortgagees when she purchased the Property;

c) the Boughton defendants conspired with Ms. Jones to make an unlawful charge of criminal harassment against him in an attempt to have him incarcerated so that he will not be able to prosecute the First and Second Actions;

d) but for the Surrey defendant's threats of condemning the Property, Matryx would have removed the subject conditions and purchased the Property;

e) the Surrey defendant has provided no reasonable explanation for its failure to enforce the requirements for a building permit;

f) the reference to the Surrey defendant having concealed acts and omissions relates to the City of Surrey's solicitor sending Mr. Grosz a letter in which it declined to tell Mr. Grosz what defences the City of Surrey might raise if the action was filed against it;

g) Mr. and Ms. Elliott are liable as agents for Royal Trust, but in any event, his primary claim against them is a breach of the B.C. *Realtor's Code of Ethics* rather than a breach of the Contract; and

h) the Strata defendant's bylaws required it to obtain a building permit, which it breached in unreasonably failing to ensure one was obtained by those it hired to perform the work.

82 Mr. Grosz says that he will also amend the notice of civil claim to remove some of the claims as he is no longer seeking to be involved in the administration of Ms. Bird's Estate and is not seeking injunctions or a reduction of the sale price of the Property.

83 Mr. Grosz explained that he always planned to make amendments and that he would have done so earlier, but he was prevented from bringing any applications. It is unclear where this understanding arises from, as there were no orders made in the Second Action, except that the hearing of the applicant defendants' applications would be set for December 3 and 4, 2019.

84 Mr. Grosz submits that all of his claims can be substantiated, but there are limits to what he can currently provide as he has not yet had a chance to conduct discovery. He also submits that he has had more pressing matters to deal with since he was alerted to the Dismissal Application, which involve actions he has brought against other unrelated individuals and corporations.

Submissions on damages

85 At the hearing of these applications, Mr. Grosz had difficulty explaining what loss or damage he sustained as a result of the actions of the applicant defendants. At Mr. Grosz's request, I granted him leave to prepare a written submission on this issue and to respond to two cases that were handed up by the applicant defendants during their reply submissions. The applicant defendants were also granted leave to reply to his submissions. I will address Mr. Grosz's argument with respect to the cases later in these reasons when I consider the appropriate remedy.

86 On December 9, 2019, Mr. Grosz submitted a document entitled "Written Submissions of Plaintiff on Damages before Suit", which consists of 15 pages of written submissions with 44 paragraphs and 32 exhibits, totaling 494 pages (the "Damages Submissions"). The essence of Mr. Grosz's submissions with respect to his damages are:

a) He was unable to remove the subject conditions on July 14, 2014, because of Royal Trust's failure to resolve the lack of building permit. Since the Contract was not completed, Mr. Grosz and his partner lost the opportunity to purchase a home, which they can no longer afford to do.

b) Mr. Grosz could not simply "walk away" from the Contract when he discovered the "unrecorded encumbrance" because he had already commenced the First Action and he could not dismiss it without suffering costs.

c) The time he spent on due diligence and communicating with various parties with respect to his execution and performance of the Contract was time that he could have spent working as a paralegal and earning income.

87 In an approach I greatly appreciated, the applicant defendants prepared one joint reply submission to the Damages Submissions. Their position is:

a) Mr. Grosz clearly discovered the alleged misrepresentations and fraud with respect to the death of Ms. Bird before the Contract completed, and therefore suffered no damages or loss as a result of the "unrecorded encumbrance" or the "stigmatized property".

b) The exhibits attached to Mr. Grosz's submissions are not admissible for the purpose of the applications as they have not been attached to a properly sworn affidavit, and any evidence sought to be admitted in these applications was required to be included in Mr. Grosz's application response materials, which were never filed or served: R. 8-1(9). In any event, evidence is not admissible for the purposes of assessing whether there is a reasonable claim under R. 9-5(1)(a): R. 9-5(2).

c) If the Court deems the exhibits admissible, the evidence shows that Mr. Grosz was aware that he had no provable damages at the time he commenced the First Action and intended to use the litigation for strategic purposes. The fact that Mr. Grosz commenced the First Action before the period of time specified in the Contract for fulfilling the subject conditions elapsed, along with evidence contained in text message conversations between Mr. Grosz and his partner exhibited to his Damages Submissions, support the fact that he brought the First Action to leverage the circumstances of Ms. Bird's death in order to obtain the Property for less than the negotiated price in the Contract and/or turn a profit. The text messages also indicate that even if Mr. Grosz wanted to complete the Contract, he could not obtain the necessary financing to complete the purchase.

d) For reasons solely attributable to Mr. Grosz, the subject conditions, which were for his sole benefit, were never removed and the Contract never completed. The loss of opportunity to purchase a property does not flow from the termination of the Contract or any alleged misconduct by the applicant defendants as Mr. Grosz could have chosen to purchase a different property.

e) Mr. Grosz's loss of income claims are merely speculative as he has provided no evidence establishing a reasonable probability that he would have secured a full-time paralegal position at the material times, or any evidence about his previous work history or employability, aside from asserting that he was "qualified".

f) Even if Mr. Grosz's framing of damages can be proven, no such formulation of damages is set out in his pleadings, even if given the most generous interpretation.

88 I agree with the applicant defendants' submission that no evidence is admissible for the purpose of determining whether the pleadings disclose a reasonable claim and, therefore, I will not consider the exhibits submitted with the Damages Submissions. My decision as to whether or not the pleadings disclose a reasonable claim must be based on the pleadings alone as they currently stand. To the extent that the Damages Submissions contain information not pleaded in his notice of civil claim, I will consider it only with respect to the question of whether, to the extent I accept that the pleadings disclose no reasonable claim, the remedy should be to strike the pleadings or to allow Mr. Grosz to amend them.

Rule 9-5(1)(b), (c) and (d): are the pleadings frivolous, vexatious, embarrassing, or an abuse of process?

Position of the applicant defendants

89 Related to the above submissions arguing that the pleadings disclose no reasonable cause of action, the applicant defendants argue that Mr. Grosz's claims are vexatious because they do not establish the causes of action pleaded, they do not advance any claim known in law, and it is obvious that the action cannot succeed.

90 They argue that the fact that multiple proceedings have been brought regarding the same conduct and that Mr. Grosz has brought claims with no real prospect of success, including making allegations against his adversaries' counsel, demonstrate that the Second Action is an abuse of process.

91 The applicant defendants also submit that, in the circumstances, a reasonable inference to draw is that Mr. Grosz's purpose in commencing the Second Action when he did was:

a) to avoid the application to have the First Action struck for want of prosecution by commencing a duplicative Second Action;

b) to disqualify the adverse party's counsel in the First Action from pursuing the Dismissal Application; and

c) to avoid having to bring an application to add new defendants in the First Action, which would have faced issues due to the limitation and notice periods.

92 The applicant defendants submit that these are improper purposes, and that the pleadings should therefore be struck as vexatious and an abuse of process. To the extent that new allegations are made in the Second Action, the proper means to address that would have been to bring an application to add parties and amend the pleadings in the First Action.

93 The Realtor defendants also rely on s. 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which provides:

> In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

Position of the plaintiff

94 Mr. Grosz submits that he was not intending to abuse the court's process by bringing a new action because, in his view, the limitation period has not expired. This means that he could file a new claim, and then seek to have them consolidated, which he has sought to do. Mr. Grosz also claims that in starting the Second Action, he was not attempting to circumvent the August 28, 2019 order that no applications were to be made in the First Action before September 24, 2019.

95 Mr. Grosz submits that starting the Second Action was advantageous to all of the parties, including the applicant defendants, because it would allow them to obtain an earlier trial date in September 2020 and have the matter resolved sooner.

96 He submits that the Second Action should be allowed to proceed with an order that he be permitted to amend the pleadings because there has been no finding on the merits of the First Action, seeing it was dismissed for want of prosecution. He says that, if given an opportunity to redraft his pleadings, it will contain three to four times the content in order to properly address all of the facts and the elements of the causes of action.

Analysis

97 As Justice Voith recognized in *Sahyoun v. Ho*, 2015 BCSC 392 at paras. 61-64, while R. 9-5(1)(a) to (d) address different concerns, there is also significant overlap among them. In the case of pleadings that are overwhelmed with difficulty, the various provisions of R. 9-5(1) may apply together: *Simon v. Canada (Attorney General)*, 2017 BCSC 1438 at para. 53.

98 I am satisfied that it is plain and obvious that the claims against the applicant defendants offend R. 9-5(1)(a), (b), (c), and (d). It is particularly clear that the Second Action is vexatious and an abuse of process.

99 I accept that Mr. Grosz commenced the Second Action for the purposes of:

a) disqualifying the Boughton defendants from acting for Royal Trust in the First Action; and

b) circumventing my order of August 28, 2019 that no applications were to be made prior to September 24, 2019.

100 I agree with the applicant defendants' submissions that these are improper purposes that support a finding that the pleadings are vexatious and an abuse of the court's process. Mr. Grosz's assertions that he was not attempting to circumvent my order are unbelievable and he has not provided any credible rationale to support this claim.

101 My finding that the Second Action was commenced for an improper purpose is supported by the fact that Mr. Grosz brought an application to disqualify the Boughton lawyers as counsel at the hearing of the Dismissal Application. The fact that Mr. Grosz has commenced multiple actions dealing with the same underlying conduct, and even expressly re-pleads the notice of civil claim from the First Action in the Second Action, further supports that the action is vexatious.

102 I do not think it is necessary to go into detail about the deficiencies in the claims as they relate to each of the applicant defendants as I accept that the pleadings offend R. 9-5(1)(a) on the basis that, as a whole, they are prolix, convoluted, at times contradictory, and lacking in material facts and law. Rather than pleading material facts, the notice of civil claim is written as a lengthy narrative and contain many extracts from letters, emails, contracts, reports, and other evidence, which are not properly included in a notice of civil claim: R. 3-7(1).

103 I further accept the applicant defendants' argument that, despite the need to be cautious in looking behind the facts as pleaded for the purpose of assessing whether or not the pleadings disclose a reasonable claim, this is one of those cases in which it is necessary to subject the allegations to a sceptical analysis. Throughout his pleadings and his submissions before me, Mr. Grosz has advanced wildly speculative theories against the applicant defendants which are clearly embarrassing, scandalous, and vexatious, a sample of which include:

a) that the death of Ms. Bird was caused by foul play;

b) questioning why her name is "Bird", and how her Estate was accumulated;

c) that the Realtor, Royal Trust, and Boughton defendants conspired to create a fraudulent will for Ms. Bird;

d) that Ms. Jones bribed the Surrey defendant to gain an illegal exemption from the building permit requirement; and

e) that counsel have conspired to make false claims of criminal harassment against him in order to have him incarcerated so that he is unable to prosecute this action.

104 The fact that the notice of civil claim makes highly inflammatory allegations of fraud, conspiracy, and criminal conduct against the applicant defendants globally, several of whom Mr. Grosz has never met or even communicated with, which are not sufficiently particularized and are based on pure speculation, is also relevant to my finding that this action is vexatious and an abuse of process.

105 I am persuaded that Mr. Grosz is using the court process in an abusive manner. He continues to use the threat of a lawsuit as a means to achieve his personal goals, including to attempt to extract settlements from the applicant defendants in circumstances where it is obvious that the action cannot succeed and no reasonable person could expect a court to grant relief.

106 I am concerned by the use of judicial resources to fuel Mr. Grosz's speculative theories at an inordinate cost to the applicant defendants and to the detriment of other litigants awaiting hearings. To allow the Second Action to continue would be to allow the court's process to be misused and to allow an oppressive and vexatious action to continue against the applicant defendants.

Remedy

107 As I have found that the pleadings offend R. 9-5(1), I must now decide whether to allow Mr. Grosz an opportunity to amend the pleadings or to strike them. I find that the appropriate remedy in this case is to strike the pleadings and to dismiss the action against each of the applicant defendants.

108 Earlier in these reasons, I alluded to the fact that Mr. Grosz was granted leave to make written submissions on two cases raised by the applicant defendants in their reply submissions. Those case were *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2019 BCSC 1138 [*H.M.B. Holdings*] and *Beauchesne v. W.J. Selmaschuk and Associates Ltd.*, 2015 BCSC 921. Mr. Grosz also made written submissions on a third case that he did not receive leave to respond to, *Simon*, cited above. He says he was handed *Simon* just before the hearing of these applications on December 3 and was, therefore, not given proper notice of it. In fact, *Simon* was cited in the notices of application of each of the applicant defendants. Mr. Grosz had ample notice that the applicant defendants were relying on this case and I will, therefore, not address his submissions with respect to it.

109 The Realtor defendants rely on *H.M.B. Holdings* for authority that where there are fundamental deficiencies in the pleading, particularly in relation to damages that were not particularized or could not be claimed, the pleadings should be struck rather than allowing an amendment: paras. 4, 57-65, 72. Mr. Grosz submits that counsel has attempted to deceive the Court as to the holding in that case and that it should be distinguished because he has not filed a proposed amended notice of civil claim, as the plaintiffs in that case had done. He also submits that because counsel handed him the case at the hearing, he did not receive proper notice and that counsel should be sanctioned for improperly serving him with it.

110 *Beauchesne* was relied upon by the Surrey defendant to respond to Mr. Grosz's argument that he will be able to better particularize his claims once examinations for discovery are completed. In that case, the court rejected a similar argument and cited *Imperial Tobacco* for the proposition that it is incumbent upon the plaintiff to clearly plead the facts upon which it relies in making its claim, and a claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses: para. 21. Mr. Grosz submits that it can be distinguished on its facts.

111 Both *H.M.B. Holdings* and *Beauchesne* were raised by the applicant defendants in their reply submissions to arguments that Mr. Grosz raised in the hearing. The applicant defendants did not have any notice of Mr. Grosz's arguments because he did not file any application responses. It is unreasonable for Mr. Grosz to say that these cases cannot be relied upon because he did not have ample notice of them when the reason for this is that he failed to reply to the applications, giving the applicant defendants no advance notice of the arguments he would raise.

112 Furthermore, I have reviewed both decisions and the applicant defendants' submissions were in no way misleading as to the points of law for which they were cited. Mr. Grosz's claims that counsel was attempting to deceive the court is a further example of an unsubstantiated and inflammatory statement regarding the conduct of professionals with whom he deals.

113 Mr. Grosz seeks the opportunity to amend his pleading in order to plead the material facts to supports his claims for conspiracy and fraud. There is a heavy burden on a plaintiff to plead the material facts when pleading a conspiracy, which is an intentional tort: *Ontario Consumers* at para. 25.

114 In the pleadings:

a. Mr. Grosz has failed to list any material facts that would support a claim of fraud or conspiracy against the applicant defendants;

b. Mr. Grosz has made a bald statement that the Boughton defendants and Royal Trust employees conspired without providing any particulars of the overt acts done by each of the alleged conspirators in furtherance of the conspiracy;

c. there are no particulars of the time, place or mode of agreement amongst the alleged co-conspirators; and

d. there are no material facts pleaded that the alleged conspiracy caused him to suffer any damages.

115 I do not accept Mr. Grosz's submission that he should be permitted to conduct examinations for discovery. The onus is on a plaintiff to clearly plead the facts upon which he relies, and he cannot rely on the possibility that new facts will turn up.

116 I am not convinced that allowing Mr. Grosz the opportunity to amend his pleadings will cure the defects, nor would it be fair to do so in the circumstances. He has always had the ability to make amendments to his pleadings, but has chosen not to do so despite claiming to have discovered the last of the allegations in July and August of 2019, before the Second Action was commenced. Furthermore, his proposed solution to cure the defects is to include three to four times the volume of material in his pleadings. This would likely make the pleadings even more prolix and convoluted rather than assisting the applicant defendants in understanding the claims against them.

117 I also find that amending the pleadings will not assist Mr. Grosz with respect to the question of damages. The Contract is clear that the purchase of the Property was on an "as is" basis with no representations or warranties made with respect to its condition. The subject conditions were included solely for Mr. Grosz's benefit to allow him to walk away from the deal if he found the Property to be unsatisfactory. That is precisely what happened in this case, and, as I held in my November 21, 2019 Reasons at para. 139, the fact that Mr. Grosz did not purchase another property is not the fault of the applicant defendants.

118 It is also not the fault of the applicant defendants that Mr. Grosz chose to commence the First Action when he did. The costs he would have suffered from choosing to walk away from it in July of 2014 would have been far less than they are at this point in time.

119 Finally, I agree with the applicant defendants' submissions that Mr. Grosz's loss of income claims are speculative as he was unemployed at the time of the alleged misconduct and he has provided no basis on which to establish a "real and substantial possibility" that he would have secured employment: *Mickelson v. Borden Ladner Gervais LLP*, 2018 BCSC 348 at paras. 196-197.

120 These circumstances, combined with the fact that I have found these proceedings to be vexatious and an abuse of process, lead to the conclusion that the appropriate remedy in this case is to strike the pleadings and dismiss the action as against each of the applicant defendants.

Conclusion

121 I conclude that Mr. Grosz's claims against the Royal Trust defendants, the Boughton defendants, and the Strata defendant be struck, pursuant to R. 9-6 as time barred under the *Limitation Act*.

122 I also conclude that the pleadings offend R. 9-5(1)(a), (b), (c), and (d) as disclosing no reasonable claim and being vexatious, embarrassing, and an abuse of process. As such, the pleadings are struck and the proceeding dismissed against all of the applicant defendants.

Costs

123 Mr. Grosz submits that each party should bear its own costs, relying on the decision of *Dhillon v. Sher-A-Punjab Community Centre Corporation*, 2018 BCSC 571. However, in that case, the court held that the test for striking the pleadings under R. 9-5 had not been met and the defendants' application was dismissed. In this case, by contrast, all of the applicant defendants have been successful and the pleadings have been struck.

124 Accordingly, the applicant defendants are each entitled to their costs of the proceedings on Scale B. The issue that remains is whether special costs should be awarded.

125 Although the Strata and Realtor defendants sought special costs in their notice of application, I am of the view that I did not have the opportunity to hear full submissions from the applicant defendants on a claim for special costs, nor did Mr. Grosz have an opportunity to fully reply. If the applicant defendants wish to seek special costs, leave is granted for written submissions only. The following timelines are ordered:

a) The applicant defendants who seek special costs must serve and deliver to the registry written submissions, of no more than five pages each, on or before 4 p.m. on February 21, 2020. The applicant defendants may file joint submissions so long as the maximum length of the submissions does not exceed 25 pages.

b) Mr. Grosz must serve and deliver to the registry written submissions, of no more than 25 pages, on or before 4 p.m. on March 16, 2020.

c) The applicant defendants must serve and deliver to the registry any reply submissions, of no more than three pages each or 15 pages jointly, on or before 4 p.m. on March 30, 2020.

126 The written submission of the parties must not include any tabs, appendices, schedules, or exhibits. If a party wishes to rely on any type of affidavit evidence, leave must first be requested from me. The written submissions may be supplemented by a brief of authorities, but only with cases referred to in the written submissions.

127 Mr. Grosz's signature on the form of order is dispensed with.

C.L. FORTH J.

End of Document

Homalco Indian Band v. British Columbia, [1998] B.C.J. No. 2703

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

K. Smith J.

Heard: October 26-28, 1998.

Judgment: filed November 13, 1998.

Vancouver Registry No. C944747

[1998] B.C.J. No. 2703 | 25 C.P.C. (4th) 107 | 83 A.C.W.S. (3d) 751 | 1998 CanLII 6658

Between Richard Harry, Susan Blaney, Mavis Coupal, Brian Leo and Darren Blaney on their own behalf, and on behalf of all members of the Homalco Indian Band, and the Homalco Indian Band, plaintiffs, and Her Majesty the Queen in Right of the Province of British Columbia and The Attorney General of Canada, defendants

(8 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, prolix pleading — Grounds, unnecessary, irrelevant, immaterial or redundant — Grounds, prejudice, embarrass or delay fair trial.

This was an application by the defendants for orders striking out portions of the amended statement of claim, or for further and better particulars.
HELD: The defendants' application was allowed and the statement of claim was set aside, with leave to the plaintiffs to substitute a statement of claim prepared properly.

Further proceedings were stayed pending the filing and delivery of a fresh statement of claim. The statement of claim was prolix and convoluted, and violated several of the rules of pleading set out in the Rules and the case law. The material facts of some of the causes of action were separated in the pleading, and could be found only by careful study and meticulous attention to many internal cross-references. Particulars were sometimes mixed with material facts. It was not enough that the facts could be found in the statement of claim upon tortuous analysis of the document. It had to plead the causes of action in the traditional way so that the defendant could know the case it had to meet, and so that clear issues of fact and law were presented to the court. The statement of claim was an embarrassing pleading. It was prejudicial in that it would be difficult, if not impossible, to answer. Any attempt to reform it by striking out portions and amending other portions was likely to result in more confusion as to the real issues.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rules 19(1), 19(5), 19(9.1), 19(11), 19(24)(a), 19(24)(b), 19(24)(c), 19(24)(d).

Counsel

H.C.R. Clark, Q.C. and D.L. Kydd, for the plaintiffs. V.K. Orchard and R. Wright, for the defendant, Her Majesty the Queen in Right of the Province of British Columbia. R. Kyle and D. Prosser, for the Attorney General of Canada.

K. SMITH J.

1 The defendants seek orders pursuant to Rule 19(24) of the Rules of Court striking out portions of the amended statement of claim and staying proceedings until other parts are amended. Their alternative application for orders pursuant to Rule 19(16) for further and better particulars was adjourned by agreement of counsel.

2 Rule 19(24) provides as follows:

> (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

3 The amended statement of claim was filed and delivered, by agreement of counsel, in substitution for the original statement of claim and reply. The plaintiffs' claims were not stated clearly and were contained, in part, in the statement of claim and, in part, in the reply. The reason for the agreement was to permit the plaintiffs to collect their claims and to assert them clearly in a statement of claim. For ease of reference, I will hereafter refer to the amended statement of claim as the statement of claim.

4 The statement of claim is prolix and convoluted and violates several of the rules of pleading set out in Rule 19 of the Rules of Court and in the case law. Rule 19(1) requires the pleader to state in summary form, as briefly as the nature of the case will permit, the material facts upon which the party relies. It also prohibits the pleading of evidence by which the material facts are to be proven. Rule 19(5) provides that each allegation shall be contained in a separate paragraph. Rule 19(9.1) states that conclusions of law may be pled only if the material facts supporting them are pled. Rule 19(11) requires full particulars to be stated of allegations of misrepresentation, fraud, breach of trust, wilful default and undue influence. All of these rules are transgressed by this pleading.

5 The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: Troup v. McPherson (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

6 A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, Handbook of Common Law Pleading, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:

> Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.

If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the particulars should follow and should be identified as such: Gittings v. Caneco Audio-Publishers Inc. (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

7 Mr. Clark, who did not draw the statement of claim, said that the plaintiffs' claims are for breach of fiduciary duty against the Crown federal; for equitable fraud and undue influence against both the Crown federal and the Crown provincial; and for unjust enrichment, for intermeddling in a trust (trustee de son tort), for interference with riparian rights, and for trespass against the Crown provincial. While he admitted to some deficiencies that require amendment, essentially he defended the statement of claim on the basis that all of the necessary material facts and particulars of those causes of action can be found within it. Perhaps that is the case, but, if so, they are not collected in any conventional, organized way that would permit the defendants, or the trial judge for that matter, to easily grasp the nature and the constituent elements of the plaintiffs' claims.

8 If I followed Mr. Clark's submissions, it appears that the material facts of some of the causes of action are separated in the pleading and can be found only by careful study and by meticulous attention to the many internal cross-references. As well, in some instances allegations against one defendant are contained in the same paragraphs as allegations against the other defendant. Moreover, particulars are sometimes mixed with material facts and often serve as particulars of more than one material fact. Again, the nature and effect of these particulars must be discerned, if that is possible, by tortuous analysis of the document.

9 Nevertheless, Mr. Clark submitted, it is enough if the material facts can be found in the statement of claim and a plaintiff cannot be compelled to prepare it in the conventional form. I cannot agree. A statement of claim must plead the causes of action in the traditional way so that the defendant may know the case he has to meet to the end that clear issues of fact and law are presented for the court. The comments of Thesiger L.J. in Davy v. Garrett (1877), 7 Ch. D. 473 (C.A.) at 488 and 489 are apt here:

> I am disposed to agree with the contention that the mere stating material facts at too great length would not justify striking out a statement of claim. But when in addition to the lengthy statement of material facts we find long statements of immaterial facts, and of documents which are only material as evidence, a Defendant is seriously embarrassed in finding out what is the case he has to meet.
>
> ...
>
> Now, in any properly constituted system of pleading, if alternative cases are alleged, the facts ought not to be mixed up, leaving the Defendant to pick out the facts applicable to each case; but the facts ought to be distinctly stated, so as to shew on what facts each alternative of the relief sought is founded.

10 Mr. Clark, relying upon Keddie v. Dumas Hotels Ltd. (1985), 62 B.C.L.R. 145 (C.A.), further contended that the statement of claim cannot be described as "embarrassing" because it is not plain and obvious that the allegations are so irrelevant that to allow them to stand would involve useless expense and would prejudice the trial of the action. However, it is impossible to say whether many of the allegations are relevant or irrelevant to a cause of action, because one cannot identify the causes of action from the No. 2889, leading: see Continental Securities v. Fehr, [1993] B.C.J. No. 2889 (10 February 1993) Vancouver C914674 (B.C.S.C.) at para. 18.

11 In my view, the statement of claim is an embarrassing pleading. It contains much that appears to be unnecessary. As well, it is constructed in a manner calculated to confuse the defendants and to make it extremely difficult, if not impossible, to answer. As a result, it is prejudicial. Any attempt to reform it by striking out portions and by amending other portions is likely to result in more confusion as to the real issues. In the interests of all parties, it must be set aside with leave to the plaintiffs to substitute a statement of claim prepared in accordance with the principles set out in these reasons: see Gittings v. Caneco Audio-Publishers Inc., supra, at 352-53.

12 Further proceedings will be stayed pending the filing and delivery of a fresh statement of claim. The parties are at liberty, despite the stay, to take any interlocutory steps they may agree upon in the meantime without further order.

13 Although, in their notices of motion, the defendants each claimed costs in any event of the cause, no submissions were made on costs. Counsel may speak to costs if they wish. If not, the defendants will have their costs as claimed.

K. SMITH J.

End of Document

Khodeir v. Canada (Attorney General), [2022] F.C.J. No. 26

Federal Court Judgments

Federal Court
Ottawa, Ontario
S. Grammond J.
January 14, 2022.
Docket: T-1690-21

[2022] F.C.J. No. 26 | [2022] A.C.F. no 26 | 2022 FC 44

Between Lucien Khodeir, Applicant, and Attorney General of Canada, Respondent

(69 paras.)

Counsel

Lucien Khodeir: for the Applicant (on his own behalf).

Mariève Sirois-Vaillancourt, Ludovic Sirois, Benoît de Champlain: for the Respondent.

ORDER AND REASONS

S. GRAMMOND J.

1 Mr. Khodeir seeks judicial review of the federal government's requirement that all its employees be vaccinated against COVID-19. He asserts that this requirement is unreasonable, because he believes that the virus that causes the disease does not exist.

2 The Attorney General is asking me to strike Mr. Khodeir's application at the preliminary stage. He says that I should take judicial notice of the existence of SARS-CoV-2, the virus that causes COVID-19. As a consequence, Mr. Khodeir will be unable to prove the central premise of his application, which is thus bound to fail.

3 For the reasons that follow, I agree with the Attorney General. The existence of SARS- CoV-2 has become notorious. Courts have repeatedly taken judicial notice of it. Although Mr. Khodeir had the opportunity to file evidence and make submissions, he failed to offer any factual foundation for his belief in the inexistence of SARS-CoV-2. His application must therefore be struck.

I. Procedural Background

4 Mr. Khodeir brought an application for judicial review of the *Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police* [the Policy], made by the Treasury Board pursuant to sections 7 and 11.1 of the *Financial Administration Act*, RSC 1985, c F-11, and effective October 6, 2021. In a nutshell, the Policy requires all employees of the core public administration to be fully vaccinated against COVID-19 before October 29, 2021, unless there is a medical contraindication or a need for accommodation based on religion or another prohibited ground of discrimination.

5 Unlike other litigants who have challenged the validity of the Policy, Mr. Khodeir does not invoke his rights guaranteed by the *Canadian Charter of Rights and Freedoms*. Rather, he asserts that the policy is *ultra vires* the *Financial Administration Act*, because it is unreasonable in the administrative law sense of the term. In this regard, his amended application alleges the following:

> * The virus, named SARS-CoV-2, is the alleged cause of COVID-19;
>
> * SARS-CoV-2 was never proven to exist according to three experts: two sought by the Applicant and one sought by the Respondent who cited 18 times SARS-CoV-2 in an affidavit of November 14th, 2021, but never referenced a proof of its existence;
>
> * SARS-CoV-2 is the basis of all the COVID-19 vaccines;
>
> * The [Policy] is enforcing COVID-19 vaccinations;
>
> * It is unreasonable to mandate a vaccine to protect against a non-existent pathogen; [...].

6 The Attorney General responded to Mr. Khodeir's application by bringing a motion to strike, pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106. He asserts that Mr. Khodeir's application is bereft of any possibility of success, because the Court can take judicial notice of the existence of SARS-CoV-2. He also asserts that Mr. Khodeir has no standing to bring the application, because he is not an employee of the core public administration and cannot claim public interest standing in the circumstances.

7 Mr. Khodeir made submissions in response to the Attorney General's motion to strike. He also filed three affidavits in support of his response, and moved for leave to amend his notice of application. The Attorney General did not object to the amendment or to the filing of the affidavits. Accordingly, I will grant Mr. Khodeir leave to amend his notice of application. I have already quoted from the amended application. I will consider the affidavits later in these reasons.

II. The Test for a Motion to Strike

8 Rule 221(1)(a) provides that a statement of claim that "discloses no reasonable cause of action" may be struck. While this rule applies to actions, a similar principle has been extended to applications for judicial review. Thus, in *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 (CA) at 600 [*David Bull Laboratories*], the Federal Court of Appeal held that it could strike a notice of application for judicial review that is "so clearly improper as to be bereft of any possibility of success"; see also *Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 at paragraphs 47-48, [2014] 2 FCR 557 [*JP Morgan*]; *Wenham v Canada (Attorney General)*, 2018 FCA 199 at paragraphs 32-33.

9 By way of example, applications for judicial review have been struck where they are premature (*Dugré v Canada (Attorney General)*, 2021 FCA 8), where the Court lacks jurisdiction (*JP Morgan*), where the application obviously lacks legal foundation (*Canada (Attorney General) v Valero Energy Inc*, 2020 FCA 68 [*Valero*]) or where the facts alleged are purely speculative (*Assouline v Canada (Attorney General)*, 2021 FC 458).

10 A motion to strike is aimed at a defect in the pleadings. For this reason, it is sometimes called a "pleadings motion." According to rule 2, a pleading is "a document in a proceeding in which a claim is initiated, defined, defended or answered." In this case, the pleading is the notice of application. While it defines the claim, a pleading is not evidence. Evidence to support the claim is typically brought at a later stage of the proceedings. Thus, a motion to strike tests the validity of the claim in the abstract, before any evidence is considered.

11 For this reason, on a motion to strike, the general principle is that the allegations contained in the notice of application must be taken to be true: *JP Morgan*, at paragraph 52. On such a motion, the role of the Court is not to assess the potential evidence nor to predict whether the applicant will succeed in proving the allegations of the notice of application. This is reinforced by a prohibition on admitting evidence on certain categories of motions to strike: rule 221(2).

12 There are, however, exceptions to these principles.

13 First, where a pleading refers to supporting documents or evidence, they may be taken into consideration, as if incorporated in the pleading: *JP Morgan*, at paragraph 54.

14 Second, the rule that allegations must be taken to be true does not extend to facts "manifestly incapable of being proven:" *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paragraph 22, [2011] 3 SCR 45. In *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 455, the Supreme Court noted that

> The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true.

15 This will also be the case, as we will see below, where allegations are contrary to judicially noticed facts, because judicial notice is conclusive. Such allegations, therefore, are "manifestly incapable of being proven."

III. No Possibility of Success

16 I accept the Attorney General's invitation to take judicial notice of the existence of the SARS-CoV-2 virus, which causes COVID-19. To explain why, I must begin by outlining the contours of the concept of judicial notice. I then show that the existence of the SARS-CoV-2 virus is beyond reasonable debate and that Mr. Khodeir's submissions to the contrary are without merit.

A. *Judicial Notice*

(1) Definition and Purpose

17 Courts make decisions based on evidence brought in each particular case. Some facts, however, are so obvious that courts assume their existence and no evidence of them is required. This is called judicial notice: Jean-Claude Royer, *La preuve civile* (6th ed by Catherine Piché, Cowansville, Yvon Blais, 2020) at paragraphs 139-147 [Piché, *La preuve*]; Léo Ducharme, *Précis de la preuve* (6th ed, Montreal, Wilson & Lafleur, 2005) at paragraphs 74-92 [Ducharme, *Précis*]; Sidney N Lederman, Alan W Bryant and Michelle K Fuerst, *Sopinka, Lederman and Bryant: The Law of Evidence in Canada* (5th ed, Toronto, LexisNexis Canada, 2018) at paragraphs 19.16-19.63 [Sopinka, *Law of Evidence*]; David M Paciocco, Palma Paciocco and Lee Stuesser, *The Law of Evidence* (8th ed, Toronto, Irwin Law, 2020) at 573-583 [Paciocco and Stuesser, *Law of Evidence*].

18 The Supreme Court of Canada provided the following definition and test for judicial notice in *R v Find*, 2001 SCC 32 at paragraph 48, [2001] 1 SCR 863 [*Find*]:

> Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy [...].

19 While the above comments were made in the context of a criminal case, similar principles apply in Quebec civil law. Civil law principles are relevant in the present case because Mr. Khodeir's application was filed at the Montreal registry office, and this Court must apply the laws of evidence in force in the province where the application was filed: *Canada Evidence Act*, RSC 1985, c C-5, s 40. The following provisions of the *Civil Code of Québec* deal with judicial notice:

> **2806**. No proof is required of a matter of which judicial notice shall be taken.
>
> **2806**. Nul n'est tenu de prouver ce dont le tribunal est tenu de prendre connaissance d'office.

***

> **2808**. Judicial notice shall be taken of any fact that is so generally known that it cannot reasonably be questioned.
>
> **2808**. Le tribunal doit prendre connaissance d'office de tout fait dont la notoriété rend l'existence raisonnablement incontestable.

20 Judicial notice performs several functions: Danielle Pinard, "La notion traditionnelle de connaissance d'office des faits" (1997) 31 RJT 87 [Pinard, "La notion"]. It fosters efficiency, by ensuring that the bringing of evidence of obvious facts does not bog down the judicial process. It also promotes public confidence in the administration of justice. Courts would not be trusted if they required litigants to go to the expense of proving notorious facts or if they reached conclusions that are contrary to what is considered beyond reasonable dispute. The Supreme Court of Canada summarized this in *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at paragraph 57, [2004] 3 SCR 381:

> The purpose of judicial notice is not only to dispense with unnecessary proof but to avoid a situation where a court, on the evidence, reaches a factual conclusion which contradicts "readily accessible sources of indisputable accuracy", and which would therefore bring into question the accuracy of the court's own fact-finding processes. A finding on the evidence led by the parties, for example, that the Newfoundland deficit in 1988 was $5 million whereas anyone could ascertain from the public accounts that it was $120 million would create a serious anomaly.

(2) Scope

21 Thus, whether the matter is envisaged from the perspective of common law or civil law, judicial notice is taken of facts that are beyond reasonable dispute. A conclusion that a fact is beyond reasonable dispute may be based on a finding that the fact is notorious or on verifications in "sources of indisputable accuracy": *Find*, at paragraph 48.

22 The category of notorious facts includes everyday facts that anyone can personally ascertain. For example, judicial notice will be taken of the fact that when driving on St. Catherine Street in Montreal, one will cross Bleury, Jeanne-Mance and St. Urbain Streets in that order. If one is unaware of this, the consultation of a map will readily provide the answer; see, by way of analogy, *R v Krymowski*, 2005 SCC 7 at paragraph 22, [2005] 1 SCR 101.

23 Facts may be notorious even where the decision-maker cannot ascertain them personally. For example, in *R v Khawaja*, 2012 SCC 69 at paragraph 99, [2012] 3 SCR 555 [*Khawaja*], the Supreme Court of Canada took judicial notice of the war in Afghanistan, even though it is highly unlikely that its members, like most Canadians, travelled there to witness the hostilities. The existence of the war is nevertheless notorious because over the years, trusted sources of information have repeatedly mentioned it. Thus, reasonable persons would not doubt that there was a war in that distant country.

24 Based on the same logic, courts have taken judicial notice of facts of a technical or scientific nature. For example, in *Baie-Comeau (Ville de) c D'Astous*, [1992] RJQ 1483 at 1488 (CA) [*D'Astous*], the Quebec Court of Appeal noted that

> [TRANSLATION]
>
> ... radar, as an instrument of detection and measurement, is covered by the concept of judicial notice. Its use in air and marine navigation is as widespread as that of the compass. Moreover, all North Americans know from experience that it is also used to measure the speed of motor vehicles. We learned, in high school or in college, that the basic principle of radar is the emission, by a device, of beams of electromagnetic rays that, when they are reflected by an obstacle, return to the emitter. Any dictionary or encyclopedia provides the reader with scientific details. What then was a military secret at the beginning of the last world war has today become an indisputable fact.

25 Likewise, in *Telus Communications Inc v Vidéotron Ltée*, 2021 FC 1127 at paragraph 5 [*Telus*], I wrote, "Mobile phone technology requires the use of electromagnetic waves of various frequencies." The parties in that case did not bring any evidence regarding what electromagnetic waves are, how they were discovered or exactly how they can be received by a mobile phone. Nonetheless, the fact that mobile phones use electromagnetic waves is notorious among the general public.

26 Courts are nevertheless mindful that there is disagreement about some aspects of scientific knowledge. They are careful not to take judicial notice of matters on which science has not reached consensus or which are laden with value judgments: *R v Spence*, 2005 SCC 71 at paragraph 63, [2005] 3 SCR 458 [*Spence*]; *R v Mabior*, 2012 SCC 47 at paragraph 71, [2012] 2 SCR 584; *Quebec (Attorney General) v A*, 2013 SCC 5 at paragraphs 273-274, [2013] 1 SCR 61 [*Quebec v A*].

27 Courts have also calibrated the test for judicial notice "according to the nature of the issue under consideration": *Spence*, at paragraph 60; see also Paciocco and Stuesser, *Law of Evidence*, at 576-581. They insist on stricter compliance with the above-mentioned test when the fact to be judicially noticed is central to the case: *R v Malmo-Levine*, 2003 SCC 74 at paragraph 28, [2013] 3 SCR 571; *Quebec v A*, at paragraph 274. This is because "the need for reliability and trustworthiness increases directly with the centrality of the 'fact' to the disposition of the controversy": *Spence*, at paragraph 65.

(3) Process and Consequences

28 In many cases, judicial notice is an implicit process. For example, in the *Telus* case mentioned above, I did not explicitly state that I was taking judicial notice of the use of electromagnetic waves by mobile phones. The parties did not dispute the point and took it for granted.

29 In other situations, the propriety of taking judicial notice will be debated. One party will argue that a particular fact is not beyond reasonable dispute and that the test for judicial notice is not met. When this happens, both parties may provide submissions and information to help the judge decide whether it is appropriate to take judicial notice.

30 The effect of judicial notice has been the subject of academic debate. Some writers assert that judicial notice is a rebuttable presumption: Pinard, "La notion"; Piché, *La preuve*, at paragraph 146. According to that view, a party may attempt to prove a fact contrary to judicial notice. The weight of judicial opinion, however, is to the effect that judicial notice is conclusive: *D'Astous*, at 1487-1488; *R v Zundel* (1987), 35 DLR (4th) 338 at 391 (Ont CA), cited with approval in *Spence*, at paragraph 55; see also Paciocco and Stuesser, *Law of Evidence*, at 576; Ducharme, *Précis*, at paragraph 89; Sopinka, *Law of Evidence*, at paragraphs 19.57-19.60. Not only does judicial notice dispense with proof of a fact, it also forecloses an attempt to prove the contrary. As I mentioned above, allowing attempts to disprove what is beyond reasonable dispute would erode trust in the administration of justice.

31 Those who assert that judicial notice should only be a rebuttable presumption are typically concerned with the fairness of the process. Judicial notice could be a vehicle for imposing commonly held stereotypes, which may in fact be wrong. This concern, however, does not arise where the propriety of taking judicial notice is the subject of adversarial debate. In such a case, the parties have a chance to show that the fact in question is not sufficiently notorious or beyond reasonable dispute to warrant judicial notice.

32 Having established the principles governing judicial notice, I can now turn to their application to the existence of the SARS-CoV-2 virus.

B. *Application to This Case*

33 In my view, the existence of the SARS-CoV-2 virus is beyond reasonable dispute and is a matter of judicial notice. I reach this conclusion for three reasons, developed below: the existence of the virus is notorious; other courts have taken judicial notice of it; and Mr. Khodeir's assertions to the contrary do not withstand scrutiny.

34 I am mindful that taking judicial notice of the existence of the virus is dispositive of Mr. Khodeir's application. In these circumstances, the bar is high for the Court to take judicial notice. Nevertheless, the test is clearly met in this case.

35 I also wish to emphasize that the Attorney General is asking me to take judicial notice solely of a narrow and basic fact regarding the COVID-19 pandemic, namely, the existence of the virus causing the disease. Of course, knowledge about various aspects of COVID-19 continues to develop, and there is a lively debate about which public health measures are most appropriate to fight the pandemic. In this process, some facts beyond the mere existence of the virus may or may not be sufficiently indisputable or notorious to warrant judicial notice. I am not, however, called upon to set the outer boundaries of judicial notice in relation to the COVID- 19 pandemic.

(1) Notoriety

36 Over the last two years, most people on this planet have been affected in various ways by the COVID-19 pandemic. It has become common knowledge that COVID-19 is caused by a virus called SARS-CoV-2. Numerous trusted sources of information have repeated this fact, to the point that it is now beyond reasonable dispute. There is a lack of debate on this issue in scientific circles.

37 A fact, however, does not become indisputable by mere repetition. One must consider channels through which the information is conveyed, scrutinized and exposed to criticism, and the fact that these channels operate in a society based on freedom of discussion. This is particularly important in this case because, over the last two years, the COVID-19 pandemic and the public health measures deployed to fight it have been one of the most significant topics of public debate. Scientific knowledge about COVID-19 has developed under intense public scrutiny. The existence of the SARS-CoV-2 virus and the fact that it causes COVID-19 are at the root of the matter. As matters related to the pandemic have been debated so thoroughly, it is unimaginable that any actual scientific debate about these basic facts would have escaped public attention. Moreover, if there was any evidence incompatible with the existence of the virus, one would have expected Mr. Khodeir to provide it to the Court. As we will see later, he utterly failed in this regard.

38 Like the war in Afghanistan in *Khawaja*, the existence of the virus is notorious even though people cannot see the virus themselves, and have to rely on knowledge from trusted sources. The average person's lack of precise understanding of the functioning of viruses or methods for their isolation does not prevent the fact that the SARS-CoV-2 virus is the cause of COVID-19 from becoming notorious among the general public. Like the radar in *D'Astous* or the mobile phone in *Telus*, courts can take notice of the basic aspects of scientific or technical phenomena, even though most people do not understand the minute details.

39 As I find that the existence of SARS-CoV-2 and the fact that it causes COVID-19 are notorious, I need not decide whether they can also be ascertained by reference to sources of indisputable accuracy, nor attempt to set out what those sources would be.

(2) Precedent

40 On numerous occasions since the beginning of the pandemic, courts in this country have noted the link between the SARS-CoV-2 virus and COVID-19. In a number of cases, expert evidence was adduced. In others, courts took notice of various aspects of the pandemic. These statements made in previous cases may contribute to a finding that judicial notice is warranted: *R v Williams*, [1998] 1 SCR 1128 at paragraph 54.

41 In some cases, the virus is mentioned without debate. For example, in *Taylor v Newfoundland and Labrador*, 2020 NLSC 125 at paragraph 1, the court mentioned "the global impact of the SARS-CoV-2 virus, known more commonly by the infectious and potentially fatal disease it causes, COVID-19." Likewise, in *Spencer v Canada (Attorney General)*, 2021 FC 361 at paragraph 11, my colleague Justice William F. Pentney referred to "the SARS-CoV-2 virus - the virus that causes the potentially severe and life-threatening respiratory disease of COVID-19." See also *Gateway Bible Baptist Church v Manitoba*, 2021 MBQB 219 at paragraphs 53 and 61. In these cases, there does not appear to have been any controversy that SARS-CoV-2 causes COVID-19. It is true that the courts in these cases do not explicitly say whether they received evidence or are taking judicial notice, but the fact that they did not feel the need to make this explicit buttresses my finding that the existence of SARS-CoV-2 is a notorious fact.

42 In other cases, courts have explicitly taken judicial notice of facts related to the COVID- 19 pandemic, including the fact that COVID-19 is caused by the SARS-CoV-2 virus. Thus, in *R v Morgan*, 2020 ONCA 279 at paragraph 8, the Ontario Court of Appeal wrote:

> We do, however, believe that it falls within the accepted bounds of judicial notice for us to take into account the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission.

43 Courts across the country have reached similar conclusions. In *Manzon v Carruthers*, 2020 ONSC 6511 at paragraph 18, the Ontario Superior Court of Justice took "judicial notice of the fact that COVID-19 is caused by SARS-CoV-2, a communicable and highly contagious virus." In *TRB v KWPB*, 2021 ABQB 997 at paragraph 12, the Alberta Court of Queen's Bench noted that

> Since early 2020, Canadians have been living in the midst of a global pandemic caused by the SARS-CoV-2 virus. I take judicial notice of this fact which is so notorious and indisputable as to not require proof.

44 In *OMS v EJS*, 2021 SKQB 243 at paragraphs 112-114, the Saskatchewan Court of Queen's Bench did the same, although referring to the "COVID virus." See also *BTK v JNS*, 2020 NBQB 136 at paragraphs 19-22; *R v Pruden*, 2021 ABPC 266 at paragraph 54; *Halton Condominium Corp No 77 v Mitrovic*, 2021 ONSC 2071 at paragraph 17.

45 Thus, Canadian courts have taken judicial notice of the fact that COVID-19 is caused by the SARS-CoV-2 virus. While these cases are not, strictly speaking, binding on me, they are persuasive authority.

46 In reviewing these cases, I also noted that there does not appear to be a single instance where a party challenged the existence of the SARS-CoV-2 virus or its link to COVID-19. Mr. Khodeir has not brought any such case to my attention. In fact, he asserts that the denial of the existence of the virus distinguishes his application from all others. The absence of any such challenge only reinforces my finding that the existence of the virus is beyond reasonable dispute.

(3) Mr. Khodeir's Evidence

47 In response to the Attorney General's motion to strike, Mr. Khodeir brought evidence. While evidence is usually not admissible on a motion to strike, Mr. Khodeir explicitly referred to this evidence in his amended notice of application. Moreover, when arguing about whether it is proper to take judicial notice, parties are entitled to provide the Court with information or evidence showing that the fact in question is or is not beyond reasonable dispute. The Attorney General did not object to the admission of the evidence tendered by Mr. Khodeir. In fact, Mr. Khodeir stated that, in response to the motion to strike, he provided the Court with all the evidence and submissions he intended to file on the merits. I will therefore analyze this evidence to see if it affects my conclusion that the existence of the virus is beyond reasonable dispute.

48 Mr. Khodeir first provides an affidavit from Dr. Daniel Yoshio Nagase, an emergency physician. At Mr. Khodeir's request, Dr. Nagase studied two documents, excerpts of which are appended to the affidavit.

49 The first is an article by Drosten and others published on January 23, 2020, in Euro Surveillance, which appears to be a scientific journal. It proposes a diagnostic methodology for identifying the SARS-CoV-2 virus, using a technique known as the PCR test. The paper was published merely two weeks after Chinese authorities published the genome sequence of the virus in various public databases.

50 The second document appended to Dr. Nagase's affidavit purports to be a review report of the Drosten paper, dated November 2020. Its authors assert that there are major flaws in the Drosten paper and request the Euro

Surveillance journal to retract it. Only short excerpts of the report are provided, which describe only one alleged flaw: the fact that the Drosten paper is based on a computerized model of the virus, instead of the actual virus. The authors also note that ten months after the initial publication, Drosten and his colleagues have not validated their methodology using the actual virus. Dr. Nagase does not say whether the review report was accepted for publication anywhere, nor whether the Drosten paper was retracted as a result.

51 Dr. Nagase concludes his short summary of the two documents by the following sentence: "Perhaps, Drosten could not update the Protocol because SARS-CoV2 did not really exist in nature but in a computer file." I attach no value whatsoever to this statement. It does not follow logically from what precedes it. It is pure speculation, not fact. There is absolutely nothing in the documents Dr. Nagase refers to suggesting that SARS-CoV-2 does not exist. Dr. Nagase himself carefully refrains from drawing a firm conclusion in this regard, by using the word "perhaps." In his amended notice of application, Mr. Khodeir misrepresents Dr. Nagase's evidence when saying that he concluded that SARS-CoV-2 "was never proven to exist." Dr. Nagase did not state such a conclusion and provides no facts that could support it.

52 Moreover, if Dr. Nagase's affidavit is intended to provide an overview of current knowledge regarding the SARS-CoV-2 virus, or even the narrower issue of the validity of the PCR tests, it is sorely lacking. Dr. Nagase merely highlights a November 2020 critique of a paper written in January 2020, at the very beginning of the pandemic. He does not provide any up-to-date information regarding the validation of PCR tests, even if he signed his affidavit a year later. He does not conduct his own search of the literature and does not offer any fulsome literature review. Rather, he confines himself to the two papers to which Mr. Khodeir drew his attention. If Dr. Nagase is intended to be an expert witness, the selective comparison he undertakes and the extremely narrow range of information he provides are fundamentally at odds with the neutrality expected of experts.

53 Mr. Khodeir also filed an affidavit from Ms. Christine Massey, who describes herself as a biostatistician and purports to testify as an expert, although we know little about her qualifications. Ms. Massey states that she has made access to information requests to 25 "Canadian health and science institutions," asking for

> all studies or reports in the possession, custody or control of each institution that describe the isolation/purification of SARS-CoV2 directly from a sample taken from a diseased human where the patient sample was not first combined with any other source of genetic material.

54 Ms. Massey states that other persons in various countries made similar requests and forwarded the responses to her. She observes that none of the 138 institutions to whom a request was made was able to provide such records.

55 I am unable to draw any material conclusions from Ms. Massey's affidavit. The institutions to whom requests were made are not identified. One does not know if they can reasonably be expected to possess the studies or reports in question. I am also not in a position to assess the relevance of the restrictions contained in the description of the records sought. Thus, I do not know whether Ms. Massey's requests were designed for failure or, if not, what to infer from the negative responses.

56 What is also striking is that Ms. Massey does not herself attempt to draw any conclusions from the results of her access to information requests. Again, Mr. Khodeir's reliance upon her evidence to state that SARS-CoV-2 "was never proven to exist" is a misrepresentation. She says nothing of this kind. In truth, she states no fact that contradicts the existence of SARS-CoV-2.

57 Lastly, Mr. Khodeir filed his own affidavit. In addition to information about COVID-19 vaccines, he appends an affidavit sworn by Dr. Celia Lourenco of Health Canada in other proceedings in which the validity of the Policy is being challenged. He notes that Dr. Lourenco "cited 18 times SARS-CoV2 but never once referenced a single document which proves its existence." Again, nothing logically flows from this. The existence of SARS-CoV-2 was not an issue in these other proceedings, so Dr. Lourenco was not required to provide documents on this topic.

58 Thus, Mr. Khodeir's evidence does not erode the notoriety of the existence of the SARS- CoV-2 virus in any way. What Mr. Khodeir does, with the assistance of his so-called experts, is to look for evidence of the existence of the virus in discrete and narrow places and, finding none, to ask the Court to infer its inexistence. This is irrational: the conclusion simply does not flow from the premise. The absence of evidence in one place does not mean that the evidence does not exist elsewhere and tells nothing about the fact in dispute.

59 One should not be fooled by Mr. Khodeir's reliance on so-called experts and scientific literature. His affiants have not been qualified as experts and the information they provide in their affidavits does not allow me to consider them as such. The selective citation of a few elements from the scientific literature does not confer scientific value on Mr. Khodeir's contentions.

60 In fact, Mr. Khodeir's arguments amount to this. He first raises suspicions by alleging that a crucial piece of information is missing, without, however, conducting a thorough search for that information. He then alludes to an explanation that runs against what has become notorious knowledge, without providing any positive evidence of that explanation. Finally, he jumps to the conclusion that the suggested explanation is true and uses it as a factual basis for his application for judicial review.

61 Such a process has no probative value, scientific or otherwise. Reasonable persons do not recognize this as establishing the veracity of an alleged fact. Put simply, the layering of affidavits from so-called experts and selected documents of dubious scientific value cannot make up for Mr. Khodeir's failure to bring a single fact that contradicts the existence of the SARS-CoV-2 virus.

(4) Summary

62 In summary, the fact that COVID-19 is caused by a virus called SARS-CoV-2 is so notorious that it is beyond reasonable dispute. Like many other judges across Canada, I am taking judicial notice of this fact. Despite having had the opportunity to present evidence and submissions, Mr. Khodeir failed to put forward any cogent reason for concluding otherwise.

63 Thus, if Mr. Khodeir's application were allowed to proceed, he would be precluded from attempting to prove that SARS-CoV-2 does not exist, as this would be contrary to a judicially noticed fact. Yet, this allegation is the premise of his whole application. It is the "lynchpin holding the elements of the Application together": *Valero*, at paragraph 29. Mr. Khodeir would be unable to prove this central allegation, although he would have the burden of doing so: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 100. His application would be bound to fail or "bereft of any possibility of success," to borrow the language of the Federal Court of Appeal in *David Bull Laboratories*. It must be struck at this preliminary stage.

64 In his submissions, Mr. Khodeir compares himself to Galileo, who was persecuted in the 17th century for asserting that the Earth revolves around the Sun, a theory unanimously accepted today. Yet, unlike Mr. Khodeir, Galileo buttressed the heliocentric theory with facts, especially his discovery of Jupiter's moons. In contrast, Mr. Khodeir asks us to believe his assertions regarding the SARS-CoV-2 virus without providing any tangible fact in support. The comparison is unfair to the great Italian scholar. Mr. Khodeir's case has no scientific footing.

IV. Standing

65 Given the conclusions I reach with respect to judicial notice, it is not necessary to analyze in detail the Attorney General's submissions regarding Mr. Khodeir's lack of standing. I will confine myself to making the following comments.

66 Mr. Khodeir is not directly affected by the Policy. He is not an employee of the federal government. Rather, in his affidavit, he states that he is an employee of a subsidiary of the Canadian Imperial Bank of Commerce [CIBC]. He lacks the personal standing necessary to bring an application for judicial review.

67 Relying on *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 1 SCR 524 [*Downtown Eastside*], however, Mr. Khodeir asks the Court to grant him public interest standing. The Attorney General opposes this request because other applicants, who are employees of the federal government and are directly affected by it, have been able to mount judicial challenges to the Policy. The Attorney General's submission has much force. Indeed, this may well be a situation where "plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources": *Downtown Eastside*, at paragraph 27. Nevertheless, I would not go so far as to conclude that Mr. Khodeir's request for public interest standing is bound to fail, so I would not consider his lack of standing as an independent ground for striking his application.

V. Disposition and Costs

68 For these reasons, the Attorney General's motion to strike Mr. Khodeir's application for judicial review will be granted.

69 The Attorney General is seeking his costs. Relying on *McEwing v Canada (Attorney General)*, 2013 FC 953, Mr. Khodeir submits that no costs should be awarded against him. The usual rule is that the losing party is condemned to pay the costs of the prevailing party according to the tariff. The Court has discretion to depart from that rule, taking into account all the circumstances of the case. In contrast to *McEwing*, Mr. Khodeir's application is entirely devoid of factual foundation. Thus, I do not think is it appropriate to relieve Mr. Khodeir from a costs award.

ORDER in T-1690-21

THIS COURT ORDERS that:

1. The applicant's motion to amend his notice of application is granted.
2. The style of cause is amended so that the Attorney General of Canada is the respondent.
3. The respondent's motion to strike the notice of application is granted.
4. Costs are awarded to the respondent.

S. GRAMMOND J.

End of Document

Kuhn v. American Credit Indemnity Co., [1992] B.C.J. No. 953

British Columbia Judgments

British Columbia Supreme Court
Vancouver, British Columbia
(In Chambers)
Master Joyce
Heard: March 23, 1992
Judgment: April 15, 1992
Vancouver Registry No. C918353

[1992] B.C.J. No. 953

Between Harvey Alexander Kuhn, Plaintiff, and American Credit Indemnity Company, Howard C. Kaye, Wyn E. Shearer, and Robert Labelle, Defendants

(17 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Statement of claim — Grounds — Prolix pleading — Failure to disclose cause of action — Evidentiary or subordinate facts — Conspiracy action.

The defendant applied to strike the plaintiff's statement of claim in an action for damages for conspiracy on the grounds that it failed to disclose a reasonable claim, and that it was prolix and replete with irrelevant facts, evidence and argument.
HELD: The action was dismissed.

The court was satisfied that the facts alleged in the statement of claim were not capable of supporting any reasonable claim for damages, and that the proceeding ought to be dismissed. The statement of claim was 84 pages long, and consisted of 456 numbered paragraphs. The court agreed with the defendants that for the most part, the statement of claim consisted of either irrelevant facts, argument or evidence. It would be nearly impossible for the defendants to plead in reply to this document. The court was of the opinion that these facts, even if proved, would not be sufficient to make out the causes of action which the plaintiff sought to advance.

STATUTES, REGULATIONS AND RULES CITED:

British Columbia Supreme Court Rules, Rule 19(1), 19(24).
Counsel for the Plaintiff: David A. Freeman. Counsel for the Defendants: P. Miller.

MASTER JOYCE

This is an application to strike the plaintiff's statement of claim under R.19(24) on the grounds, firstly, that it fails to disclose a reasonable claim and, secondly, on the ground that it is so prolix and so replete with irrelevant facts, evidence and argument as to be embarrassing.

The plaintiff's action arises as a consequence of the termination of his employment by the corporate defendant, whom I shall refer to as "American". The plaintiff does not allege, however, that the termination constituted a wrongful dismissal. He concedes it was not. Nor does the plaintiff allege that American owes him any salary or other remuneration or benefits for the period of his employment. While the prayer for relief claims an accounting, counsel for the plaintiff conceded there is no debt claim for moneys payable as a result of the plaintiff's employment.

Counsel for the plaintiff submits the essence of the case is conspiracy. The plaintiff alleges that American and the individual defendants are guilt of a civil conspiracy in connection with the termination of his employment.

The statement of claim by which the plaintiff seeks to plead his cause of action is 84 pages in length and consists of 456 numbered paragraphs. It is, in my view, a gross violation of R. 19(1) which provides that:

> "A pleading shall be as brief as the nature of the
>
> case will permit and must contain a statement in
>
> summary form of the material facts on which the party
>
> relies, but not the evidence by which the facts are to
>
> be proved."
>
> (emphasis added)

Having read the document carefully and in its entirety I must agree with counsel for the defendants that for the most part it consists of either irrelevant facts, argument or evidence. I am satisfied that the document is so prolix as to be embarrassing. It would be nearly impossible for the defendants properly to plead in reply to this document other than by bare denial. For this reason alone, I am of the opinion the statement of claim should be struck.

Putting aside its prolixity, I have further examined the statement of claim to determine whether it is possible for one to extract from the sea of evidence and irrelevancy sufficient material facts on which to found the essential allegation of conspiracy or any other cause of action, bearing in mind that in an application under R. 19(24)(a) the facts alleged in the statement of claim are assumed to be true and that statement of claim should be struck only where it is plain and obvious that it discloses no reasonable cause of action (Hunt v. T. & N plc. (1990) 49 B.C.L.R. (2d) 273 (S.C.C.).

In my view one must begin the analysis with paragraphs 442 to 450 where the plaintiff attempts to summarize his claims. In my opinion these paragraphs do not, in themselves, constitute pleadings of material facts. They state legal conclusions which the plaintiff suggests flow from the facts which are set out in the preceding paragraphs. These legal conclusions can be paraphrased as follows:

> 442. Between June 1, 1989 and June 26, 1991 two or more of the defendants conspired to injure the plaintiff in the office of his employment.
>
> 443. Between June 1, 1989 and June 26, 1991 two or more of the defendants conspired to engineer the termination of the plaintiff's employment.
>
> 444. Between June 1, 1989 and June 26, 1991 two or more of the defendants conspired to interfere with the contractual relationship between the plaintiff and American.
>
> 445. The defendants, either alone or jointly, intentionally or recklessly brought about the termination of the plaintiff's employment.
>
> 446. The defendants, either alone or jointly, intentionally or recklessly created mental stress to such an extent as to be oppressive on the plaintiff.
>
> 447. The defendants, either alone or jointly, intentionally or recklessly participated in or condoned acts or omissions that were oppressive to the plaintiff.
>
> 448. American breached its fiduciary duty to the plaintiff.
>
> 449. American breached its duty to protect the plaintiff from the actions of the individual defendants.

450. American breached its contractual obligations which it owed to the plaintiff not to restrict his post termination efforts to obtain employment.

I have attempted, as best I can, to distil from the preceding 441 paragraphs the essential averments making up the factual foundation upon which the plaintiff rests his action. The essential facts are as follows (the numbers in brackets correspond to the paragraphs in the statement of claim from which these facts are extracted):

1. American is an insurance company. (5)
2. The plaintiff was an employee of American and was its sole agent in British Columbia during the period 1987 to June 26, 1991. (4,12,16)
3. Kaye, Shearer and Labelle are employees and officers of American. (6,7,8)
4. "In their capacities as Officers of the defendant American, the defendants Kaye, Shearer and Labelle, were acting within the scope of their employment, relating to the carrying out of their offices, authorized to make decisions and bind the defendant American." (9)
5. The plaintiff was assigned excessive premium goals for the 1990 production year. (69-70, 71-73, 75, 77-79)
6. On November 12, 1990 Kaye and Shearer imposed excessive new business requirements on the plaintiff under the threat of probation. (115,135-137)
7. "The penultimate target of such excessive new business requirements was the penalty of probation". (138, 298)
8. "The penalty of probation was intended as having the direct, sole, exclusive and certain result of the non-achievement of the aforementioned imposed excessive new business requirements." (139)
9. The plaintiff did not meet his assigned goals due to a number of uncontrollable factors, including the imposition of the excessive new business requirements under the threat of probation. (76, 88)
10. The excessive new business requirements together with the necessity to maintain renewal premiums in accordance with the assigned goals created "a unconscionable combined objective" by Kaye, Shearer and American. (141)
11. "The aforesaid imposition had clearly been designed to cause a mental and physical burden under which the plaintiff's ability to effectively produce for the defendant American was impaired." (142)
12. Kaye gave instructions to issue a renewal policy prematurely with the intention to create a bad reflection on the plaintiff's performance. (148-151)
13. Kaye, "acting in his capacity as an officer of American", by imposing excessive new business requirements on the plaintiff intended the result of or was reckless as to the consequences of his actions. (154)
14. The plaintiff was assigned excessive premium goals for the 1991 production year. (179, 180, 183)
15. The plaintiff was injured in a motor vehicle accident on January 14, 1991 and his sales effectiveness was thereby dramatically reduced. (199-200, 206)
16. On February 15, 1991 Shearer placed the plaintiff in a "Formal Action Program": with additional new business requirements and under the threat of probation. (280-284)
17. Kaye, Shearer and American created the Action Programs "almost certainly intended to eventually bring about failure of the plaintiff in reaching the necessary figures". (289)
18. The plaintiff was systematically targeted by Kaye, Shearer and American with the express purpose of having his employment come to an end. (293)
19. Kaye, Shearer and American deliberately and purposely tampered with the numerical interpretation of the plaintiff's measured performance. (310)

20. Kaye, Shearer and American deliberately attempted to change the meaning and context of "annualized" in relation to annualized new premium so as to understate the plaintiff's performance and attempted to deceive and injure the plaintiff. (311-315, 371-374)

These actions were in accordance with an intention of having the plaintiff placed on probation. (316-317)

21. On April 24, 1991 Kaye, Shearer and American placed the plaintiff on Performance Probation under the threat of termination. (365)
22. The new business requirements contained within the Performance Probation were excessive and were imposed intentionally or with reckless disregard of the effect and consequences of such action upon the plaintiff. (367-370)
23. On May 28, 1991 the plaintiff received an "unsatisfactory" performance review from Kaye which review contained errors and inaccuracies. (392-396)
24. In completing the performance review Kaye wilfully and deliberately included inaccurate information with the intent to injure the plaintiff or was reckless as to the consequences of his actions. (397-398)
25. On or about June 26, 1991 the plaintiff's employment was terminated.
26. Since termination the plaintiff has been unable to find suitable employment. (452)
27. The non-achievement of the new business requirements

brought about termination of the plaintiff's employment. (140)

I am of the opinion that these facts, if proved, would not be sufficient to make out the causes of action which the plaintiff seeks to advance. They establish only that certain officers of American, acting within the scope of their offices and employment, placed excessive production demands on the plaintiff which he did not meet or which they perceived he did not meet and as a result of which his employment was terminated.

If the imposition of those demands or the imposition of "penalties" was not warranted and in breach of the terms of the plaintiff's employment, then he might have a remedy for breach of contract but that is not alleged. It is conceded that American was entitled to terminate the employment but it is suggested that the events leading up to the termination constitute a conspiracy.

In my view paragraphs 442, 443 and 444 each describe, in somewhat different language, the same claim. They allege a conspiracy to injure the plaintiff by bringing about the termination of his employment.

Counsel for the defendants refers to Remedies in Tort, Volume 1, L.D. Rainaldi, Ed., Carswell, 1987, which contains a convenient discussion of the essential elements of the tort of conspiracy beginning at page 3-12. In summary, the plaintiff must plead and must prove the following:

1. An agreement, in the sense of a joint plan or common intention on the part of the defendants to do the act which is the object of the alleged conspiracy.
2. An overt act or acts consequent upon the agreement.
3. Resulting damage to the plaintiff.

The defendants must intend to be a party to the combination. Mere knowledge of or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view to furtherance of the common design and purpose.

Where the acts relied on are in themselves unlawful it is sufficient to show that the defendants' conduct was directed toward the plaintiff and that the defendants should have known that injury to the plaintiff would result. Where the means employed to carry out the plan are in themselves lawful the plaintiff must establish that the predominant purpose was to injure the plaintiff.

In my opinion, the facts as set out in the statement of claim, if proved, do not establish the agreement or combination amongst the defendants which is required to make out the tort of conspiracy.

I note, in the first place, that the plaintiff fails to allege which of the defendants were party to the alleged conspiracy. He simply says "two or more of them". I note, as well, that it is only the defendants American, Kaye and Shearer who figure in the events described in the preceding paragraphs which the plaintiff suggests establishes the conspiracy. It is clear, in my view, that no cause of action is pleaded as against Labelle.

The plaintiff alleges acts done variously by American, Kaye and Shearer. The acts alleged are not, in themselves, unlawful.

The plaintiff further alleges an intention on the part of the defendants to bring about the termination of the plaintiff's employment and thereby injure the plaintiff. However, in my view, the pleadings fall short of alleging facts which would establish the agreement or combination which the law requires.

The acts of these individuals which are complained of are ones which, in my view, clearly were done by them in their capacities as officers of American. It is not alleged that they were done outside the scope of their office or employment. On the contrary, the plaintiff admits in paragraph 9 that in their capacities as officers the individual defendants were acting within the scope of their employment. They were, in my view, not the acts of these individuals done pursuant to a common plan but the acts of one person, the corporate defendant, acting through its officers. A person cannot conspire with himself.

In Desimone v. Herrmann Group Ltd., Ontario Judgments [1991] No. 929, Ontario Court of Justice-General Division, June 3, 1991, the court was concerned with an analogous situation. One of the defendants applied to strike out portions of the statement of claim on the ground that they disclosed no reasonable cause of action against her. The plaintiff claimed he was wrongfully dismissed by his employer, a corporation. In the action he joined claims against an individual defendant (the applicant), who was a director of the corporate defendant, of conspiring to have the corporate defendant wrongfully dismiss him and inducing the corporate defendant to breach the contract of employment.

In dealing with the claim for inducing breach of contract Weiler, J. at page 2 said this:

> "The applicant and respondent agree that the facts of the tort of inducing breach of contract must be independent of the breach of contract itself, the wrongful dismissal, although they may arise out of the same set of circumstances.
>
> "The applicant says there are no facts pleaded against the individual defendant which are independent of the wrongful dismissal. A company can only act by its officers, servants or agents and if the individual defendant was acting within the scope of her employment, and therefore as the company's alter ego, the claim must fail: D.C. Thomson & Co. Ltd. v. Deakin, et al. [1952] 2 All E.R. 361 at 370 (c.A.) quoting from Winfield's Law of Torts 5th ed. (1950) p. 603."
>
> (emphasis added)

The learned judge concluded that the individual defendant was not acting outside the scope of her employment and struck that claim against her.

With respect to the conspiracy claim the learned judge said at page 3:

> "Paragraph 10 of the statement of claim alleges a conspiracy on the part of the individual and corporate defendants. One cannot conspire to breach a contract with oneself: Patterson v. Canadian Pacific Ry. Co. (1918), 38 D.L.R. 183 and see also Katz v. Tannenbaum (supra) p. 2, 'It is logical that an individual may not conspire with himself.'"
>
> "For the reasons given above in dealing with inducing breach of contract, this claim too must fail."

In my view, if one cannot conspire to breach a contract with oneself, then, a fortiori, one cannot conspire with oneself to terminate a contract in accordance with one's contractual rights. In my opinion the statement of claim fails to disclose a reasonable claim based on the tort of conspiracy.

Counsel for the plaintiff agreed with my suggestion that the cause of action sought to be described in paragraph 445 amounted to "intentionally inducing a 'rightful' termination of employment". The plaintiff faces the same difficulty here as he does in the case of the alleged conspiracy. The acts complained of were the acts of American and one cannot induce oneself to breach a contract, let alone induce oneself to not breach a contract. In any event, in my respectful opinion, there is no such cause of action as that suggested by counsel for the plaintiff known in law. Absent proof of a conspiracy to injure, I cannot imagine a remedy for inducing the termination of an employee's employment in a manner in which the employer is justified.

In my opinion paragraphs 445 and 447 do not describe a cause of action. The actions complained of are not, in my view, actionable in there own right. Unless they were done in furtherance of a conspiracy to injure they afford no remedy to the plaintiff.

With respect to paragraph 446, apart from the highly doubtful nature of the cause of action for infliction of mental stress in conduct leading up to a termination of contract which is not wrongful (see Edwards v. Mutual Life Assurance Company of Canada (1982) 41 B.C.L.R. 162 (C.A.) and Vorvis v. Insurance Corporation of British Columbia (1989) 58 D.L.R. (4th) 193 (S.C.C.)), the plaintiff has not pleaded any facts which would establish "mental stress to such an extent as to be oppressive" in my view. I would strike this paragraph.

With respect to paragraph 448, there are no facts pleaded which in my view establish the fiduciary duty allegedly owed by American, let alone the breach of any such duty. In my view no reasonable claim for breach of fiduciary duty is pleaded or is capable of being pleaded in these circumstances.

With respect to paragraph 449, in my opinion there are no facts pleaded which can give rise to the duty which is suggested, namely, to protect the plaintiff from the actions of its officers and employees, carried out in the performance of their duties, in setting performance criteria on behalf of the company and in making decisions or carrying out decisions to terminate the plaintiff's employment when those criteria are not met.

The claim referred to in paragraph 450, as I understand it, arises because the plaintiff considers that the terms of a confidentiality agreement which he made with American as part of his employment is making it difficult for him to find a new position. Counsel does not suggest, however, that the confidentiality agreement is not enforceable. He seems to suggest that by concluding this agreement, the validity of which is not challenged, the employer has somehow covenanted not to rely on it if the employment was terminated other than for cause. In my opinion, there are no facts here which can establish the "fundamental obligation" alleged. There is no reasonable claim advanced by this paragraph in my view.

In summary, I am satisfied that the facts alleged in this statement of claim are not capable of supporting any reasonable claim for damages and that the proceeding ought to be dismissed.

The action will be dismissed with costs to the defendants at scale 3.

MASTER JOYCE

End of Document

Re Lang Michener et al. and Fabian et al., [1987] O.J. No. 355

Ontario Judgments

Ontario

High Court of Justice

Henry J.

April 15, 1987

[1987] O.J. No. 355 | 59 O.R. (2d) 353 | 37 D.L.R. (4th) 685 | 16 C.P.C. (2d) 93 | 4 A.C.W.S. (3d) 141 | 1987 CanLII 172 | 1987 CarswellOnt 378

Counsel

M.R. Gray, for applicants.

J. Fabian, appearing in person and representing respondent company.

HENRY J.

1 This in an application for an order pursuant to s. 150 of the Courts of Justice Act, 1984 (Ont.), c. 11, which provides:

> 150(1) Where a judge of the Supreme Court is satisfied, on application, that a person has persistently and without reasonable grounds,
>
> (a) instituted vexatious proceedings in any court; or
>
> (b) conducted a proceeding in any court in a vexatious manner,
>
> the judge may order that,
>
> (c) no further proceeding be instituted by the person in any court; or
>
> (d) a proceeding previously instituted by the person in any court not be continued,
>
> except by leave to a judge of the Supreme Court.
>
> (2) An application under subsection (1) shall be made only with the consent of the Attorney General, and the Attorney General is entitled to be heard on the application.

2 The consent of the Attorney-General has been filed as required.

3 The facts, as they have been placed before me in the affidavits filed, are substantially as follows:

4 The respondent Jozsef Fabian was the unsuccessful plaintiff in a motor vehicle personal injury action which came to trial in November, 1982. After the trial, Mr. Fabian commenced an action for damages of $12 million for loss of credibility and loss of the personal injury action against Dr. Albert Irwin Margulies, a medical doctor who submitted a medico-legal report and gave evidence for the defence at trial of the personal injury action. The statement of claim against Dr. Margulies alleged that he maliciously falsified facts in his written report and in oral testimony, thereby discrediting Mr. Fabian personally as well as his claim in the personal injury action. This statement of claim against Dr. Margulies was struck out by Labrosse J. on January 30, 1984 [53 O.R. (2d) at p.

381], as disclosing no reasonable cause of action and the action was dismissed; this decision was affirmed by the Court of Appeal: see Fabian v. Margulies loc. cit. p. 380. Immediately thereafter Mr. Fabian commenced a second action for $42 million damages against Dr. Margulies, three solicitors in the law firm which acted for the defendants in the personal injury action, and the defendants' insurer. The statement of claim alleged that the solicitors were negligent for stalling the personal injury action, attempting to dismiss the action, introducing fraudulent documents, and that the insurer was negligent for financing the defence of the personal injury action. The statement of claim as against the three solicitors and the insurer was struck out on April 4, 1984, by Southey J. on the basis that no reasonable cause of action was disclosed and the action was dismissed. The statement of claim against Dr. Margulies was struck out by Southey J. on the same day on the ground that it was an attempt to litigate the point already decided by Labrosse J. and, as such, it was vexatious and an abuse of process; and as well that it disclosed no reasonable cause of action; Southey J. dismissed the action. Mr. Fabian unsuccessfully appealed the orders in both actions to the Ontario Court of Appeal. He then sought leave to appeal to the Supreme Court of Canada, first from the Ontario Court of Appeal, and then from the Supreme Court of Canada itself. The Supreme Court of Canada denied leave to appeal the decisions in both actions on November 6, 1986 [57 O.R. (2d) 576n].

5 The respondent Jozsef Fabian is an officer and a principal of the respondent Napraforgo Construction Ltd. In 1980, Napraforgo commenced action No. 553580/80 ("the 1980 action") against Janin Building & Civil Works Ltd. for payment pursuant to a construction subcontract. The action went to trial in September, 1984, before the Honourable Mr. Justice Holland. Fabian, who is not a solicitor, was permitted to conduct the action on behalf of Napraforgo. At the conclusion of a four-day trial, Holland J. gave judgment on September 27, 1984 [summarized 27 A.C.W.S. (2d) 379], by which Napraforgo was awarded $27,640.50, an amount which Janin had conceded was due at the outset of the trial, subject to its own counterclaim. Janin succeeded on its counterclaim, the amount to be determined by reference before the master, and to be set off against Napraforgo's recovery on the principal claim. Napraforgo unsuccessfully appealed the judgment of Mr. Justice Holland to the Ontario Court of Appeal [summarized 37 A.C.W.S. (2d) 277], Subsequently, Napraforgo sought leave to appeal to the Supreme Court of Canada from the Ontario Court of Appeal. Leave to appeal was denied. It then applied to the Supreme Court of Canada for leave to appeal to that court; that application was dismissed on March 26, 1987. The reference to determine the amount of Janin's recovery on its counterclaim has not yet been held in view of the pending appeals.

6 Meantime, the respondents Fabian and Napraforgo have commenced three further actions against Janin, its former solicitors and its present solicitors, respectively. These actions all ostensibly arise from Janin's conduct of its defence in the main action.

7 The first of these three related actions, No. 16210/84, was commenced on March 23, 1984, against the law firm Harries Houser for damages of $2 million. In that action, Jozsef Fabian, as plaintiff, alleged bad faith and negligence by Harries Houser in its conduct of the defence of the 1980 action on behalf of Janin. This action was prompted by:

(a) a motion by Janin to stay the 1980 action until Napraforgo had obtained legal counsel which was withdrawn, and

(b) the delivery by Janin of its documents brief for trial.

In response to the action, Harries Houser successfully brought a motion before the Honourable Mr. Justice Galligan on May 24, 1984, to strike out the statement of claim on the basis that it disclosed no cause of action; the action was dismissed. Mr. Fabian unsuccessfully appealed the decision of Galligan J. to the Ontario Court of Appeal who affirmed that no such action lies; he then applied to the Supreme Court of Canada for leave to appeal to the Supreme Court of Canada. His application for leave to appeal was struck from the list for failure to file proper material.

8 The second related action, No. 17565/84, was commenced by Napraforgo against Janin on May 7, 1984 (before trial of the main action). Damages of $3.25 million were sought by Napraforgo from Janin due to Janin's conduct of its defence in the main action. Specifically, Napraforgo alleged that Janin had included fraudulent documentation in its documents brief then prepared for trial; also included was a further claim for damages based on Janin's refusal to pay for work performed (the subject of the main action). Without notice to Janin or its solicitors, Fabian noted pleadings closed against Janin. Janin subsequently brought a motion to strike the statement of claim as disclosing no cause of action, or alternatively, for leave to file a defence to the action. On September 4, 1984, the Honourable Madam Justice McKinlay ordered that the noting of pleadings closed be set aside and stayed all other proceedings in this action until after the trial of the main action. Despite the order of Madam Justice McKinlay staying the action, Fabian unsuccessfully attempted to bring the matter on for trial as an undefended action before the Honourable Mr. Justice Anderson on January 18, 1985, and again before the Honourable Mr. Justice Smith on April 8, 1985. Fabian then unsuccessfully sought leave to appeal the decisions of each of the Justices McKinlay, Anderson and Smith before the Honourable Mr. Justice Steele on May 24, 1985. The motion for leave to appeal was refused. Janin was unrepresented on the appearances before Smith and Steele JJ., as no notice of either hearing had been given to Janin or its solicitor. Although the action was stayed, Mr. Fabian brought a further motion before me as I shall indicate.

9 The third related action, No. 14903/86, arising out of Janin's defence to the main action was brought by Mr. Fabian as plaintiff against Janin's present solicitors, Lang Michener Lash Johnston, and Daniel R. Dowdall, the solicitor who has had conduct of the file throughout the time Harries Houser and Lang Michener have acted for Janin. The writ of summons was issued October 14, 1986. In the statement of claim, Mr. Fabian claims damages of $9.2 million. The conduct complained of includes the use of the allegedly improper document book filed by Janin's former solicitors, Harries Houser, and the submissions made by Mr. Dowdall at the trial of the main 1980 action and before the Court of Appeal. Mr. Fabian acknowledged to me in court that these matters had already been raised before Holland J. at the trial and also before the Court of Appeal and the Supreme Court of Canada on his application for leave to appeal. This action was in substance similar to No. 16210/84 against Harries Houser, which Galligan J. dismissed.

10 Fabian has indicated to the solicitor for Janin on various occasions that he would drop the related actions against Harries Houser and Lang Michener if Janin would make a settlement favourable to Napraforgo in the 1980 action.

11 Awards of costs have been made against Fabian and Napraforgo, and have not been paid. Mr. Fabian has indicated on numerous occasions that he is on welfare and has persistently declined to have counsel represent Napraforgo as required by the rules of civil procedure.

12 Mr. Fabian has taken appeals in all the actions which have been determined at the Supreme Court of Ontario level. In more than one action, he has sought leave to appeal to the Supreme Court of Canada first from the Ontario Court of Appeal and subsequently from the Supreme Court of Canada itself, and has been unsuccessful on all occasions.

13 Mr. Fabian has, on several occasions, attempted to note pleadings closed without notice, and has taken interlocutory applications and appeals without notice to the solicitors for the responding party.

14 Fabian has made numerous allegations of bad faith and bias against Janin, Janin's solicitors, solicitors acting for the defendants in the personal injury action.

15 Mr. Fabian also commenced legal proceedings in the Supreme Court of Ontario against the Attorney-General of Ontario by issuing a writ of summons on May 7, 1984, together with a statement of claim, in action No. 17563/84. Mr. Fabian's claim against the Attorney-General was for malicious false imprisonment, conflict of interest, police harassment and damages of $1,854,000.

16 In response to these proceedings the Attorney-General brought a motion to strike out the statement of claim as disclosing no cause of action, being frivolous and vexatious, and raising matters which were res judicata. That motion was heard on July 9, 1984, by Griffiths J., who ordered that the statement of claim be struck out and the action dismissed. Mr. Fabian appealed that decision to the Court of Appeal; the appeal was heard on January 24, 1986, by a panel of three judges: Brooke, Morden and Finlayson JJ.A.; the appeal was dismissed and Mr. Fabian was ordered to pay costs if demanded.

17 Mr. Fabian subsequently sought leave to appeal to the Supreme Court of Canada, claiming that the Court of Appeal had "admitted malice concerning malicious false imprisonment" by the Attorney-General. Application for leave to appeal was heard by a panel composed of Blair, Thorson and Grange JJ.A. on November 3, 1986, and leave to appeal was refused. Following that, Mr. Fabian served a notice of motion in the Supreme Court of Canada for an extension of time and leave to appeal to that court. The application for leave to appeal was heard by the Supreme Court of Canada on January 27, 1987, and was dismissed by endorsement issued March 26, 1987.

18 I have been referred to the following judicial decisions by counsel for the applicants: Foy v. Foy (No. 2) (1979), 26 O.R. (2d) 220 at p. 226, 102 D.L.R. (3d) 342 at p. 348, 12 C.P.C. 188 (Ont. C.A.); Re Kitchener-Waterloo Record Ltd. and Weber (1986), 53 O.R. (2d) 687 at p. 693 (Ont. S.C.); Re Law Society of Upper Canada and Zikov (1984), 47 C.P.C. 42 (Ont. S.C.).

19 From these decisions the following principles may be extracted:

(a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;

(b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;

(c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

20 There are three additional matters to which I must refer. Although he had unsuccessfully sought leave to appeal the decisions of McKinlay, Anderson and Smith JJ. before Mr. Justice Steele, who refused leave, Mr. Fabian brought a further motion before me to reopen that matter and, in effect, again to seek leave to appeal from the decisions of those four judges; I dismissed that motion on March 6, 1987, on the ground that he had already exhausted his rights of appeal.

21 Second, at the same time as I heard argument in the present application on April 3rd, I heard the remainder of the motion brought before McKinlay J. on September 4, 1984, in No. 17565/ 84, which action had been stayed by her until after the trial of the 1980 action in Napraforgo v. Janin [unreported]. As Mr. Fabian and Napraforgo had exhausted all avenues of appeal in the 1980 action, I dealt with the remainder of the motion, lifting the stay to do so. The statement of claim seeks damages for $3.2 million for:

(a) refusal by Janin to pay for work done under the subcontract; this is a claim already raised and adjudicated by Holland J. at trial in the main (1980) action;

(b) added is a claim for damages for destruction of Napraforgo's business by the failure of Janin to pay for the work done; that claim ought to have been made at trial before Holland J. and it is now too late to do so and becomes res judicata as a result;

(c) introduction of fraudulent documents, a matter already raised at the subsequent trial and in later proceedings including the appellate courts;

(d) using the legal system to obtain money under false pretenses; complaints of conduct of defendant's counsel, alleged perjury of a witness and the alleged falsity of documents were all raised, as Mr. Fabian agreed in court, before Holland J. and in the Court of Appeal and Supreme Court of Canada (on application for leave to appeal) in the 1980 action. Otherwise, Holland J. has disposed of the claim and counterclaim in his judgment which awarded relief to both parties and was upheld on appeal.

22 I therefore concluded that the matters raised in the action which was before McKinlay J. raised matters and grounds of relief which had already been disposed of or should have been raised in the main 1980 action. Those matters are by now res judicata and the continuation of action No. 17565/84, in my opinion, constitutes an abuse of the process of the court. I have therefore dismissed that action.

23 Third, at the same time I heard the motion brought by Lang and Michener as defendants in the action brought against them by Mr. Fabian, to strike out the statement of claim as disclosing no reasonable cause of action. I was unable to find a proper cause of action on the statement of claim and I accordingly struck out the statement of claim and dismissed the action; I add that, in that proceeding, matters were raised with respect to the conduct of the defence by Janin and its counsel and a witness which Mr. Fabian alleged was improper, fraudulent and misleading, matters which had already been disposed of in the 1980 action tried by Holland J. and raised also in the Court of Appeal and on the application for leave to appeal to Supreme Court of Canada. The action against Lang, Michener must be regarded as vexatious and an abuse of the process of the court, and I have struck out the statement of claim and dismissed it.

24 On the basis of the foregoing facts, including the three matters which I disposed of in the motions before me, the conclusion is inescapable that Mr. Fabian's conduct as a litigant, as appears from the over-all review of his numerous proceedings in the courts, has brought himself within all of the principles emerging from the judicial decisions to which I have referred.

25 I have no hesitation in finding on the factual material before me that he has instituted vexatious proceedings in this court and in the appellate courts, and has conducted proceedings in the courts in a vexatious manner, within the meaning of s. 150(1) of the Courts of Justice Act, 1984.

26 I, therefore, have endorsed the application record that the following order shall issue:

(a) an order that no further proceedings be instituted by Jozsef Fabian and Napraforgo Construction Ltd. in any court, except by leave of a judge of the Supreme Court;

(b) an order that proceedings previously instituted by Jozsef Fabian against Harries Houser in Supreme Court Action No. 16210/84 and against Lang Michener Lash Johnston and Daniel Dowdall in Supreme Court Action No. 14903/86 not be continued except by leave of a judge of the Supreme Court;

(c) an order that proceedings in Supreme Court Actions Nos. 53358/80 and 17565/84 by Napraforgo Construction Ltd. against Janin Building & Civil Works Ltd. not be continued, except by leave of a judge of the Supreme Court, save and except for the reference to determine the amount due to Janin on its counterclaim, which was ordered by Mr. Justice Holland on September 27, 1985, following the trial in action No. 53358/80.

27 If costs are asked, the matter may be spoken to.

Order accordingly.

End of Document

Li v. British Columbia, [2021] B.C.J. No. 1405

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

B. Fisher, S.A. Griffin and P.G. Voith JJ.A.

Heard: October 28-30, 2020.

Judgment: June 29, 2021.

Docket: CA46520

[2021] B.C.J. No. 1405 | 2021 BCCA 256 | 491 C.R.R. (2d) 243

Between Jing Li, Appellant (Plaintiff), and Her Majesty the Queen in Right of the Province of British Columbia, Respondent (Defendant), and International Commission of Jurists Canada, Intervenor BROUGHT PURSUANT TO the Class Proceedings Act, R.S.B.C. 1996, c. 50

(234 paras.)

Case Summary

Constitutional law — Constitutional validity of legislation — Level of government — Provincial or territorial legislation — Interpretive and constructive doctrines — Paramountcy doctrine — Pith and substance — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Constitutional law — Division of powers — Federal jurisdiction — Federal powers (Constitution Act, 1867, s. 91) — Provincial jurisdiction — Provincial powers (Constitution Act, 1867, s. 92) — Direct taxation within the province — Property and civil rights — Determination of jurisdiction — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Constitutional law — Canadian Charter of Rights and Freedoms — Equality rights — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Real property law — Real property tax — Land transfer tax — Foreign buyers tax — Appeal by Li from

dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Real property law — Proceedings — Constitutional issues — Federal v. provincial jurisdiction — Canadian Charter of Rights and Freedoms — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Taxation — Provincial and territorial taxation — Constitutional validity of provincial or territorial tax — Land taxes — British Columbia — Appeal by Li from dismissal of her action that challenged constitutionality of amendments to Property Transfer Tax Act dismissed — Amendments imposed additional transfer tax on foreign purchasers of residential property in specified areas of province — Amendments were matter in relation to property and civil rights under s. 92(13) of Constitution Act and were not ultra vires province — Legislation was not inoperative under federal paramountcy doctrine as there was no operational conflict with Citizenship Act or NAFTA — Legislation did not violate s. 15(1) of Charter — Property Transfer Tax Act.

Appeal by Li from the dismissal of her action that challenged the constitutionality of amendments to the Property Transfer Tax Act. The amendments imposed an additional transfer tax on foreign purchasers of residential property in specified areas of the province where foreign demand had been shown to contribute to rising prices. The appellant was a Chinese citizen who moved to British Columbia in 2016. She held a valid work permit but was not a permanent resident of Canada. In 2016, she purchased a residential property in Langley and was required to pay the additional 15 per cent property transfer tax.
HELD: Appeal dismissed.

The amendments were not ultra vires the province. The dominant purpose of the tax, its pith and substance, was to address the problem of housing affordability by discouraging foreign nationals from purchasing residential property in specified areas, which was a matter in relation to property and civil rights under s. 92(13) of the Constitution Act and only incidentally affected the federal powers over aliens and international trade. The legislation was not inoperable under the federal paramountcy doctrine. There was no operational conflict between the legislation and the Citizenship Act or the North American Free Trade Agreement (ôNAFTAö). The additional tax did not prevent foreign nationals from acquiring and owning residential property but simply imposed a more stringent requirement on them to pay a higher transfer tax on purchase. The legislation did not violate s. 15(1) of the Charter. The provisions did not create a distinction based on citizenship or national origin. They created a distinction based on immigration status, which was not an enumerated or analogous ground under s. 15 of the Charter. They did not perpetuate a real disadvantage to the group of non-citizens affected by the tax. No negative stereotypical assumption made against the affected subset of non-citizens was perpetuated by the tax. The tax was not predicated on anti-Chinese prejudice.

Statutes, Regulations and Rules Cited:

An Act respecting Naturalization and Aliens, S.C. 1881, c. 13

Canada Act 1982(UK), 1982, c. 11

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 6, s. 6(2), s. 6(2)(a), s. 6(3)(b), s. 15, s. 15(1)

Citizenship Act, R.S.C. 1985, c. C-29, s. 24(1), s. 34, s. 35, s. 35(1), s. 35(3), s. 35(3)(b), s. 37

Class Proceedings Act, R.S.B.C. 1996, c. 50

Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.)

Constitution Act, 1867 (UK), 30 & 31 Vict., c. 3, s. 91, s. 91(2), s. 91(24), s. 91(25), s. 92, s. 92(1), s. 92(2), s. 92(13), s. 132

Constitution Act, 1982, s. 35

Home Owner Grant Act, R.S.B.C. 1996, c. 194

Immigration Act, R.S.C. 1985, c. I-2

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Land Act, R.S.B.C. 1996, c. 245

Land Tax Deferment Act, R.S.B.C. 1996, c. 249

NAFTA Implementation Act, s. 4, s. 9, s. 10, s. 22, s. 50, s. 241

Naturalization Act, 1870, 33 Vic. c. 14

Notaries Act, R.S.B.C. 1996, c. 334

Patent Act, R.S.C. 1985, c. P-4

Property Transfer Tax Act, R.S.B.C. 1996, c. 378, s. 2.01, s. 2.04

Property Transfer Tax Regulation, B.C. Reg. 74/88 <LEGISLAITON/> Public Service Employment Act, R.S.C. 1985, c. P-33

World Trade Organization Agreement Implementation Act, S.C. 1994, c. 47

Youth Criminal Justice Act, S.C. 2002, c. 1, s. 37(10)

Court Summary:

The appellant challenges the constitutionality of amendments to the Property Transfer Tax Act, R.S.B.C. 1996, c. 378 that impose an additional transfer tax on foreign purchasers of residential property in specified areas of the province. She raises three grounds: (1) the tax is properly classified as legislation in relation to the federal power over naturalization and aliens under s. 91(25) or international trade under s. 91(2) of the Constitution Act, and therefore ultra vires the Province; (2) alternatively, the legislation is inoperable under the federal paramountcy doctrine as it is in operational conflict with s. 34 of the Citizenship Act, R.S.C. 1985, c. C-29 and Canada's obligations under Chapter 11 of the North American Free Trade Agreement, and also frustrates the purpose of s. 35 of the Citizenship Act and NAFTA; and (3) the tax infringes her equality rights under s. 15 of the Charter on the basis of citizenship or national origin.

Held: Appeal dismissed.

(1) The amendments are not ultra vires the province. The dominant purpose of the tax is to address the problem of housing affordability in specified areas of the province by discouraging foreign nationals from purchasing residential property in those areas, thereby reducing demand. This is a matter in relation to property and civil rights under s. 92(13) of the Constitution Act and only incidentally affects the federal powers over aliens and international trade.

(2) The legislation is not inoperable under the federal paramountcy doctrine. There is no operational conflict with s. 34 of the Citizenship Act, which permits non-citizens to take, acquire, hold and dispose of real and personal property "in the same manner in all respects as by a citizen". This provision was intended to reverse the common law disability for non-citizens to acquire, hold and transfer land to their heirs and the tax simply imposes a more stringent requirement on some non-citizens to pay a higher tax on the purchase of certain kinds of real property. There is no operational conflict or frustration of purpose with NAFTA because Chapter 11 has not been implemented into federal domestic law. There is no frustration of purpose with s. 35 of the Citizenship Act because it has never been proclaimed in British Columbia and has no legal effect in this province.

(3) The legislation does not violate s. 15(1) of the Charter. The appellant has not established that the tax provisions create a distinction, direct or indirect, based on either citizenship or national origin. The tax creates a distinction based on immigration status, which is not an enumerated or analogous ground under s. 15. Even if a distinction can be said to be based on citizenship, the tax provisions do not have the effect of perpetuating a real disadvantage to the group of non-citizens affected by the tax in the social and political context of the claim. In addition, even if a distinction can be said to be based on national origin, the appellant has not established that the tax has a disproportionate adverse impact on a sub-group of buyers from China.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated October 24, 2019 (*Li v. British Columbia*, 2019 BCSC 1819, Vancouver Docket S168644).

Counsel

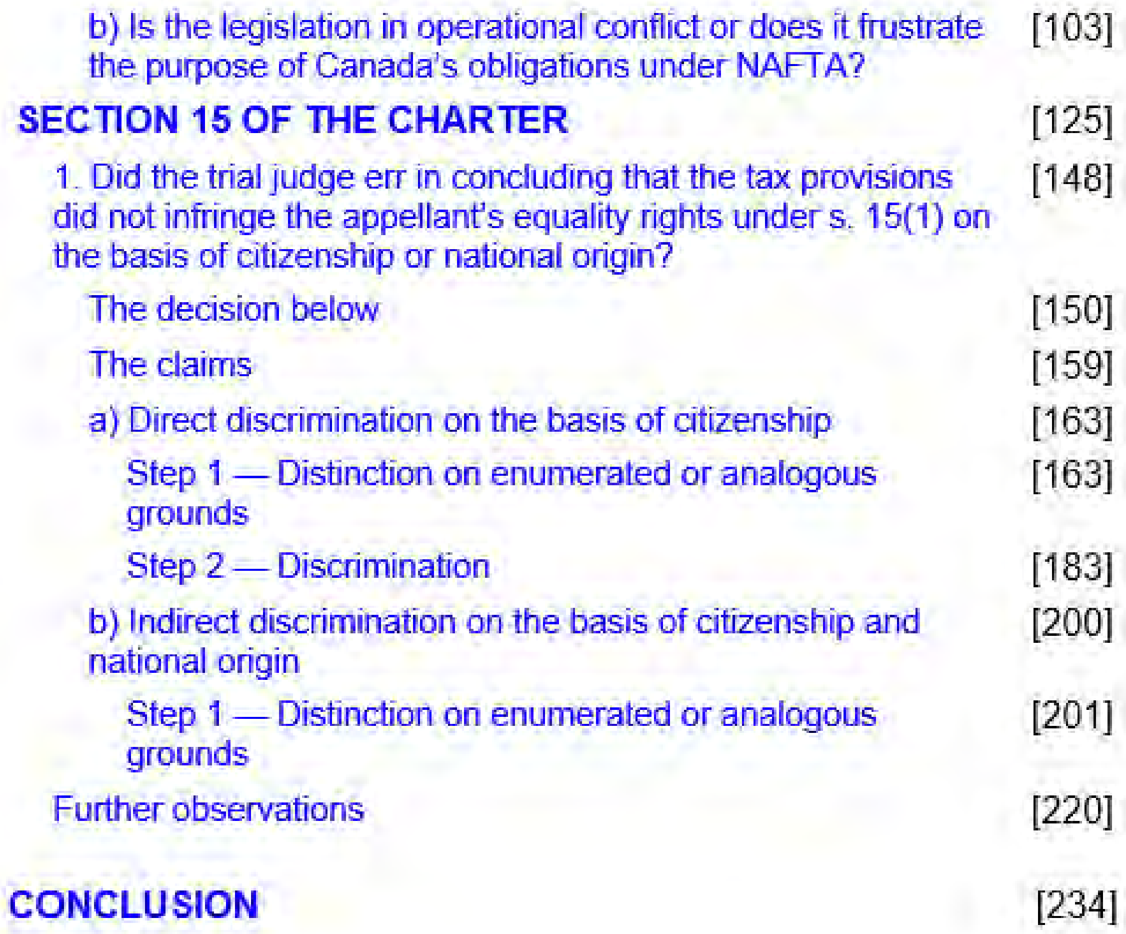
Counsel for the Appellant, (via videoconference): J.J.M. Arvay, Q.C., D. Wu, L. Brasil, A. Sharon.

Counsel for the Respondent, (via videoconference): S.A. Bevan, M.A. Witten.

Counsel for the Intervenor, (via videoconference): G. van Ert.

Table of Contents	Paragraph

THE TAX IN CONTEXT [5]
CONSTITUTIONAL AND STATUTORY PROVISIONS [11]
THE ISSUES [14]
CONSTITUTIONAL PRINCIPLES OF FEDERALISM [18]
  1. Did the trial judge err in characterizing the tax provisions and classifying them as legislation in relation to the provincial powers under ss. 92(2) and (13) of the Constitution Act? [27]
    The decision below [30]
    Characterizing the pith and substance of the law [36]
    Classifying the law [46]
      Sections 92(13) & 91(25) — Property and civil rights & aliens [50]
      Sections 92(13) & 91(2) — Property and civil rights & trade and commerce [70]
      Section 92(2) — Direct taxation [75]
    Valid provincial power [78]
  2. Did the trial judge err in concluding that the tax provisions were not inoperative under the federal paramountcy doctrine? [80]
    The decision below [82]
    a) Is the legislation in operational conflict with s. 34 of the Citizenship Act? [89]



b) Is the legislation in operational conflict or does it frustrate the purpose of Canada's obligations under NAFTA? [103]
SECTION 15 OF THE CHARTER [125]
1. Did the trial judge err in concluding that the tax provisions did not infringe the appellant's equality rights under s. 15(1) on the basis of citizenship or national origin? [148]
The decision below [150]
The claims [159]
a) Direct discrimination on the basis of citizenship [163]
Step 1 — Distinction on enumerated or analogous grounds [163]
Step 2 — Discrimination [183]
b) Indirect discrimination on the basis of citizenship and national origin [200]
Step 1 — Distinction on enumerated or analogous grounds [201]
Further observations [220]
CONCLUSION [234]

Reasons for Judgment

The judgment of the Court was delivered by

B. FISHER J.A.

1 This appeal concerns the constitutionality of an additional property transfer tax imposed by the Province of British Columbia, known as the foreign buyer's tax. At the time the tax was brought into force in August 2016, it imposed an additional 15% transfer tax on a purchaser of residential property in the Greater Vancouver Regional District who was not a Canadian citizen or permanent resident. The tax was subsequently increased to 20% and expanded to include several other regional districts in the province.

2 The appellant is a Chinese citizen who moved to Canada in 2011 and to British Columbia in June 2016. She held a valid work permit but was not a permanent resident of Canada. On July 13, 2016, she purchased a residential property in Langley, with a closing date of November 14, 2016. She was required to pay the additional 15% property transfer tax when she completed the sale and registered the transfer of the property.

3 The appellant challenges the foreign buyer's tax legislation, contained in ss. 2.01 to 2.04 of the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [the *PTTA*], on the basis that it is *ultra vires* the Province, inoperative under the federal paramountcy doctrine, and unjustifiably infringes her rights under s. 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [the *Charter*]. Her action was dismissed in the court below after a 21-day summary trial. In this appeal, she contends that the trial judge erred in his legal analysis on each issue and in his determinations on the admissibility of expert evidence.

4 For the reasons that follow, I have concluded that the impugned provisions of the *PTTA* were validly enacted by the provincial legislature and do not infringe the appellant's equality rights under s. 15 of the *Charter*.

The tax in context

5 Under the *PTTA*, a purchaser of real property in the province is required to pay a transfer tax when registering the transaction at the land title office, unless eligible for an exemption. The tax is calculated at rates of 1-5% of the fair market value of the property: 1% on the first $200,000, 2% on the value over $200,000 up to $2,000,000, 3% on the value over $2,000,000, and 5% on the value over $3,000,000.

6 There is no dispute that housing affordability has been a problem in Greater Vancouver (the GVRD) for some time. It had reached a critical level by June 2016, when prices of residential property had increased significantly from the previous 12 months -- almost 40% for single-family homes and just over 30% for condominiums. As of July 2016, the average price for a single-family home was about $1.2 million. The growth of incomes has not matched these increases.

7 The government of the day considered a number of options to calm the residential real estate market and increase affordability, and in June 2016 decided to enact several housing measures. It amended the *PTTA* to require the collection of information regarding the citizenship and permanent residence of transferees and collected data of property transfers for the period from June 10, 2016 to July 14, 2016. This data revealed that 6.6% of the residential transactions in the province during that month involved foreign buyers, which was a cumulative investment of over $1 billion. The proportion of those transactions in the GVRD was 9.7%.

8 Amendments to the *PTTA* in August 2016 required the payment of an additional 15% tax on the transfer of residential property in a specified area (the GVRD) where the purchaser is a "foreign entity" (defined as a "foreign national" or a "foreign corporation"1), a "taxable trustee"2 or both. A "foreign national" is defined by reference to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the *IRPA*], which is a person who is not a Canadian citizen or permanent resident of Canada.

9 In 2017, amendments were made to the *Property Transfer Tax Regulation*, B.C. Reg. 74/88 to exempt or refund foreign nationals who were close to obtaining permanent resident status and who lived or intended to live in the property: provincial nominees under the B.C. Provincial Nominee Program, and those who became citizens or permanent residents within one year of the registration date of the property transfer. In 2018, the tax rate was increased to 20% and expanded to include the regional districts of the Capital, Central Okanagan, Fraser Valley and Nanaimo.

10 It is important to note that the foreign buyers tax applies to only one segment of the real estate market -- residential property -- and only in areas where foreign demand has been shown to contribute to rising prices. It also applies only to individuals with no permanent or imminently permanent status in Canada or entities without ties to Canada. Foreign nationals who do not wish to pay the additional tax remain free to purchase non-residential property or residential property in areas unaffected by the tax.

Constitutional and statutory provisions

11 The subject-matters of constitutional authority between Parliament and provincial legislatures that are relevant to this case are found in the following subsections of ss. 91 and 92 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3 [the *Constitution Act*]*:*

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing

> Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say...
>
> 2. The Regulation of Trade and Commerce.
>
> ...
>
> 25. Naturalization and Aliens.
>
> ...
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say...
>
> 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
>
> ...
>
> 13. Property and Civil Rights in the Province.

12 Related to the federal power over "Naturalization and Aliens" are ss. 34 and 35 of the *Citizenship Act*, R.S.C. 1985, c. C-29:

> 34 Subject to section 35,
>
> (a) real and personal property of every description may be taken, acquired, held and disposed of by a person who is not a citizen in the same manner in all respects as by a citizen; and
>
> (b) a title to real and personal property of every description may be derived through, from or in succession to a person who is not a citizen in the same manner in all respects as though through, from or in succession to a citizen.
>
> 35 (1) Subject to subsection (3), the Lieutenant Governor in Council of a province or such other person or authority in the province as is designated by the Lieutenant Governor in Council thereof is authorized to prohibit, annul or in any manner restrict the taking or acquisition directly or indirectly of, or the succession to, any interest in real property located in the province by persons who are not citizens or by corporations or associations that are effectively controlled by persons who are not citizens.
>
> (2) The Lieutenant Governor in Council of a province may make regulations applicable in the province for the purposes of determining
>
> (a) what transactions constitute a direct or an indirect taking or acquisition of any interest in real property located in the province;
>
> (b) what constitutes effective control of a corporation or association by persons who are not citizens; and
>
> (c) what constitutes an association.
>
> (3) Subsections (1) and (2) do not operate so as to authorize or permit the Lieutenant Governor in Council of a province, or such other person or authority as is designated by the Lieutenant Governor in Council thereof, to make any decision or take any action that
>
> (a) prohibits, annuls or restricts the taking or acquisition directly or indirectly of, or the succession to, any interest in real property located in a province by a permanent resident within the meaning of subsection 2(1) of the Immigration and *Refugee Protection Act*;
>
> (b) conflicts with any legal obligation of Canada under any international law, custom or agreement;
>
> (c) discriminates as between persons who are not citizens on the basis of their nationalities, except in so far as more favourable treatment is required by any legal obligation of Canada under any international law, custom or agreement;

(d) hinders any foreign state in taking or acquiring real property located in a province for diplomatic or consular purposes; or

(e) prohibits, annuls or restricts the taking or acquisition directly or indirectly of any interest in real property located in a province by any person in the course or as a result of an investment that the Minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada under the *Investment Canada Act*.

13 The provisions of the *Charter* relevant to this case are found in ss. 1 and 15:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The issues

14 The issues before this court are essentially the same as those before the court below, and raise primarily questions of constitutional law. The appellant challenges the foreign buyer's tax legislation in three ways:

1. The tax is properly classified as legislation in relation to the federal power of naturalization and aliens under s. 91(25) of the *Constitution Act*, or alternatively the federal power over international trade and commerce under s. 91(2), and is therefore *ultra vires* the Province.
2. If the tax is *intra vires*, the legislation is inoperable by virtue of the doctrine of federal paramountcy, as it is in operational conflict with s. 34 of the *Citizenship Act* and Canada's obligations under the *Northern American Free Trade Agreement* [*NAFTA*], and it also frustrates the purpose of *NAFTA* and s. 35 of the *Citizenship Act*.
3. The tax infringes the appellant's equality rights under s. 15 of the *Charter*, as it discriminates against her on the basis of citizenship or national origin, and is not justified under s. 1.

15 The appellant also disputes some of the trial judge's rulings on the admissibility of expert evidence and his apprehension of the evidence, which is primarily related to her challenge under s. 15 of the *Charter*.

16 The Province's position is that the tax is properly classified as legislation in relation to its powers of direct taxation under s. 92(2) and property and civil rights under s. 92(13) of the *Constitution Act*, and is not in operational conflict with federal legislation. The Province also says that the legislation does not infringe the appellant's rights under s. 15 of the *Charter*, or alternatively is demonstrably justified as a reasonable limit under s. 1. Finally, the Province says that the trial judge made no error in principle or palpable or overriding errors in his evidentiary rulings or his treatment of the evidence.

17 I would define the issues as follows:

1. Did the trial judge err in characterizing the tax provisions and classifying them as legislation in relation to the provincial powers under ss. 92(2) and (13) of the *Constitution Act*?
2. Did the trial judge err in concluding that the tax provisions were not inoperative under the federal paramountcy doctrine:
    a) Is the legislation in operational conflict with s. 34 of the *Citizenship Act*?
    b) Is the legislation in operational conflict or does it frustrate the purpose of Canada's obligations under *NAFTA*?

3. Did the trial judge err
    a) in concluding that the tax provisions did not infringe the appellant's equality rights under s. 15 on the basis of citizenship or national origin;
    b) in excluding some of the expert evidence adduced by the appellant or in assessing the evidence relevant to the appellant's equality rights under s. 15 of the *Charter*?
4. Did the trial judge err in concluding that the tax provisions were nevertheless justified as a reasonable limit under s. 1 of the *Charter*?

Constitutional principles of federalism

18 I do not propose to delve into the details of the constitutional principles of federalism but rather to provide a brief overview of the principles that are relevant to the issues raised in this appeal: the doctrines of pith and substance, paramountcy, and interjurisdictional immunity.

19 A two-stage analytical framework for reviewing legislation on federalism grounds is well established in the jurisprudence: (1) determine the "pith and substance" or essential character of the law, and (2) classify that essential character by reference to the heads of power under the *Constitution Act* to determine whether the law comes within the jurisdiction of the enacting government: *Reference re: Firearms Act*, 2000 SCC 31 at para. 15; *Reference re: Pan-Canadian Securities Regulation*, 2018 SCC 48 at para. 86; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 26.

20 Determining the pith and substance requires an examination of the law's purpose and its legal and practical effects. The purpose may be ascertained by reference to statements in the legislation itself, by extrinsic material such as Hansard and government publications, or by considering the problem sought to be remedied (the "mischief" approach). The legal effects of a law flow directly from its provisions and the practical effects from their application: *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 51. This inquiry focuses on how the law sets out to achieve its purpose, not whether it is likely to do so. However, where the effects of the law diverge substantially from its stated purpose, this may suggest a purpose other than the stated purpose: *Reference re: Firearms Act* at paras. 16-18; *Reference re Genetic Non-Discrimination Act* at paras. 30, 34, 51. Therefore, it is always necessary to ascertain the true purpose of the law: *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 27.

21 Legislation may have more than one purpose, but it is the dominant purpose that is decisive to its essential character. As long as the dominant purpose is within the jurisdiction of the legislature that enacted it, its secondary objectives and effects will not impact on its constitutionality, as "merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law": *Canadian Western Bank* at para. 28, citing *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21 at para. 23.

22 The second step of the analysis is to determine whether the law as characterized falls within the jurisdiction of the enacting legislature. This requires an examination of the heads of power under ss. 91 and 92 of the *Constitution Act* and a determination of what the matter is "in relation to". This is not an exact science, as in a federal system, laws in relation to the jurisdiction of one level of government may have "incidental effects" on the jurisdiction of the other. There is also a presumption of constitutionality, which means that the appellant, as the party challenging the legislation, must show that the impugned provisions of the *PTTA* do not fall within provincial jurisdiction: *Reference re: Firearms Act* at paras. 25-26.

23 If an analysis of the pith and substance of a law has resulted in a determination of validity, the doctrine of paramountcy may come into play. As summarized by Justice Newbury in *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181:

> [17] ...Paramountcy applies where the *validly enacted laws* of two levels of government conflict or the purpose of the federal law is 'frustrated' by the operation of the provincial law. Where this occurs, the provincial law will be rendered inoperative to the extent necessary to eliminate the conflict or frustration of

> purpose. In recent decades, the Supreme Court of Canada has viewed paramountcy with greater scrutiny than older authorities suggested, and has encouraged "co-operative federalism" and a "flexible" approach to constitutional interpretation where possible consistent with the *Constitution Act*. (See, e.g. *Canadian Western Bank (2007)* at para. 24; *Québec (Attorney General) v. Canada (Attorney General) (2015)* at para. 17; *Alberta (Attorney General) v. Moloney (2015)* at para. 27; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015)* at paras. 22-3; *Reference re Pan-Canadian Securities Regulation (2018)* at para. 18; *Orphan Well Association v. Grant Thornton Ltd. (2019)* at para. 66.
>
> [Emphasis in original.]

24 A conflict will arise in one of two situations: (1) there is an operational conflict because it is not possible to comply with both laws, or (2) while it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal law: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 18 [*Moloney*]. The burden of proving a conflict is on the party alleging it, and the standard is high. As Justice Gascon said in *Moloney*:

> [27] ...In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws...

25 Although the application of the doctrine of interjurisdictional immunity is not in issue in this appeal, the doctrine has some relevance to the appellant's submissions on the scope of the federal power over aliens under s. 91(25). Justice Newbury provided a succinct summary of this doctrine in *Reference re Environmental Management Act*:

> [18] The more complex doctrine of interjurisdictional immunity applies when a *valid* law of a province trenches upon, or impairs the "core" of, a *matter* under exclusive federal jurisdiction. (In theory at least, the principle can also operate the other way around: *Canadian Western Bank (2007)* at para. 35.) In early cases involving federal undertakings, it was applied where the provincial law "sterilized" or "paralyzed" the federal undertaking, but the doctrine expanded to include laws that "affected" a "vital part" of the undertaking: *Commission du Salaire Minimum v. Bell Telephone Company of Canada (1966)* ("*Bell (1966)*"). In later cases, the doctrine was modified to require the *impairment* of a vital part of the undertaking. More recently, however, the difficulties inherent in applying the doctrine led the Supreme Court to suggest in *Canadian Western Bank (2007)* that it should be used "with restraint" in future...
>
> [Emphasis in original.]

26 Finally, when these various constitutional doctrines are applied, account must also be taken of the principle of co-operative federalism. This principle "favours, where possible, the concurrent operation of statutes enacted by governments at both levels": see *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para. 38, and the cases cited therein.

1. Did the trial judge err in characterizing the tax provisions and classifying them as legislation in relation to the provincial powers under ss. 92(2) and (13) of the Constitution Act?

27 Before addressing this issue, it is important to explain the use of the terms "alien" and "citizen". At the time of Confederation in 1867, Canadian citizenship did not exist. An "alien" was a person who was not a British Subject and "naturalization" was the granting of that status to those born outside the British Empire. The concept of Canadian citizenship was created in 1947 with a new *Citizenship Act*, and by 1976, an "alien" became more simply "a person who is not a Canadian citizen". Hence, the words "Naturalization and Aliens" in s. 91(25) of the *Constitution Act* have today a slightly different meaning in the context of Canada's independent status as a nation: see Peter Hogg, *Constitutional Law of Canada*, 5th ed. Supplemented (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2019, release 1) at 26.3 [Hogg]. The term "alien" is no longer used, but given the language in s. 91(25) and its jurisprudence, I will refer to both "alien" and "non-citizen" to mean the same thing.

28 The appellant bases her submission on the fact that the impugned tax provisions of the *PTTA* single out "aliens", and she suggests that the law would have been constitutional had it applied to all non-residents, whether citizens or non-citizens.

29 The appellant submits, as she did before the trial judge, that the tax provisions fall within the federal power in relation to "Naturalization and Aliens" under s. 91(25) of the *Constitution Act*. She contends that the purpose and intended effect of the tax is to alter the behaviour of foreign nationals (aliens) and discourage them from participating in the local real estate market, and the fact that the tax only applies to foreign nationals is sufficient to determine that it falls within s. 91(25). Alternatively, the appellant submits that the tax provisions fall within the federal power over international trade and commerce under s. 91(2), on the basis that the tax is intended to restrict the flow of foreign capital into British Columbia.

The decision below

30 The trial judge began his analysis by determining the pith and substance, or dominant purpose, of the tax provisions. In doing so, he considered extrinsic evidence contained in Hansard as well as the data collected under the *PTTA* in the month following June 10, 2016 (referenced above):

> [111] The results of the first full month collection of data showed that 9.7% of residential real estate transactions in the GVRD involved foreign nationals. This represented a transactional value of $885,393,373. In the City of Vancouver the percentage was 10.9%, 17.7% in the City of Burnaby and 18.2% in the City of Richmond.
>
> [112] With that background, the objectives of the Amendments are readily discernable from the legislative debates in British Columbia before they were enacted. For example, Minister of Finance, Michael De Jong, said that the Amendments "...are intended to make home ownership more available, more affordable. It establishes a fund for market housing and rental initiatives... (Cleary affidavit #1, pp. 85-86; Hansard p. 13379-80) and further "...the volume of [foreign] capital in the face of our economy's ability to meet that demand appears to need further measures to help our local residents afford to realize their dream of owning a home." (Cleary affidavit #1 p. 86, Hansard, p. 13387). The Minister of Finance went on to say, "I cannot say with certainty - nor will I endeavour to do so - what the additional revenues from the additional property transfer tax on foreign nationals will be, but the intention is to allocate all those revenues to the new housing priority initiatives fund." (Cleary affidavit #1 p. 87; Hansard, p. 13381.
>
> [113] In Committee, the Finance Minister stated, "We have decided to apply an additional tax measure that is significant and designed to discourage foreign nationals from purchasing residential property within Metro Vancouver." (Cleary affidavit #1, Ex. G; Hansard July 28, 2016, PM, page 46)

31 The judge found that the dominant purpose of the tax was to foster affordability of residential property in the GVRD by discouraging foreign nationals from purchasing real property in that area and thus reducing demand. He also found a secondary purpose to raise revenue for provincial purposes, including housing priority initiatives.

32 The judge rejected the appellant's argument that the tax aimed to regulate the rights of aliens and its imposition could disrupt a potential foreign buyer's immigration process. He noted that the tax did not prevent foreign nationals from owning or renting property, or living and working in the GVRD, nor did the tax apply to foreign nationals who were permanent residents or provincial nominees.

33 The trial judge concluded that the tax provisions did not fall within s. 91(25) of the *Constitution Act*. He referred to *Morgan v. Prince Edward Island (Attorney General)*, [1976] 2 S.C.R. 349, where a provincial law prohibiting ownership of large parcels of land by non-resident aliens or Canadian citizens was upheld. Chief Justice Laskin held that the residency requirement, which affected both aliens and citizens alike, related to a competent provincial object of the holding of land in the province and limiting the size of the holdings, and could not be regarded as "a sterilization of the general capacity of an alien". The judge also referred to *Ontario (Minister of Revenue) v. Hala* (1977), 18 O.R. (2d) 88 (O.N.S.C.), which followed *Morgan* in upholding a tax provision that imposed a differential property transfer tax rate for non-resident citizens and non-citizens. The judge considered the case at bar to be similar to those cases in that the foreign buyer's tax does not "sterilize the general capacity of an alien" to acquire property or to live and work in B.C." (at paras. 125, 128).

34 The judge also rejected the appellant's alternative argument that the provisions fall within the federal power to regulate trade and commerce under s. 91(2) of the *Constitution Act*. He held that the tax would not be rendered invalid if it had some impact on international trade and commerce, such as discouraging the flow of foreign capital into the purchase of real property in the province, "if its pith and substance is a matter within provincial jurisdiction" (at para. 132). He then concluded that the pith and substance of the tax was a matter within provincial jurisdiction:

> [133] As the dominant purpose of the Tax is to deter the purchase of real property in the GVRD by foreign buyers so as to address housing affordability within the GVRD and the secondary purpose of generating revenue for provincial purposes, in my view, in pith and substance it is a measure that falls within provincial jurisdiction under both s. 92 (2) and (13) of the *Constitution* and is *intra vires* the Province of British Columbia. Any effect upon international trade and commerce is incidental and does not detract from the Province's jurisdiction to enact the Tax.

35 The appellant submits that the trial judge erred in characterizing the pith and substance of the law, and in classifying the tax as a measure that falls under s. 92 of the *Constitution Act*.

Characterizing the pith and substance of the law

36 The jurisprudence recognizes that characterizing the pith and substance of a law is a challenging exercise that plays a critical role in determining how the law is to be classified. Thus the pith and substance should be described as precisely as possible to capture the law's essential character. This was discussed by Justice Karakatsanis, for the majority, in *Reference re Genetic Non-Discrimination Act*:

> [31] Characterizing a law can be a challenging exercise, especially when the challenged law has multiple features, and the court must determine which of those features is most important. Characterization plays a critical role in determining how a law can be classified, and thus the law's matter must be precisely defined: see *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 35; see also [*Reference re Assisted Human Reproduction Act,* 2010 SCC 61] (*Reference re AHRA*), at paras. 190-91, per LeBel and Deschamps JJ. Identifying the pith and substance of the challenged law as precisely as possible encourages courts to take a close look at the evidence of the law's purpose and effects, and discourages characterization that is overly influenced by classification. The focus is on the law itself and what it is really about.
>
> [32] Identifying the law's matter with precision also discourages courts from characterizing the law in question too broadly, which may result in it being superficially related to both federal and provincial heads of power, or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re AHRA*, at para. 190. Precisely defining the impugned law's matter therefore facilitates classification. But precision should not be confused with narrowness. Pith and substance should capture the law's essential character in terms that are as precise as the law will allow.

37 The need to describe the pith and substance as precisely as possible was recently reiterated by Chief Justice Wagner, for the majority, in *Reference re Greenhouse Gas Pollution Pricing Act*:

> [52] ... A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("*Assisted Human Reproduction Act*"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 U.T.L.J. 487, at p. 490.

38 The appellant's primary submission is that the trial judge's characterization of the law was too broad, in that the purpose of fostering housing affordability improperly expands its objective. She submits that the objective of housing affordability is inherently so diffused that it provides no meaningful information for the purpose of classifying the tax under a federal or provincial head of power. She cites the authorities referred to above, as well as *Rogers Communications*; *Greenhouse Gas Pollution Pricing Act (Re)*, 2019 ONCA 544, aff'd 2021 SCC 11; *Reference re: Anti-Inflation Act (Canada)*, [1976] 2 S.C.R. 373; *Chatterjee v. Ontario (Attorney General)*, 2009 SCC 19; and *Reference re Environmental Management Act*.

39 The appellant contends that housing affordability is the ultimate purpose of the tax but not its dominant purpose. She suggests two ways to characterize the tax: (1) "to reduce foreign investment in local residential real estate markets because of the assumed mischief associated with the decoupling of real estate from local incomes", or (2) "to reduce foreign investment in local real estate markets by taxing foreign nationals, thereby discouraging and deterring foreign nationals from purchasing residential real property in GVRD". She equates this latter characterization with that of the trial judge at para. 115 of his reasons, where he stated that the dominant purpose of the tax "was to discourage and deter foreign nationals from purchasing residential property in the GVRD" without mentioning housing affordability. The appellant candidly acknowledges that her submission on pith and substance turns on this point.

40 The Province submits that the determination of a law's pith and substance requires all facets of it to be considered, which includes its social and economic purposes, means, legal and practical effects, and the mischief to which it is directed. It refers to the need for a flexible approach as well as the need for sufficient precision that answers the question, "What's it all about?", citing *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at 481 and *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58 at para. 35.

41 The Province says that the trial judge made no error in characterizing the primary and secondary objectives of the tax and submits that the appellant's argument demonstrates a technical, formalistic approach that is not reflected in the authorities.

42 In this case, the impugned provisions of the *PTTA* levy a tax on foreign nationals who purchase residential real property in specified areas of the province. While it is clearly a taxing measure, the court is to look beyond this direct legal effect and inquire into the social or economic purposes the provisions were enacted to achieve: Hogg, at 15.5.

43 How precise the pith and substance of a law is to be characterized will depend on the particular law in question and the circumstances in which it was enacted. I do not accept the appellant's suggestion that the purpose of legislation is not the pith and substance, as both the purpose and the effects of the law inform its essential character. In some decisions, the purpose forms part of the language used to characterize the pith and substance: see, for example: "directed to enhancing public safety by controlling access to firearms through prohibitions and penalties" (*Reference re: Firearms Act* at para. 24); "to control systemic risks having the potential to create material adverse effects on the Canadian economy" (*Reference re: Pan-Canadian Securities Regulation* at para. 87); "concerned with the management of the Canadian fishery" (*Ward v. Canada (Attorney General)*, 2002 SCC 17 at para. 28). In others, the characterization is expressed more narrowly: see, for example: "to place conditions on, and if necessary, prohibit, the carriage of heavy oil through an interprovincial undertaking" (*Reference re Environmental Management Act* at para. 105); "the choice of the location of radio communication infrastructure (*Rogers Communication* at para. 46); "establishing minimum national standards of GHG price stringency to reduce GHG emissions" (*Reference re Greenhouse Gas Pollution Pricing Act* at para. 57). Moreover, it is also permissible to include the means in the identification of the pith and substance, where the means is so central to the legislative objective that it is necessary to properly understand the main thrust of a statute or provision: *Reference re Greenhouse Gas Pollution Pricing Act* at paras. 53-55.

44 I see no error in the trial judge's general characterization of the pith and substance of the law. While he was not always consistent in his description, it is clear from his reasons as a whole that he considered the dominant purpose of the tax to include fostering housing affordability in the GVRD. The enormous increase in the cost of housing in the GVRD was the mischief the legislature sought to remedy. The legal effect of the law was to make it more expensive for foreign nationals to purchase residential property in an area where recent data showed that this group was purchasing a significant proportion of the housing market, raising serious concerns about "hyper-commodification of real estate". I do not consider the objective of housing affordability to expand the purpose of the tax improperly or to render the characterization too broad, as this overall purpose was coupled with the more specific purpose of discouraging foreign nationals from purchasing residential property, and only in specified areas where this problem had been identified. The extrinsic evidence shows that the tax would not have been imposed had the housing affordability problem in the GVRD not reached such a critical point.

45 I would re-phrase the pith and substance of the law as follows: the dominant purpose of the tax is to address the problem of housing affordability in specified areas of the province by discouraging foreign nationals from purchasing residential property in those areas, thereby reducing demand.

Classifying the law

46 The appellant submits that the judge erred in classifying the tax as a measure under provincial jurisdiction by resting his conclusion solely on the basis of a flawed analysis that it did not fall under s. 91(25) or s. 91(2), and conducting no analysis of the scope of the provincial powers under ss. 92(2) and (13). She says that the judge's analysis was flawed because the proper test for determining whether the tax falls within s. 91(25) is to determine whether it singles out or applies only to aliens, and not whether it rises to the level of sterilizing the capacity of aliens. She contends that the cases of *Morgan* and *Hala* do not stand for the proposition that a law that does not sterilize the capacity of aliens will necessarily be within provincial jurisdiction, as the "sterilization" test is relevant only under the interjurisdictional immunity doctrine. She also contends that neither of those cases singled out aliens but rather applied to non-residents, whether citizens or not. She urges an interpretation of s. 91(25) that is similar to the jurisprudence interpreting s. 91(24) regarding "Indians", where singling out this class of subject has rendered provincial legislation *ultra vires*, citing *Leighton v. British Columbia* (1989), 35 B.C.L.R. (2d) 216 (B.C.C.A.).

47 The appellant also submits that the trial judge's brief analysis of s. 91(2) demonstrates a misunderstanding of the basic analytic steps. She says his assumption that the tax was designed to discourage the flow of foreign capital into the purchase of real property in the province would naturally result in classifying the tax under the federal trade and commerce power.

48 The Province submits that the trial judge made no error in first determining that the law did not fall within ss. 91(25) or 91(2), as the provincial powers under s. 92(13) are "broad and plenary" and the relationship of the law to the power of direct taxation under s. 92(2) is self-evident. It also submits that the judge correctly defined the scope of the federal power under s. 91(25) as requiring a threshold of "sterilization of the general capacity of aliens" and this language is not restricted to the application of interjurisdictional immunity. It relies on *Morgan* as establishing this threshold, and *Hala* as a persuasive application of it. It challenges the appellant's attempt to broaden the interpretation of the s. 91(25) power over "Aliens" by reference to the s. 91(24) power over "Indians" and says that singling out is not a recognized test and in any event is not determinative.

49 With respect to s. 91(2), the Province submits that to the extent the tax can be said to be aimed at foreign capital, it is in narrowly defined circumstances involving residential property in specified local areas, and therefore cannot be a dominant feature. It differentiates this with goods and commodities that are traded across provincial and national borders, which in any event remain susceptible to provincial regulation, citing *Reference re Securities Act*, 2011 SCC 66 at para. 115.

Sections 92(13) & 91(25) -- Property and civil rights & aliens

50 As I will explain, it is my view that the law as characterized by its dominant purpose is a matter in relation to property and civil rights under s. 92(13) of the *Constitution Act*, and only incidentally affects the federal power over aliens under s. 91(25). The tax provisions are aimed at addressing a serious problem in respect of one category of real property in the province in specified local areas. As the trial judge noted, the provisions do not apply to foreign nationals who are or are close to becoming permanent residents, nor do they prevent foreign nationals from owning or renting property, or living and working in the GVRD. The additional tax simply makes it more expensive for them to purchase some residential real estate that is already prohibitively expensive for many people.

51 The provincial power over property and civil rights has been recognized as a "broad and plenary" or significant power (see *Reference re Genetic Non-Discrimination Act* at para. 66; *Reference re Greenhouse Gas Pollution Pricing Act* at para. 49), while the federal power over aliens has been treated more narrowly. I agree with the Province that *Morgan* continues to be the most important authority on the scope of the s. 91(25) power in relation to provincial landholding laws, but it needs to be read in light of subsequent developments in the law regarding interjurisdictional immunity.

52 Prior to *Morgan*, the scope of s. 91(25) regarding aliens had been considered by the Judicial Committee of the Privy Council (JCPC) in two decisions involving discriminatory provincial legislation that appeared to state inconsistent principles. The first was *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580, [1899] UKPC 58, where legislation in British Columbia prohibited boys under the age of 12, all girls and women, and men of Chinese descent from working in any mine in the province. The JCPC found the provision, as it applied to men of Chinese descent, to be in pith and substance in relation to aliens and naturalized subjects. It defined s. 91(25) as investing Parliament with "exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of [men of Chinese descent] who are resident in the provinces of Canada".

53 This broad description was not repeated four years later in a case involving the validity of another British Columbia law that prohibited any "Japanese, whether naturalized or not" from voting. In *Cunningham v. Tomey Homma*, [1903] A.C. 151, [1902] UKPC 60, the JCPC did not find the pith and substance of the law to be in relation to aliens or naturalization but validly enacted under s. 92(1) (which authorized a province to amend its constitution). In doing so, they defined the s. 91(25) power more narrowly:

> Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? Yet if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of s. 91(25) would involve that absurdity. The truth is that the language in that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization, but the privileges attached to it, where these depend upon residence, are quite independent of nationality.
>
> [Emphasis added.]

54 The JCPC distinguished *Union Colliery* on the basis that the regulations there

> ... were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province.

55 *Union Colliery* was not followed in *Quong-Wing v. The King* (1914), 49 S.C.R. 440, and the extent of the "aliens" power was discussed in *Winner v. S.M.T. (Eastern) Ltd*., [1951] S.C.R. 887, a case involving interprovincial and international transportation. In examining the *Union Colliery* and *Tomey Homma* cases, Justice Rand suggested a distinction between the "incidents of the status of citizenship" and the "attributes necessarily involved in the status itself", concepts which are reflected in the judgment of Chief Justice Laskin in *Morgan*.

56 *Morgan* involved a Prince Edward Island statute that restricted the amount of land that could be owned by non-residents of the province, citizens and non-citizens. The power of the province to regulate the way in which land could be held, transferred or used was not contested. The contention was that where the province differentiated in this respect between classes of persons, and where either citizens or non-citizens were disadvantaged against those who were resident in the province, the legislation must be regarded as in pith and substance in relation to citizenship and aliens.

57 Chief Justice Laskin did not agree with that characterization. He noted that the legislation did not prevent anyone from entering the province and taking up residence there. He considered s. 24(1) of the federal *Citizenship Act* (now s. 34), which granted to aliens the right to acquire, hold and dispose of real property in the same manner and in all respects as by a citizen, stating that it was "for Parliament alone to define citizenship and to define how it may be acquired and lost": at 356. He also considered *Union Colliery*, *Tomey Homma,* and Rand J.'s observations in *Winner*. He expressed disapproval of *Union Colliery*, describing the result as "very far-reaching" and the decision in *Tomey Homma* as an attempt to recede from the literal effect of the language used in *Union Colliery*: at 361. He was not prepared to read *Union Colliery* in broad terms and observed that the reasons in *Tomey Homma* (at 362):

> ... suggested a distinction between a privilege, e.g., the franchise, which the province could grant or withhold from aliens or naturalized or even natural-born citizens, and what appeared to it to be the draconian prohibition involved in the *Union Colliery Co.* case.

58 The Chief Justice considered the case before him to be far different from those cases in that it did not involve any attempt, direct or indirect, to exclude aliens from the province or to drive out any aliens residing there. He concluded that the federal power under the *Citizenship Act* could not be invoked

> ... to give aliens, naturalized persons or natural-born citizens any immunity from provincial regulatory legislation, otherwise within its constitutional competence, simply because it may affect one class more than another or may affect all of them alike by what may be thought to be undue stringency.
>
> [Emphasis added.]

59 He defined the question as:

> ... whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalized persons so as to make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.
>
> [Emphasis added.]

60 Chief Justice Laskin equated the issue with determining the validity of provincial legislation that applied to federally-incorporated companies, stating that they were not constitutionally entitled to any advantage as against provincial regulatory legislation "so long as their capacity to establish themselves as viable corporate entities" was not precluded. He held that the law was validly enacted landholding legislation (at 365):

> In the present case, the residency requirement affecting both aliens and citizens alike and related to a competent provincial object, namely the holding of land in the province and limitations on the size of holdings (relating as it does to a limited resource), can in no way be regarded as a sterilization of the general capacity of an alien or citizen who is a non-resident, especially when there is no attempt to seal off provincial borders against entry.
>
> [Emphasis added.]

61 *Morgan* was followed in *Hala*, where the impugned law was a significantly higher tax (20%) imposed on transfers of property purchased by non-residents from that imposed on residents. Non-residents included both citizens and non-citizens, but non-resident citizens were entitled to an exemption where the property was purchased as an intended personal residence or recreational property on their return to Canada. Justice Henry found the law to be in pith and substance in relation to the acquisition and holding of land in the province, "its object being to discourage (not prohibit) absentee ownership by non-residents and by non-entitled residents of Canada". Applying the principles in *Morgan*, he found that the law did not destroy the capacity of an alien or other non-Canadian citizen to acquire or hold land, nor did it preclude entry into the province or enjoyment of the ordinary rights of those lawfully in the province. Moreover, Henry J. did not consider the additional singling out of certain non-citizens to affect the application of those principles.

62 The appellant distinguishes *Morgan* and *Hala* on the basis that the legislation considered in both applied to all non-residents, not just non-citizens, and submits that the "sterilization" language -- which later emerged in the interjurisdictional immunity doctrine -- is not applicable in the pith and substance analysis.

63 First, I am not convinced that *Morgan* and *Hala* are distinguishable on the basis that the legislation in those cases applied to non-residents more broadly. While *Morgan* was later interpreted by some to permit provinces to restrict land ownership to non-residents but not to only non-citizens,3 it does not necessarily follow that it is distinguishable on this basis. As Professor Hogg has observed, the language in *Morgan*4 suggests that the law would have been valid even if it had applied only to non-citizens. Importantly in my view, the impugned provisions in this case do not restrict foreign land ownership as did the provisions in issue in *Morgan*.

64 As for *Hala*, the distinction between non-resident citizens and non-citizens was less important given that the impugned provision did not restrict a non-resident from purchasing property in the province, and a significant exemption was available only to non-resident citizens.

65 Second, I do not agree that the principles in *Morgan* are not applicable to a pith and substance analysis of a provincial landholding law in the context of the federal power under s. 91(25). However, I have concerns about the "sterilization" language used in *Morgan* given the subsequent developments of the doctrine of interjurisdictional immunity. As reviewed above, interjurisdictional immunity operates to prevent laws enacted by one level of government from impermissibly trenching on the "unassailable core" of jurisdiction reserved for the other level of government. The doctrine originated in cases involving federal undertakings and was applied where a provincial law "sterilized" the federal undertaking. It was expanded and modified over the years to include laws that "affected", and then "impaired", a vital part of the undertaking, but more recently, the difficulties inherent in applying the doctrine led the Supreme Court of Canada to suggest that it should be used with restraint in the future: see *Reference re Environmental Management Act* at para. 18; *Canadian Western Bank; Marcotte c. Banque de Montréal*, 2014 SCC 55; Hogg at 15.8.

66 While Chief Justice Laskin's language in *Morgan* reflects this dated "sterilization" principle, he was clearly conducting a validity analysis under the pith and substance doctrine, and in doing so, he defined the scope of the federal power over aliens narrowly, restricting it to power over their essential status. He considered the issue before him to be analogous to the principles governing the validity of provincial legislation that purported to apply to federally-incorporated companies. In this context, the principles of interjurisdictional immunity and pith and substance are closely related. As Professor Hogg points out, it can be difficult to distinguish when one or the other should be applied, given that a law in relation to a provincial matter may validly "affect" a federal matter.

67 The old cases such as *Union Colliery* and *Tomey Homma* are difficult to read now given the prevailing racist attitudes reflected in the law of the day. I see *Union Colliery* as an example where the effects of the law diverged substantially from its stated purpose. In any event, it is no longer necessary to consider whether a law is so discriminatory as to amount to legislation striking at an individual's capacity, as described in *Morgan* (at 364). As this case demonstrates, problems associated with discriminatory laws may now be addressed through the rights guaranteed under s. 15 of the *Charter*. I agree with the Province that the decision in *Morgan* was a synthesis of the old cases into a more concise interpretation of the scope of the federal power over "Naturalization and Aliens" in s. 91(25) in relation to provincial landholding legislation.

68 I do not accept the appellant's submission that a provincial law that singles out non-citizens, or a subset of non-citizens, is the determinative test for invalidity in relation to s. 91(25). However, singling out is relevant to the pith and substance analysis. In *Morgan*, the court's comparison between the federal power over aliens and over federally incorporated companies demonstrates this, but confirms that such a law will be valid as long as it does not trench on the capacity of the non-citizen: see also Hogg at 15.5(b), and cases such as *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575. This is not inconsistent with some of the jurisprudence in relation to "Indians" under s. 91(24), although the scope of legislation that affects "their essential character as Indians" has been interpreted more broadly under that head of power: see, for example, *Leighton*. However, in light of the extensive jurisprudence in relation to Aboriginal rights under s. 35 of the *Constitution Act, 1982*, as well as the federal government's fiduciary responsibilities towards Indigenous people, there is good reason, in my view, not to equate the power over "Indians" with that over "Aliens".

69 As Newbury J.A. observed in *Reference re Environmental Management Act*, the determination of the dominant purpose of legislation should not be conflated with deciding whether the law "impairs" a "vital part" of a federal power (at para. 92). For this reason, I would not use "sterilization" language to define the scope of the federal power under s. 91(25), but I consider *Morgan* to be binding authority establishing that laws related to provincial land holding, which do not strike at the "essential status" of a non-citizen, may be validly enacted under the provincial power over property and civil rights under s. 92(13). The provincial law in *Morgan* restricting the amount of land that could be held by non-residents did not strike at the essential status of a non-citizen as one class of non-resident, nor did the law in *Hala* imposing a higher tax on non-resident purchasers of real property who were primarily non-citizens. Similarly, the tax provisions in this case do not strike at the essential status of the non-permanent resident class of non-citizens who are affected. The additional tax they are required to pay does not interfere with their right to live and work, or to acquire, hold and dispose of property in British Columbia.

Sections 92(13) & 91(2) -- Property and civil rights & trade and commerce

70 Because trade and commerce is carried on by means of contracts that give rise to "civil rights" over "property", the federal power over the regulation of trade and commerce has been interpreted to include interprovincial and international trade and commerce or that which affects the nation: see Hogg at 20.1.

71 The appellant's submission that the impugned tax provisions fall within the federal trade and commerce power is predicated in part on the trial judge's assumption that the tax has "some impact on international trade and commerce in that it is designed to discourage the flow of foreign capital into the purchase of real property in the province": at para. 132. She contends that a law designed to discourage the flow of foreign capital would fall within the federal trade and commerce power.

72 With respect, this argument fails to recognize that this is not the dominant purpose of the impugned provisions. I accept that "discouraging foreign nationals from purchasing residential property" may have the effect of reducing the amount of foreign capital entering the province (assuming that foreign money is used to purchase the property). However, the tax applies regardless of the source of funds. I see no error in the trial judge's conclusion that any effect upon international trade and commerce was incidental and did not disturb the constitutionality of the tax as an otherwise *intra vires* provincial law.

73 Moreover, the circumstance of the use of foreign capital to purchase residential real property within a province does not fit within the normal paradigm of trade and commerce of commodities across borders. The case authorities relied on by the appellant relate to trade in goods such as milk, eggs, petroleum, natural gas, potash and hogs: see *Attorney General for Manitoba v. Manitoba Egg and Poultry Association et al*, [1971] S.C.R. 689; *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; *Central Canada Potash Co. Ltd. et al v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; *Burns Foods Ltd. et al v. Attorney General for Manitoba et al*, [1975] S.C.R. 494. I do not see these cases as useful comparisons to the circumstances here.

74 I also see the appellant's position that the tax would have been constitutional had it been based on non-residency only as inconsistent with her submission on s. 91(2), as interprovincial trade would be affected in the same way as international trade.

Section 92(2) -- Direct taxation

75 The appellant did not seriously challenge the trial judge's characterization of the secondary purpose of the law (to raise revenue for provincial purposes), other than to question this logic in light of his recognition that the less revenue the tax raised the more successful the measure would be to deter foreign nationals from purchasing property.

76 The Province submits that a statement of pith and substance in this case must recognize that the foreign buyer's tax is in fact a tax measure that raises revenue for provincial purposes each time it is levied. It suggests that the question of whether the total revenue collected under the *PTTA* rose or fell as a result of this additional tax is not a matter that can properly be considered, "as taxes exist within an ecosystem of other tax measures".

77 The trial judge found that the secondary purpose of the tax was to raise revenue for provincial purposes, and held that this was sufficient to ground the law under s. 92(2) as well as s. 92(13). While the primary source of the provincial power is s. 92(13), I see no error in this conclusion. Where the foreign buyer's tax was payable, it clearly raised revenue for a provincial purpose that would presumably off-set revenue lost from a slower market.

Valid provincial power

78 The ultimate effect of the appellant's submissions on pith and substance is to deprive the Province of the ability to address a local problem of housing affordability by way of a measure aimed at foreign buyers. Common sense dictates that this kind of local problem requires a local solution, especially considering the fact that the tax applies only to residential property in certain districts in the province. I agree with the Province's description of the impugned provisions as a tax measure "that is embedded in the provincial land title registration system connected to private contracts for the transfer of property", and "a housing intervention addressed to local concerns with severe unaffordability of residential property in specified areas of BC".

79 As I have explained, the dominant purpose of this legislation brings it within the provincial power of property and civil rights under s. 92(13) of the *Constitution Act*, and any effects on the essential status of non-citizens, or on international trade and commerce, are incidental and do not affect its validity.

2. Did the trial judge err in concluding that the tax provisions were not inoperative under the federal paramountcy doctrine?

80 The appellant submits that the impugned tax provisions are inoperative under the paramountcy doctrine because they are in operational conflict with s. 34 of the *Citizenship Act*, which she says guarantees non-citizens equal rights as citizens to acquire and hold land. She also submits that the provisions are in operational conflict with the investor protections found in Chapter 11 of NAFTA. She says that this conflict with NAFTA also frustrates the purpose of Canada's obligations under NAFTA, as well as s. 35 of the *Citizenship Act*, which does not permit a province to restrict a non-citizen from acquiring property if the law conflicts with a legal obligation under an international agreement.

81 The appellant made similar arguments in the court below but focused more broadly on international treaties and various pieces of legislation that incorporated Canada's treaty obligations into domestic law.

The decision below

82 The trial judge recognized that the doctrine of paramountcy required a provincial law to be inoperative where it conflicts with a federal law, such that it is impossible to comply with both. He referred to the two branches described in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd*., 2015 SCC 53: operational conflict between federal and provincial legislation, and frustration of purpose of a federal law. He held that operational conflict does not arise when a federal law is permissive and a provincial law more restrictive. He concluded that s. 34

> [153] ... simply removes the common law disability of aliens to hold property and is permissive rather than restrictive in relation to provincial statutory restrictions which might be imposed on the land-owning capacity of aliens.

83 The judge considered the background of the enactment of s. 35 and considered the intention was to provide the provinces an administrative delegation of federal authority to ban foreign ownership of property on the assumption that they might otherwise not have such authority. However, he held that s. 35 had no application in this case because the section has never been proclaimed in force in British Columbia.

84 The judge found the tax provisions were "only intended to dampen demand and discourage acquisitions by foreign nationals without denying their capacity to acquire such property" and did not restrict or prohibit acquisitions (at para. 154). In doing so, he cited the following passage from *Morgan* at 364:

> I do not think that the federal power as exercised in ss. 22 and 24 of the *Citizenship Act*, or as it may be exercised beyond those provisions, may be invoked to give aliens, naturalized persons or natural-born citizens any immunity from provincial regulatory legislation, otherwise within its constitutional competence, simply because it may affect one class more than another or may affect all of them alike by what may be thought to be undue stringency. The question that would have to be answered is whether the provincial legislation, though apparently or avowedly related to an object within provincial competence, is not in truth directed to, say, aliens or naturalized persons so as to make it legislation striking at their general capacity or legislation so discriminatory against them as in effect to amount to the same thing.

85 The judge then concluded that the impugned provisions were not in conflict with s. 34 of the *Citizenship Act* because they did not "strike at the general capacity of aliens to acquire or hold property in British Columbia" (at para. 156).

86 The trial judge then addressed the appellant's argument that the tax provisions are in operational conflict with or frustrate the purpose of various pieces of federal legislation that incorporate treaty obligations of Canada into domestic law. He considered provisions of various treaties that provided for equal treatment of foreign investors operating in Canada and compensation upon expropriation of foreign-owned property.

87 Of the 37 treaties cited by the appellant, seven had federal implementing legislation that provided only a general approval of the relevant treaty. The judge held that such general approval does not have the effect of incorporating the content of the treaty into domestic law, citing *Pfizer Inc. v. Canada (T.D.)*, [1999] 4 FC 441, aff'd [1999] FCJ No 1598 (C.A.) and *Council of Canadians v. Canada (Attorney General)* (2006), 277 DLR (4th) 527 (O.N.C.A.). He also held that the implementing statutes incorporated only specific aspects of the treaties, excluding the investor protection provisions. He agreed with the Province that the provisions of the federal implementing statutes prohibiting a private cause of action were consistent with an intention of Parliament not to incorporate the investor protections into domestic law (at paras. 171-172).

88 The trial judge concluded:

> [174] Paramountcy requires the identification of a domestic federal law with which the impugned provincial legislation is in conflict and in my view the plaintiff has not succeeded in pointing to such a federal law. Accordingly, the plaintiff has not established that the Impugned Provisions are inoperative by reason of the paramountcy doctrine nor that they frustrate the purpose of a federal law.

a) Is the legislation in operational conflict with s. 34 of the Citizenship Act?

89 The *Citizenship Act* provides, in ss. 34, 35 and 37:

> 34 Subject to section 35,
>
> (a) real and personal property of every description may be taken, acquired, held and disposed of by a person who is not a citizen in the same manner in all respects as by a citizen; and
>
> (b) a title to real and personal property of every description may be derived through, from or in succession to a person who is not a citizen in the same manner in all respects as though through, from or in succession to a citizen.
>
> 35 (1) Subject to subsection (3), the Lieutenant Governor in Council of a province or such other person or authority in the province as is designated by the Lieutenant Governor in Council thereof is authorized to prohibit, annul or in any manner restrict the taking or acquisition directly or indirectly of, or the succession to, any interest in real property located in the province by persons who are not citizens or by corporations or associations that are effectively controlled by persons who are not citizens.
>
> ...
>
> 37 Sections 35 and 36 [Offences and punishment] shall come into force in any of the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, British Columbia, Prince Edward Island, Saskatchewan and Newfoundland and Labrador or in Yukon, the Northwest Territories or Nunavut on a day fixed in a

> proclamation of the Governor in Council declaring those sections to be in force in that Province or any of those territories.

90 The appellant submits that the trial judge's narrow interpretation of s. 34 of the *Citizenship Act* renders the language "in the same manner in all respects as by a citizen" superfluous. She relies on the language of s. 34 either on its own or as informed by s. 35. She says the right of a non-citizen to acquire and hold property "in the same manner in all respects as by a citizen" under s. 34 confers a right of non-discrimination in respect of the acquisition of property.

91 The appellant also submits that the legislative history of s. 35 contradicts the judge's interpretation of both s. 34 and *Morgan*. She says that s. 35 was introduced in light of *Morgan* as a statutory delegation of power to enable the provinces to restrict the property rights of foreign nationals; such a provision would be unnecessary if the provinces had the authority to do so. Because s. 35 has never been proclaimed into force in British Columbia, the appellant contends that the Province is without authority to "restrict the taking or acquisition" of property by a non-citizen. She repeats her contention that the sterilization language in *Morgan* refers to the question of constitutional applicability, not validity.

92 Finally, the appellant submits that s. 34 is not simply a permissive provision but rather provides for a positive entitlement, and the more restrictive tax provision frustrates the federal purpose, citing *Moloney* at para. 26.

93 The Province submits that the appellant's approach to paramountcy fails to recognize the principle of judicial restraint, in which "harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility", per *Lemare Lake Logging* at paras. 20-23. It submits that the trial judge was correct to interpret s. 34 of the *Citizenship Act* as no more than a reversal of the common law denial of landownership to aliens, in relation to which the tax provisions cause no conflict or frustration of purpose. The Province suggests that an equally plausible interpretation of s. 34 is that it requires equality only in relation to the capacity to take, acquire, hold and dispose of land, and not in relation to all incidental matters that arise in connection with land acquisition.

94 The Province also submits that s. 35 of the *Citizenship Act* cannot support application of the doctrine of paramountcy since it has never been proclaimed to be in force in British Columbia, citing *Schneider v. The Queen*, [1982] 2 S.C.R. 112. It says that an essential part of Parliament's intention in relation to s. 35 is embodied in s. 37, which ensures that s. 35 is not in force and operative in any province unless specifically declared to be so.

95 At common law, aliens could not hold land or pass land to their heirs. As the trial judge noted, s. 34 of the *Citizenship Act* finds its origins in the British Parliament's *Naturalization Act*, 1870, 33 Vic. c. 14 (Imp.) and the Canadian Parliament's *An Act respecting Naturalization and Aliens*, S.C. 1881, c. 13, which reversed this common law disability. The wording of this provision is essentially the same now as it was originally, except that the more modern Canadian legislation now refers to Canadian citizens rather than British Subjects.

96 The key question raised by the appellant is whether the right of an alien to hold land "in the same manner in all respects" as a citizen broadens the interpretation of s. 34 beyond the basic capacity to hold land. In interpreting this provision, I am mindful that the words must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 117. I am also mindful that the principle of cooperative federalism favours, where possible, the concurrent operation of federal and provincial statutes: *Rogers Communications* at para. 38.

97 In my view, s. 34 cannot be read in the broad manner proposed by the appellant. I agree with the trial judge that it was intended to reverse the common law disability for aliens to acquire, hold and transfer land to their heirs. I do not consider the words "in the same manner in all respects" to be superfluous or to produce absurd consequences. The 1881 debates in the House of Commons demonstrate that the legislators did not intend to interfere with provincial jurisdiction over property and civil rights and the effect of the *Citizenship Act* was "to remove the disability which, by the general law of the empire, all aliens labour under": *Debates of the House of Commons*, 44 Victoria 1881, Vol. XI at 1370-1371. See also J. Spencer, "The Alien Landowner in Canada" (1973) 51 Can. Bar Rev. 389 at 390-392.

98 I also see no error in the trial judge's reference to Chief Justice Laskin's comments in *Morgan* that what is now s. 34 does not give aliens immunity from valid provincial legislation regulating landholding simply because it affects aliens by undue stringency. I have already addressed the constitutional validity of the tax provisions.

99 I do not accept the appellant's submission that s. 35 and its legislative history contradict the trial judge's interpretation of s. 34 and *Morgan*. The impetus for s. 35 was interest of some provinces in the 1970s to prohibit foreign or non-resident ownership of land. In May 1973, a federal-provincial committee was formed to identify legal, constitutional and land use problems related to foreign and non-resident land ownership and examine ways for the federal and provincial governments to cooperate in order to "avoid possible legal and constitutional difficulties": Federal-Provincial Committee on Foreign Ownership of Land: Report to the First Ministers (Ottawa: Information Canada, 1975). At the time this Report was written, *Morgan* was under appeal to the Supreme Court of Canada, and the constitutional authority to legislate land ownership by aliens was considered to be uncertain. At pp. 29-30 of the Report:

> Although none of the decided cases regarding Parliament's exclusive power over aliens is conclusive, some courts have indicated that it extends to certain of their rights, privileges and disabilities. Other courts have indicated that provincial legislatures may deal with certain of these rights, privileges and disabilities. It was noted that while foreigners are subject to provincial legislation of general application, it could be argued that laws restricting aliens right to hold land on the ground of alienage might not meet this test. The recent decision of the Supreme Court of Prince Edward Island in banco [*Morgan*] upholding a provincial statute restricting land ownership in the province on the ground that it affected aliens only incidentally would seem to support this view... The extensive legislative power of provinces to regulate land ownership under sections 92(13) and 92(16) might not in itself invalidate legislation directed specifically at foreigners. However, the opinions of the delegations are divided on this subject. It is possible that certain provincial laws treating aliens differently from other persons might be upheld if they could be seen as rationally related to some legitimate provincial object, such as the disposition of interests in provincial Crown lands.
>
> [Underline in original.]

100 A number of possible measures were considered, both provincial and federal. Despite the reservations of some provinces regarding the extent to which provincial land jurisdiction is limited by the federal power over aliens5, the Committee noted that "some delegation of administrative authority from the federal government to the provinces" could avoid any constitutional uncertainties and facilitate provincial control over foreign land acquisitions (at p. 41).

101 The legislative record of the debates in the House of Commons and the Senate reflects these differing opinions and indicates an intent to provide the provinces an administrative delegation of federal authority to prohibit foreign ownership of land on the assumption that they might not otherwise have the authority.6 I agree with the Province's submission that s. 35 was enacted as a failsafe mechanism and not a determination of the scope of s. 34. Moreover, s. 37 of the *Citizenship Act* requires the Governor in Council to proclaim s. 35 into force in individual provinces, and to date this has only occurred in Alberta and Manitoba. The purpose of these individual proclamations is not clear, but the Province's suggestion that s. 37 was enacted in response to "provincial reticence" about the necessity or even the validity of the federal administrative delegation makes sense.

102 In any event, it is not necessary in the context of this appeal to decide whether the province has constitutional authority to prohibit foreign ownership of land. As I have already determined, the tax provisions here do not prohibit aliens from acquiring and holding land but simply impose a more stringent requirement on them to pay a higher transfer tax on purchase. Therefore, they are not in operational conflict with s. 34 of the *Citizenship Act*.

b) Is the legislation in operational conflict or does it frustrate the purpose of Canada's obligations under NAFTA?

103 The appellant says that the focus of her argument before the trial judge was on NAFTA, such that any potential conflicts with other treaties could be determined as part of a common issues trial following certification of the action as a class proceeding, but the judge failed to address this principal argument. She submits that the tax provisions conflict with the national treatment provision in Chapter 11 of NAFTA, and NAFTA has statutory effect either through s. 35(3)(b) of the *Citizenship Act*7 or the *NAFTA Implementation Act*, S.C. 1993, c. 44 [the *Act*].

104 In the Province's submission, paramountcy requires identification of a domestic federal law that conflicts with a provincial law. It says that Chapter 11 of NAFTA has not been incorporated into domestic law; nor does s. 35 of the *Citizenship Act*, unproclaimed in B.C., render the tax provisions inoperative.

105 It is my view that the appellant's argument on this issue cannot succeed for two main reasons.

106 First, the tax provisions cannot frustrate the purpose of s. 35 of the *Citizenship Act*, as s. 35 has no legal effect in this province. As the Supreme Court of Canada held in *Schneider,* no issue of paramountcy or conflict arises in the absence of operative federal legislation. Unless and until s. 35 is proclaimed into force in British Columbia, the "field is clear" for the application of the tax provisions. An unproclaimed portion of a statutory provision may be relevant to interpreting the provision as a whole (see, for example, the dissenting reasons of Ritchie J. in *Criminal Law Amendment Act, Reference*, [1970] S.C.R. 777 at 797), but it is not relevant to the frustration of purpose branch of the paramountcy analysis.

107 Second, the national treatment provision in Chapter 11 of NAFTA has not been implemented into federal domestic law under the *NAFTA Implementation Act*. As discussed below, while the purpose of the *Act* is to implement NAFTA, it does not do so by implementing the whole of the agreement. Rather, it implements portions of the agreement through amendments to numerous pieces of legislation, none of which address Chapter 11 generally.8 The *Act* contains a general approval provision in s. 10, which does not suffice, on its own, to implement treaty provisions: see Hogg at 11.4; Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008) at 245-246; *British Columbia (Attorney General) v. Canada (Attorney General); An Act Respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41 [*Vancouver Island Railway*]; *Pfizer*; *Council of Canadians* at para. 25.

108 The national treatment provision, contained in Article 1102 of NAFTA's Chapter 11, provides that "[e]ach Party shall accord to investors of another Party treatment no less favourable than it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments". For the purpose of this analysis, I will assume that the tax provisions in issue here are inconsistent with this treaty obligation.

109 It is well established (and not disputed) that international treaties are not part of Canadian law unless they have been implemented domestically, most often by statute, enacted by either Parliament or a provincial legislature depending on the subject matter9: *Canada (AG) v. Ontario (AG)*, [1937] UKPC 6 [*Labour Conventions*]; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 69; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para. 149; *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 159 (in dissenting reasons). Therefore, legislation that is inconsistent with a treaty obligation may attract consequences for Canada at international law but the breach of a treaty is irrelevant to the rights of parties to litigation in the courts: see Hogg at 11.4(a).

110 The rules of statutory interpretation are to be applied in interpreting an approval provision: *Vancouver Island Railway* at 110. The appellant's argument relies on the combined effect of ss. 4 and 10 of the *NAFTA Implementation Act*, but ignores other important sections -- notably s. 9 and the whole of Part II. I agree with the Province's submission that the *Act*, properly interpreted, does not implement Chapter 11 of NAFTA.

111 Section 4 of the *Act* simply states that its purpose is to implement NAFTA and sets out its objectives:

> **4** The purpose of this Act is to implement the Agreement, the objectives of which, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to
>
>> **(a)** eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the NAFTA countries;
>>
>> **(b)** promote conditions of fair competition in the free-trade area established by the Agreement;
>>
>> **(c)** increase substantially investment opportunities in the territories of the NAFTA countries;
>>
>> **(d)** provide adequate and effective protection and enforcement of intellectual property rights in the territory of each NAFTA country;
>>
>> **(e)** create effective procedures for the implementation and application of the Agreement, for its joint administration and for the resolution of disputes; and
>>
>> **(f)** establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of the Agreement.

112 Section 10 is the general approval provision:

> **10** The Agreement is hereby approved.

113 In the context of the legislation as a whole, these provisions do not express an intent to implement NAFTA generally, especially in light of the express provision in s. 9 and the extensive related and consequential amendments to federal legislation set out in Part II (which comprises the bulk of the *Act*, from ss. 22-241).

> **9** For greater certainty, nothing in this Act, by specific mention or omission, limits in any manner the right of Parliament to enact legislation to implement any provision of the Agreement or fulfil any of the obligations of the Government of Canada under the Agreement.

114 The reference to "national treatment" in s. 4 does not assist the appellant, as national treatment obligations appear in different contexts throughout NAFTA: for example, Articles 301 (trade in goods), 1003 (government procurement), 1202 (cross-border trade in services), 1405 (financial services) and 1703 (intellectual property).

115 Nor does the appellant's reliance on various comments in cases about general approval language in other treaties assist her, as they do not consider the specific provisions of the *NAFTA Implementation Act* in the context of the issues raised here. Moreover, at least one of the cases relied on an Empire treaty, which Canada had the power to directly enforce pursuant to s. 132 of the *Constitution Act* (see *Labour Conventions*) and which also contained clear implementing language.

116 I do not agree with the appellant's submission that *Pfizer* stands only for the proposition that aspects of international treaties that conflict with existing domestic legislation are not incorporated until the conflicting legislation is amended. In my view, the reasoning in *Pfizer* is persuasive and applicable in the context here, as the structure of the legislation in issue was similar to the *NAFTA Implementation Act*.

117 In *Pfizer*, the issue was whether an agreement on intellectual property rights that was annexed to the original Agreement establishing the World Trade Organization (the WTO Agreement) had been legislated into domestic law under the *World Trade Organization Agreement Implementation Act*, S.C. 1994, c. 47 [the *WTO Implementation Act*]. Pfizer owned a patent that was protected for 17 years under the *Patent Act*, R.S.C. 1985, c. P-4, and the annexed agreement provided for a minimum term of protection of 20 years. Pfizer sought to rely on the longer term of protection.

118 The *WTO Implementation Act* contained a purpose clause stating the purpose was to implement the WTO Agreement, the same general approval clause as s. 10 of the *NAFTA Implementation Act*, and an extensive Part II that contained amendments to a large number of federal statutes. Justice Lemieux concluded that Parliament had given legal effect to its treaty obligations "by carefully examining the nature of those obligations, assessing the state of the existing federal statutory and regulatory law, and then deciding the specific and precise legislative changes which were required to implement the WTO Agreement": at para. 45. He rejected Pfizer's argument that the combined effect of the purpose clause and the general approval clause had effectively legislated the annexed agreement into domestic law:

> [48] In short, Pfizer fails in its arguments. When Parliament said, in section 3 of the WTO Agreement Implementation Act, that the purpose of that Act was to implement the Agreement, Parliament was merely saying the obvious; it was providing for the implementation of the WTO Agreement as contained in the statute as a whole including Part II dealing with specific statutory changes. When Parliament said in section 8 of the WTO Agreement Implementation Act that it was approving the WTO Agreement, Parliament did not incorporate the WTO Agreement into federal law. Indeed, it could not, because some aspects of the WTO Agreement could only be implemented by the provinces under their constitutional legislative authority pursuant to section 92 of the *Constitution Act, 1867* [30 & 31 Vict., c. 3 (U.K.) (as am. by *Canada Act 1982*, 1982, c. 11 (U.K.), Schedule to the *Constitution Act, 1982*, Item 1) [R.S.C., 1985, Appendix II, No. 5] ...

119 I also do not agree with the appellant's submission that *Council of Canadians* is distinguishable on the basis that it involved an instance of positive integration that required positive action by way of implementing legislation, whereas this case involves a non-discrimination provision that requires only negative integration measures. These categories of positive and negative integration were discussed by Professor Monahan (as he then was) in the context of the federal trade and commerce power, more specifically Parliament's power to legislate to maintain and enhance the proper functioning of the Canadian economy, and the distinctions between negative and positive integration were drawn from trade law: see Patrick Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed. (Toronto: Irwin Law, 2017) at ch. 9. I do not see these distinctions as directly relevant to the question of whether a treaty provision has been implemented by legislation, as negative integration may require positive implementation.

120 *Council of Canadians* concerned Chapter 11 of NAFTA. Objections had been made to Canada enforcing awards made by arbitration tribunals under NAFTA, and one of the issues was whether the NAFTA tribunals had been incorporated into Canadian domestic law. NAFTA permits an investor from a NAFTA country to claim that another NAFTA country has treated the investor unfairly in violation of Chapter 11. NAFTA also provides for such claims to be resolved by an arbitration tribunal and requires each NAFTA country to provide for the enforcement of an arbitration award in its territory. The decisions of the tribunals were incorporated into Canadian domestic law by s. 50 of the *NAFTA Implementation Act*, which expressly made such awards enforceable in Canadian courts by amending the *Commercial Arbitration Act*. However, the Ontario Court of Appeal concluded that the tribunals themselves were not incorporated, as s. 10 was not sufficient to establish anything more than parliamentary approval of the treaty. The court distinguished between "parliamentary approval of a treaty" and "incorporation of a treaty into domestic law" and held that the *NAFTA Implementation Act* "clearly does the former, and just as clearly does not purport to do the latter": at para. 25. I agree with this interpretation.

121 The appellant makes several other arguments that do not focus on the *NAFTA Implementation Act* but rather suggest that no implementing statute is necessary because federal domestic law is not at variance with the obligations in Article 1102 of NAFTA. While I accept that implementing legislation may be unnecessary in some circumstances, this point is a complex one, as reflected in some academic commentary: see, for example, Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008) at 246-250; Patrick J. Monahan, Byron Shaw & Padraic Ryan, *Constitutional Law*, 5th ed. (Toronto: Irwin Law, 2017) at 311. In the context of this appeal, I do not consider it necessary to address this point. It is not possible, on the record here, to determine if all federal legislation is compliant with Article 1102, and in any event, the appellant's primary argument relies on implementation of Chapter 11 under the *NAFTA Implementation Act.*

122 I also do not consider it necessary to address the submission of the Intervenor, the International Commission of Jurists Canada, that opinion evidence on questions of international law is generally inadmissible. Neither party to this appeal endorsed the Intervenor's submission, nor did they raise any issues related to the expert evidence that was tendered on the international law issues raised in this case.

123 Therefore, I am not satisfied that the appellant has established that the tax provisions are in operational conflict with, or frustrate the purpose of Canada's obligations under NAFTA.

124 For all of these reasons, I would not accede to this ground of appeal.

Section 15 of the *Charter*

125 Section 15(1) of the *Charter* guarantees to every individual the right of equality before and under the law and the right to equal protection and equal benefit of the law without discrimination.

126 Beginning with the seminal case of *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, the philosophical premise and animating norm of the s. 15 framework is substantive equality. This premise recognizes that true equality does not necessarily result from identical treatment, as formal distinctions may be necessary in some contexts to accommodate differences between individuals and thereby produce equal treatment in a substantive sense.

127 The current iteration of the test to ground a violation of s. 15(1) requires a claimant to establish that the law (1) on its face (directly) or in its impact (indirectly), creates a distinction based on enumerated or analogous grounds; and if so, (2) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating disadvantage: *Ontario (Attorney General) v. G.*, 2020 SCC 38 at para. 43; *Fraser v. Canada (Attorney General)*, 2020 SCC 28 at paras. 40-42; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 25 [*Alliance*]; *Centrale des syndicats du Quebec v. Quebec (Attorney General)*, 2018 SCC 18 at para. 22 [*Centrale*]. An analogous ground is one that is like the enumerated grounds of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability, which illustrate personal characteristics that are immutable or changeable only at unacceptable cost to personal identity: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at 219.

128 This test has evolved over the years, but its essential substantive basis has remained constant. In *Andrews*, Justice McIntyre10 established an approach that considered three elements: (1) differential treatment between a claimant and others imposed by the law; (2) an enumerated or analogous ground as the basis for the differential treatment; and (3) discrimination in a substantive sense. He viewed discrimination as perpetuating prejudice or disadvantage on the basis of personal characteristics identified in the enumerated and analogous grounds, and stereotyping on the basis of those grounds that results in a law that does not correspond to a claimant's actual circumstances or characteristics. He also described discrimination (at 174)

> ... as a distinction, whether intentional or not but based on grounds related to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

129 The s. 15 jurisprudence that followed *Andrews* took steps to further define the concept of discrimination. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, Justice La Forest, for the court, confirmed that the principle of true equality stemming from *Andrews* permitted claims of discrimination to be based on the adverse effects of facially neutral laws -- now often referred to as claims of indirect discrimination. In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Justice Iacobucci, for the court, introduced the concept of human dignity to the discrimination analysis, describing the purpose of s. 15(1) "to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice". He also focused on a comparative approach in identifying differential treatment and a consideration of contextual factors in assessing whether a law has the effect of demeaning an individual's dignity. He identified four factors in assessing whether legislation has the effect of demeaning a claimant's dignity, not all of which would be relevant in every case: (1) pre-existing disadvantage (where it may be logical to conclude that further differential treatment would perpetuate the disadvantage); (2) relationship between the grounds and the claimant's characteristics or circumstances (generally where a enumerated or analogous ground may correspond with need, capacity or circumstances, such as disability, sex or age); (3) ameliorative purpose or effects (where exclusion of more advantaged individuals or groups may largely correspond with the greater need or different circumstances of a disadvantaged group); and (4) the nature of the interest affected (whether the distinction restricts access to a fundamental social institution or affects "a basic aspect of full membership in Canadian society"): see paras. 63-75.

130 Justice Iacobucci expanded the three elements from *Andrews* and directed courts to make the following three broad inquiries (at para. 88):

> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

131 The attempt in *Law* to employ human dignity as a legal test proved difficult to apply, and its comparative approach allowed elements of formal equality to resurface in the form of artificial comparator analyzes. In *R. v. Kapp*, 2008 SCC 41, Chief Justice McLachlin and Justice Abella, writing for the court in respect of the s. 15 analysis, restated the *Law* test more simply (at para. 17):

> (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

132 The court in *Kapp* did not consider *Law* to have imposed a new and distinctive test for discrimination, but rather affirmed the approach to substantive equality originally set out in *Andrews*:

> [23] The analysis in a particular case, as *Law* itself recognizes, more usefully focusses on the factors that identify impact amounting to discrimination. The four factors cited in *Law* are based on and relate to the identification in *Andrews* of perpetuation of disadvantage and stereotyping as the primary indicators of discrimination. Pre-existing disadvantage and the nature of the interest affected (factors one and four in *Law*) go to perpetuation of disadvantage and prejudice, while the second factor deals with stereotyping. The ameliorative purpose or effect of a law or program (the third factor in *Law*) goes to whether the purpose is remedial within the meaning of s. 15(2). (We would suggest, without deciding here, that the third *Law* factor might also be relevant to the question under s. 15(1) as to whether the effect of the law or program is to perpetuate disadvantage.)

133 The court added that the *Law* factors "should not be read literally as if they were legislative dispositions, but as a way of focusing on the central concern identified in *Andrews* -- combatting discrimination, defined in terms of perpetuating disadvantage and stereotyping": at para. 24.

134 In *Withler v. Canada (Attorney General)*, 2011 SCC 12, the court confirmed the two-step test set out in *Kapp* as an iteration consistent with *Andrews*, and clarified the role of comparator groups. Chief Justice McLachlin and Abella J., again writing for the court, removed the requirement for a claimant "to pinpoint a particular group that precisely corresponds to the claimant group except for the personal characteristic or characteristics alleged to ground the discrimination": at para. 63. They held that a claim should proceed to the second step as long as the claimant establishes a distinction based on one or more enumerated or analogous grounds, noting that establishing a distinction for an indirect discrimination claim will be more difficult. For such claims, it is necessary to establish that a law has a disproportionate negative impact on an individual or group that can be identified by factors relating to enumerated or analogous grounds: at para. 64.

135 The Chief Justice and Abella J. discussed substantive equality as rejecting "the mere presence or absence of a difference" and insisting on "going behind the façade of similarities and differences" and asking whether the characteristics on which the differential treatment is predicated are relevant considerations:

> [39] ... The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group.

136 They also confirmed that the *Law* factors may be helpful in determining whether a distinction is discriminatory, but it was not necessary to canvass them in every case, emphasizing that contextual factors will vary with the nature of the case:

> [66] ... Just as there will be cases where each and every factor need not be canvassed, so too will there be cases where factors not contemplated in *Law* will be pertinent to the analysis. At the end of the day, all factors that are relevant to the analysis should be considered. As Wilson J. said in [*R. v. Turpin*, [1989] 1 S.C.R. 1296],
>
> > In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]

137 A similar s. 15 analysis by Abella J. was accepted by a majority of the court in *Quebec v. A*, 2013 SCC 5, which found provisions in the Quebec *Civil Code* that excluded *de facto* spouses from patrimonial support rights granted to married and civil union spouses violated s. 15(1). Justice Abella noted several important features of Justice McIntyre's approach in *Andrews*: (1) the analysis of discrimination must take place within the context of the enumerated or analogous grounds; and (2) discrimination requires a distinction in treatment of different groups or individuals that involve prejudice or disadvantage. She confirmed that the test in *Kapp* was a reformulation of the *Andrews* test, but there is no rigid template; prejudice and stereotyping are two of the indicia that may help to answer the question of whether the law violates the norm of substantive equality, and not discrete elements of the test that a claimant must demonstrate: at para. 325. Justice Abella also emphasized that the inquiry should be flexible and contextual, focused on discriminatory impact and the question of "whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group": at paras. 327, 331.

138 In *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [*Taypotat*], Abella J., writing for the court, discussed the two-part test:

> [19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.
>
> [20] The second part of the analysis focuses on arbitrary - - or discriminatory -- disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:
>
> > The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]

> [21] To establish a *prima facie* violation of s. 15(1), the claimant must therefore demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "evidence that goes to establishing a claimant's historical position of disadvantage" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327.

139 In the twin pay equity cases, *Alliance* and *Centrale*, Abella J., for the majority, referred to the test described in *Taypotat* without reference to the word "arbitrary":

> Does the impugned law, on its face or in its impact, create a distinction based on enumerated or analogous grounds? If so, does the law impose "burdens or [deny] a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating ... disadvantage", including "historical" disadvantage" (*Taypotat*, at paras. 19-20).
>
> [*Alliance* at para. 25; the same test is articulated in *Centrale* at para. 22.]

140 In *Alliance*, Justice Abella considered the first step of the analysis to be neither a preliminary merits screen, nor an onerous hurdle designed to weed out claims on a technical basis, with focus to remain on the grounds of the distinction. As its purpose is to ensure that s. 15(1) is accessible to "those whom it was designed to protect", the distinction stage of the analysis should only bar claims that are not based on enumerated or analogous grounds. With respect to the second step, Justice Abella reiterated the principles from *Kapp*, *Withler* and *Quebec v. A* that it is not necessary to apply a step-by-step consideration of the *Law* factors and should focus on the impact of the distinction: at paras. 26, 28.

141 Finally, in *Fraser*, Justice Abella, again for the majority, reaffirmed that the court's jurisprudence subsequent to *Andrews* consistently applied the principle of substantive equality:

> [42] Our subsequent decisions left no doubt that substantive equality is the "animating norm" of the s. 15 framework (*Withler*, at para. 2; see also *Kapp*, at paras. 15 16; *Alliance*, at para. 25); and that substantive equality requires attention to the "full context of the claimant group's situation", to the "actual impact of the law on that situation", and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that group's members (*Withler*, at para. 43; *Taypotat*, at para. 17; see also *Quebec v. A*, at paras. 327 32; *Alliance*, at para. 28; *Centrale*, at para. 35).

142 She restated the test as follows:

> [27] ...To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:
>
> * On its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
>
> * Imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

143 *Fraser* involved a claim of indirect discrimination regarding the pension consequences of a job-sharing program, where the claimants had to demonstrate that the "seemingly neutral law" had a disproportionate adverse impact on women with children. Justice Abella noted several "observations" relevant to the first step of an indirect claim: (1) proof of a discriminatory intent is not required, nor does an ameliorative purpose shield legislation from s. 15(1) scrutiny; (2) where a claimant demonstrates that the law has a disproportionate impact on members of a protected group, there is no need to prove that the protected characteristic caused the impact, or to inquire into whether the law itself is responsible for creating the systemic disadvantages; and (3) there is no need to show that the law affected all members of the protected group in the same way: at paras. 69-75.

144 With respect to the second step, Justice Abella expressly removed any requirement for a claimant to prove that a distinction is arbitrary, describing the nature of the inquiry as follows: (1) it will usually proceed similarly in cases of direct and indirect claims, there is no rigid template, and the goal is to examine the impact of the harm caused to the affected group; (2) the focus should be on the protection of groups that have experienced exclusionary disadvantage based on group characteristics; (3) social prejudices or stereotyping are not necessary but may assist in showing that a law has negative effects on a particular group; (4) perpetuation of disadvantage is not less serious simply because it was relevant to a legitimate state objective; and (5) there is no need to prove that a distinction is arbitrary. The latter two considerations are inquiries properly left to s. 1: at paras. 76-80.

145 The Supreme Court of Canada has rendered two decisions on s. 15 since *Fraser*. In *Ontario (Attorney General) v. G.,* the court found provincial reporting requirements for a sex offender registry that treated those found not criminally responsible by reason of mental disorder (NCRMD) differently from those convicted of sexual offences to violate s. 15(1). Justice Karakatsanis, for the majority, confirmed that substantive equality focuses on the material impact of a law on members of a protected group in the context of their actual circumstances and both historical and current conditions of disadvantage:

> [43] The ultimate issue in s. 15(1) cases is whether the challenged law violates the animating norm of substantive equality (*Quebec v. A*, at para. 325, citing *Withler v. Canada (Attorney General)*, 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 2; *Fraser*, at para. 42; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 14). Substantive equality focuses both steps of the s. 15(1) analysis on the concrete, material impacts the challenged law has on the claimant and the protected group or groups to which they belong in the context of their actual circumstances, including historical and present day social, political, and legal disadvantage...
>
> ...
>
> [47] Emerging from the foundation laid in *Andrews*, substantive equality concerns itself with historical or current conditions of disadvantage, products of the persistent systemic discrimination that continues to oppress groups (*Fraser*, at para. 42). Substantive equality demands an approach "that looks at the full context, including the situation of the claimant group and ... the impact of the impugned law" on the claimant and the groups to which they belong, recognizing that intersecting group membership tends to amplify discriminatory effects (*Centrale des syndicats*, at para. 27, quoting *Withler*, at para. 40) or can create unique discriminatory effects not visited upon any group viewed in isolation. It must remain closely connected to "real people's real experiences" (*Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 53, per L'Heureux-Dubé J.): it must not be applied "with one's eyes shut" (McIntyre, at p. 103)...

146 Finally, in *R. v. C.P*., 2021 SCC 19, one of the issues involved a challenge to s. 37(10) of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, which denies young persons an automatic right of appeal that is available to adults under the *Criminal Code*. The court was divided on whether the impugned provision violated s. 15(1). Put simply, the main difference centered on whether the court should, in the step two analysis, have regard to the legislative scheme underlying the impugned provision in assessing the *actual* impact of the law on the claimant as a young person. Chief Justice Wagner (writing for Moldaver, Brown and Rowe JJ.) held that it was crucial to such an assessment (at para. 145), and concluded that the distinction was not discriminatory. Justice Abella (writing for Karakatsanis and Martin JJ.) held that such considerations were to be considered under s. 1 (at para. 96), and concluded that the distinction was discriminatory and was not saved by s. 1.11

147 With this jurisprudence in mind, I turn to the questions at issue here.

1. Did the trial judge err in concluding that the tax provisions did not infringe the appellant's equality rights under s. 15(1) on the basis of citizenship or national origin?

148 Before the trial judge, the appellant asserted a direct discrimination claim on the basis of the analogous ground of citizenship, and an indirect discrimination claim on the basis of citizenship and national origin, and more specifically a subset of buyers from Asia or China. The judge dismissed these claims and held that the tax provisions did not violate s. 15(1).

149 The appellant makes the same assertions before this court and submits the trial judge erred in several ways:

a) concluding that the distinction in this case was based on

a person's immigration status rather than citizenship;

b) failing to undertake the second step of the analysis on the basis of citizenship;

c) applying a formal, rather than a substantive, equality analysis in respect of the indirect discrimination claim; and

d) excluding expert evidence that was relevant to the indirect discrimination claim.

The decision below

150 The trial judge referred to the principles expressed in *Taypotat* and *Withler*, both which confirmed the principle that s. 15 protects substantive equality, and applied the two-step analysis referred to in those cases.

151 The judge articulated the first step as whether the tax provisions, on their face or in their impact, created a distinction on the basis of an enumerated or analogous ground. With respect to the appellant's direct discrimination claim, he found that the tax provisions created a distinction based on immigration status rather than citizenship because a distinction based on citizenship was not exclusive:

> [180] In the cases relied upon by the plaintiff to support her argument at the first stage that the Tax draws a distinction based on citizenship, the benefit or eligibility was conditional exclusively on citizenship. There was no exemption for permanent residents or Provincial nominees. In *Andrews*, [McIntyre J.] made it clear that a law that bars an entire class from certain forms of employment solely on the ground of citizenship violates the equality rights of that class.
>
> [181] No such exclusivity is present in the case at bar. The distinction drawn by the Impugned Provisions is not based solely on citizenship but also upon whether an individual is a permanent resident or is imminently entitled to permanent residency. In effect, the distinction is drawn between those persons who have a permanent entitlement to live in Canada or an imminent permanent entitlement to reside in B.C. and thus in Canada. In my view that distinction is based on a person's immigration status which has not been recognized as an analogous ground for the purpose of s. 15.

152 He noted that immigration status has not been recognized as an analogous ground because it is not immutable or changeable only at unacceptable cost to personal identity, citing *Corbiere* and *Toussaint v. Canada (Attorney General)*, 2011 FCA 213. He found this case to be similar to *Irshad (Litigation guardian of) v. Ontario (Ministry of Health)* (2001), 55 O.R. (3d) 43 (C.A.), where citizenship was one of many criteria that could qualify a person for benefits under the province's health insurance plan: at paras. 181-185. As the tax applies to a "foreign national", defined under the *IRPA* as a person who is not a Canadian citizen or a permanent resident of Canada, the judge was not satisfied that the tax drew "a broad or general distinction based on citizenship". He was also not satisfied that the tax created a distinction based on national origin because it applied equally to all foreign nationals regardless of citizenship or country of origin, and many within this group -- those who have permanent residence status or are Provincial nominees -- are not subject to it: at paras. 186-189.

153 The trial judge briefly addressed the appellant's indirect discrimination claim that the tax provisions have an adverse impact on buyers from China. He concluded that the tax was not responsible for any unequal burden on Asian persons, "due to social forces that are not connected to the Tax including demand factors or the population size of the buyers" and there was "nothing about the Tax itself that would cause Asian buyers to be taxed at a higher rate": at para. 190.

154 The judge went on to address the second step of the analysis only in relation to the appellant's indirect discrimination claim. It was his view that the group considered at the second step should be the same group identified at the first step, and because he did not accept that the tax drew a distinction based on citizenship, he only addressed this claim "for the sake of completeness". In doing so, he applied the following principles set out in *Taypotat*:

> [20] The second part of the analysis focuses on arbitrary - - or discriminatory -- disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage...

155 He also recognized that prejudice and stereotyping are two indicia that may help answer the question, and not discrete elements that a claimant must demonstrate.

156 The judge held that the appellant was required to show that the tax itself perpetuated or exacerbated racial stereotypes and prejudices, and it was not enough that these stereotypes and prejudices existed or were mentioned in public discourse at the time the tax provisions were enacted. He found the view that foreign buyers were contributing to housing unaffordability was not prejudiced in respect of any particular group, and noted that all of the expert economists appeared to accept that foreign buyers had contributed to the problem. He also noted evidence of "overwhelming support" for the tax among Asians living in Greater Vancouver, and that citizens and permanent residents of Chinese descent were equally impacted by housing unaffordability and would benefit from any measures that would improve this. In that context, he concluded that the tax did not perpetuate an "Asian disadvantage".

157 The judge acknowledged that the majority of buyers after the tax provisions were enacted (until November 2017) were citizens of Asian countries, particularly China, but was not satisfied that the tax adversely affected Asian buyers:

> [201] ... As the defendant says, it is not a numbers game. Buyers from Asian countries, such as China, receive equal treatment that is proportionate to the demand from those countries. There is no burden imposed on buyers from Asian countries that is not imposed on buyers from other countries. Further, buyers from Asian countries have the same opportunity to seek permanent residency status or a provincial nomination so as to be exempt from the Tax.

158 He therefore concluded that the appellant had failed to establish that the tax is discriminatory due to a disproportionate impact on buyers from China.

The claims

159 As the jurisprudence demonstrates, violations under s. 15(1) may be direct or indirect, and usually a claim is one or the other. Here, the appellant makes both types of claims. While I do not suggest this is improper, there are several problems with the appellant's approach to this ground of appeal.

160 First, while the basis for the direct discrimination claim is clearly the analogous ground of citizenship, the basis for the indirect claim is less clear. In her factum, the appellant bases it on the enumerated grounds of race and national origin, but in oral submissions, she based it on the "intersecting" grounds of citizenship and national origin. Moreover, her arguments in respect of the indirect claim do not address the ground of national origin and focus only on "a subset of foreign nationals", which she describes as "buyers from Asian countries, especially buyers from China". Without a foundational enumerated or analogous ground, an argument based on a subset of "foreign nationals" cannot establish discrimination within the meaning of s. 15(1).

161 Second, the lack of clarity in the appellant's asserted enumerated or analogous grounds for the indirect claim is reflected throughout her argument. In respect of the subset group, she makes little distinction between buyers from Asia or China and "Asian" or "Chinese" persons, and she asserts a disproportionate impact grounded on the sad history in this province of discrimination against Asian and Chinese persons (a ground different from that asserted before the trial judge). An Asian or Chinese person may or may not be a citizen of Canada, and in the context of this case, may or may not be subject to the tax or affected by it. An Asian or Chinese person may also be part of the group for whom the tax was aimed to protect by making home ownership in the GVRD more affordable. While all members of a protected group do not have to be adversely affected by an impugned law, there must be an identifiable subgroup that is.

162 As I will explain, it is my view that the appellant has not established that the tax provisions create a distinction, whether direct or indirect, based on citizenship or national origin.

a) Direct discrimination on the basis of citizenship

Step 1 -- Distinction on enumerated or analogous grounds

163 It is clear that the impugned tax provisions directly create a distinction based on a definition of "foreign nationals". The question is whether that distinction is based on the analogous ground of citizenship.

164 The appellant submits that the trial judge's approach to a distinction based on citizenship imposes inclusivity criteria that is unsupported by *Andrews* and other case law. She says that the only relevant factor at the first step of the analysis is that all persons who pay the tax are non-citizens and it does not matter that the tax does not disadvantage all non-citizens. She cites several authorities to support the proposition that differential treatment can occur even where not all persons belonging to the protected group are equally mistreated: *Lavoie v. Canada*, [2002] 1 S.C.R. 769; *Eldridge*; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54; *Centrale*.

165 The appellant further submits that the judge's reliance on *Irshad* and *Toussaint* to ground his conclusion that the distinction was based on immigration status was misplaced. She says that *Irshad* involved a law based on residency, not citizenship, and no immigration status distinction was found in *Toussaint*.

166 The Province submits that immigration status is the only basis on which the tax provisions distinguish between transferees. It says the citizenship cases of *Andrews* and *Lavoi* e are distinguishable because the eligibility at issue in those cases was conditioned exclusively on citizenship, with no exemptions for permanent residents or other types of immigration status. It submits that *Martin* and *Centrale* establish that a distinction can be established at the level of a subset of a protected group, and do not suggest that a distinction will be drawn where the affected subset heterogeneously straddles both sides of the alleged distinction.

167 In addition to being the seminal case on s. 15 jurisprudence, *Andrews* established citizenship as an analogous ground. I agree with the appellant that *Andrews* did not establish a distinction based on citizenship that must be "perfectly inclusive". The citizenship requirement in *Andrews* did not adversely affect all non-citizens; it affected only those non-citizens who were permanent residents. The same group was adversely affected in *Lavoie*. However, there is a difference between the impact of the distinction and the basis for eligibility. In both of these cases, the group impacted was excluded from employment only on the basis of their citizenship.

168 The claimant in *Andrews* was a permanent resident who had fulfilled all the requirements for admission to the practice of law in British Columbia, except that of Canadian citizenship. The citizenship requirement had the effect of requiring permanent residents otherwise qualified to wait a minimum of three years from the date of establishing their permanent residence before being considered for admission to the Bar. This distinction was found to be discriminatory because it imposed a burden in the form of some delay on permanent residents who had acquired all or some of their legal training abroad. Justice McIntyre concluded that "[n]on-citizens, lawfully permanent residents of Canada, are ... a good example of a 'discrete and insular minority' who come within the protection of s. 15". It was in this context that he described the distinction as a "rule which bars an entire class of persons from certain forms of employment solely on the grounds of a lack of citizenship status".

169 In *Lavoie*, a provision in the federal *Public Service Employment Act*, R.S.C. 1985, c. P-33 that gave preferential treatment to Canadian citizens at a certain stage of open competitions was found to violate s. 15(1). Not only did the treatment affect only permanent residents, it did not impose a complete bar on non-citizens.

170 This case is in some respects the converse of *Andrews* and *Lavoie* in that the tax provisions apply only to those non-citizens who are *not* permanent residents. However, the citizenship distinction in both *Andrews* and *Lavoie* was obvious, given the clear citizenship requirement to be eligible for employment for otherwise qualified candidates. Even those persons who had a strong connection to the country, and were in fact permanent residents, were excluded from employment because they fell on the opposite side of the demarcation between citizens and non-citizens. In contrast, non-citizens in this case fall on both sides of the demarcation made by the tax provisions.

171 On its face, by applying the definition of "foreign national" in the *IRPA*, the tax provisions make a distinction between persons who are neither Canadian citizens nor permanent residents of Canada and others, thus including more than one criterion. Subsequent regulations provided for exemptions for provincial nominees and entitlement to refunds for transferees who become Canadian citizens or permanent residents within a year of the transfer and who reside or intend to reside in the property. These exemptions create further criteria of persons whose status as a permanent resident is imminent.

172 In my view, *Irshad* provides a helpful analysis of the meaning of immigration status. In that case, the Ontario Court of Appeal dismissed a s. 15 challenge to regulations that defined "resident" for the purpose of establishing eligibility for public health insurance on the basis that a person's immigration status is not an enumerated or analogous ground. The impugned regulations, aimed at eliminating coverage for temporary residents, linked the definition of resident to one's status under the *Immigration Act*, R.S.C. 1985, c. I-2. To be eligible, a person had to be both ordinarily resident in the province and fall within one of 11 categories of immigration status. Under the previous regulations, a person's immigration status was irrelevant as long as that person could lawfully remain in Canada.

173 Justice Doherty, writing for the court, rejected the appellants' argument that the impugned regulations violated s. 15(1) on the basis of immigration status, as this was neither a ground enumerated under s. 15 nor an analogous ground. He also rejected an argument that the definition of residency drew a distinction between Canadian citizens ordinarily resident in the province and non-citizens ordinarily resident in the province:

> [125] ... The language of the regulation does not reflect this comparison. Many non-citizens are eligible for OHIP under the definition of resident. Canadian citizenship is but one of many criteria which may bring a person within the definition of resident and make that person eligible for OHIP if he or she is ordinarily resident in Ontario.

174 He found the distinction in the regulations to be

> [134] ... a distinction between those persons who are ordinarily resident in Ontario and whose status under federal immigration law is such that they are entitled or will shortly be entitled to be permanent residents of Ontario, and those persons who are ordinarily resident in Ontario but who, by virtue of their immigration status, are not entitled to become permanent residents in Ontario.

175 Justice Doherty recognized that the immigration process must be assumed to operate within constitutional limits and within the spirit of s. 15(1), and therefore a legislature's reliance on immigration status in determining matters such as residence in the province could not be classified as discriminatory: at para. 137.

176 In my view, *Irshad* was clearly a case of a law making a distinction based on immigration status. The focus of the impugned law was residency. The regulation in issue set out 11 ways in which a person ordinarily resident in the province was eligible for insurance benefits, which included: Canadian citizenship or landed immigrant (now permanent resident) status; a Convention refugee; persons at specified stages of the process for obtaining landed immigrant status and refugee status; persons with an employment contract holding an employment authorization; and persons under certain types of Minister's permit. There were numerous ways applicants could meet the requirement of having a legal status that permitted them to legitimately intend to make their permanent home in the province.

177 While the immigration status distinction was made in a different context in *Irshad*, it has clear parallels to the present case. Here, the group subject to the tax is more narrowly defined than the individuals who met the residency requirement in *Irshad*, but the distinction in both cases applies only to the subset of non-citizens who do not have a present or imminent right to permanently reside in Canada. The Province correctly notes that a s. 15 distinction has never been recognized where citizenship is not the only criterion. It also cautions that accepting a citizenship distinction in this case would have far-reaching implications on government decisions that favour individuals who have committed to Canada for many valid purposes.12

178 Whatever the implications for government, the purpose of this first step is not to "weed out" claims on technical bases but to ensure that s. 15(1) is accessible to those whom it was designed to protect: groups that are disadvantaged in the larger social and economic context: *Taypotat* at para. 19. The enumerated or analogous grounds are critical as "constant markers of suspect decision making or potential discrimination": *Corbiere* at para. 8; *Alliance* at para. 26. Immigration status has not been recognized as an analogous ground under the principles set out in *Corbiere,* as such status is not immutable or changeable at unacceptable cost to personal identity, unlike citizenship: see *Irshad* at paras. 135-136; *Toussaint* at para. 99; *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651 at paras. 861-870. There is merit to the Province's submission that the appellant's assertion of the citizenship ground attempts to sidestep the immutability analysis.

179 Notably, the appellant did not pursue immigration status as constituting an analogous ground as an alternative argument in the appeal, other than pointing to some authority suggesting a view contrary to the cases referred to above: *Re Jaballah*, 2006 FC 115 and *Fraser v. Canada (Attorney General)*, 2005 CanLII 47783 (Ont. S.C.). However, there was no considered analysis in either case, and in *Fraser v. Canada*, the question was raised in the context of a motion to strike pleadings.

180 Respectfully, the appellant's argument that the only relevant factor is that all persons who pay the tax are non-citizens is too simplistic. Differential treatment can clearly occur among a subset of the protected group, as not all persons belonging to the protected group need be equally mistreated. The key, though, is a clear definition of the protected group defined by the applicable enumerated or analogous ground. For example, a distinction on the basis of sex may only affect pregnant women (*Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219); a distinction on the basis of disability may affect only chronic pain sufferers (*Martin*) or deaf people (*Eldridge*): see *Fraser* at paras. 72-75.

181 Here, the tax draws a distinction based on citizenship combined with another ground -- permanent residence -- that is neither an enumerated nor an analogous ground. While it is true that no citizens are required to pay the tax, non-citizens fall on both sides of the line drawn by this dual distinction.

182 Therefore, it is my view that the tax provisions draw a distinction based on immigration status, not citizenship. Indeed, an attempt to conduct step two of the analysis, as set out below, illustrates the difficulty of applying a citizenship distinction in this case, as the permanent residence "ground" distorts the analysis.

Step 2 -- Discrimination

183 The appellant submits that the tax provisions perpetuate disadvantage against non-citizens, as they impose a financial burden on non-citizens as a historically disadvantaged group. She says the tax is expressly intended to deter non-citizens from engaging in an economic activity -- home ownership -- that the trial judge acknowledged was a critical aspect of one's social identity and a potent symbol of belonging and moral worth. She further submits that the tax reinforces, perpetuates or exacerbates disadvantage, citing *Lavoie*.

184 In *Lavoie*, Justice Bastarache, writing for the majority on this issue, found that all four *Law* factors militated in favour of a violation of s. 15(1). In respect of the second factor (the relationship between the ground and the claimant's characteristics or circumstances), he found that the distinction was not based on "any actual differences between individuals" and placed an additional burden on an already disadvantaged group. He then turned to the remaining three factors (pre-existing disadvantage, ameliorative purpose or effects, and the nature of the interest affected):

> [45] ... First, while the claimants in this case are all relatively well-educated, it is settled law that non-citizens suffer from political marginalization, stereotyping and historical disadvantage. Indeed, the claimant in *Andrews*, who was himself a trained member of the legal profession, was held to be part of a class "lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated": see *Andrews, supra, per* Wilson J., at p. 152. In my view, this dictum applies

> no matter what the nature of the impugned law. Second, s. 16(4)(c) of the *PSEA* does not aim to ameliorate the predicament of a group more disadvantaged than non-citizens; rather, the comparator class in this case (unlike in *Law*, perhaps) enjoys greater status on the whole than the claimant class. Finally, the nature of the interest in this case -- namely, employment - - is most definitely one that enjoys constitutional protection. As repeatedly held by this Court, work is a fundamental aspect of a person's life, implicating his livelihood, self-worth and human dignity: see *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, *per* Dickson C.J., at p. 368, and subsequent cases. Although the scope of the affected interest in this case is fairly narrow owing to the fact that s. 16(4)(c) is limited to public sector employment and does not impose a complete bar on non-citizens, in my view the nature and scope of the affected interest still warrants constitutional protection. As stated above, work is a fundamental aspect of a person's life, and a law which operates to limit the range of employment options for non-citizens is still likely to implicate the individual's livelihood, self-worth and human dignity. Indeed, much of the discussion in this case was centered on the appellants' argument that Parliament's intention was to distinguish between citizens and non-citizens on the basis of their relative loyalty and commitment to Canada. In this context, a cursory look at the four *Law* factors suggests that s. 16(4)(c) of the *PSEA* violates s. 15(1) of the *Charter*.
>
> [Emphasis added.]

185 Justice Bastarache emphasized the importance of considering the overarching question of whether the law perpetuates the view that non-citizens are less capable or less worthy of recognition or value as human beings or members of Canadian society, and the need for "a contextualized look at how a non-citizen legitimately feels when confronted by a particular enactment":

> [52] Turning to the subjective-objective evaluation in this case, I think the claimants in this case felt legitimately burdened by the idea that, having made their home in Canada ..., their professional development was stifled on the basis of their citizenship status. Their subjective reaction to the citizenship preference no doubt differed from their reaction to not being able to vote, sit in the Senate, serve on a jury, or remain in Canada unconditionally. An obvious difference in this context is that employment is vital to one's livelihood and self-worth; another is that there is no apparent link between one's citizenship and one's ability to perform a particular job; finally, the distinction can reasonably be associated with stereotypical assumptions about loyalty and commitment to the country, even if that is not Parliament's intention...
>
> [Emphasis added.]

186 He therefore concluded:

> ... Immigrants come to Canada expecting to enjoy the same basic opportunities as citizens and to participate fully and freely in Canadian society. Freedom of choice in work and employment are fundamental aspects of this society and, perhaps unlike voting and other political activities, should be, in the eyes of immigrants, as equally accessible to them as to Canadian citizens. Discrimination in these areas has the potential to marginalize immigrants from the fabric of Canadian life and exacerbate their existing disadvantage in the Canadian labour market. This is true whether or not the discrimination operates on the basis of stereotyping; if it makes immigrants feel less deserving of concern, respect and consideration, it runs afoul of s. 15(1): see *Law, supra*, at para. 88. For these reasons, I conclude that s. 16(4)(c) of the *PSEA* violates s. 15(1) of the *Charter* and requires justification under s. 1.
>
> [Emphasis added.]

187 The appellant submits that one can replace the words "employment" with "housing" and the above reasoning applies with equal force in this case. She contends that the tax is intended to make access to homeownership less accessible to non-citizens and has the effect of perpetuating barriers to "meaningful access to what is generally available", citing *Quebec v. A* at para. 319.

188 Respectfully, I disagree. There is a significant difference between the nature of the interest affected in *Lavoie* and the interest in this case. In the context of the actual circumstances of the group of non-citizens affected by the tax, who do not have the same rights as those accorded to citizens and permanent residents to live and work in Canada, I do not see this case as simply about housing and homeownership.

189 I do not accept the appellant's submission that the tax perpetuates a disadvantage simply because a financial burden has been placed on non-citizens as a historically disadvantaged group, which is not placed on others. There is no question that a burden has been placed on some non-citizens, but the effect of that burden must be discriminatory to constitute a violation of s. 15(1).

190 I accept that in general, non-citizens suffer from political marginalization, stereotyping and historical disadvantage, and the appellant as a non-citizen can be said to be a person lacking in political power such that she is vulnerable to having her interests and rights overlooked: see *Lavoie* at para. 45, cited above. I do not accept, however, that this fact alone establishes discrimination where there has been differential treatment. As Justice Iacobucci stated in *Law*, a claimant's association with a group which has been historically disadvantaged is not conclusive of a violation under s. 15(1), as the result will depend on whether or not the distinction truly affects the dignity of the claimant: at para. 67. Within the current test, the distinction must truly disadvantage the claimant and the protected group in the full context of their actual circumstances: see *Ontario (Attorney General) v. G.* at paras. 43 and 47 (cited at para. 145 above); *Fraser* at para. 42.

191 It is here that the citizenship distinction, as asserted by the appellant, becomes blurred when permanent residents are not part of the protected group, as her position relies substantially on protections afforded to permanent residents.

192 In contrast with *Lavoie*, the nature of the interest affected in this case does not enjoy constitutional protection. Section 6 of the *Charter* draws a distinction between citizens and non-citizens, and between permanent residents and other non-citizens in respect of mobility rights:

> 6 (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.

193 There is no question that s. 6 does not deny non-citizens and non-permanent residents the protection of s. 15, which applies to "every individual". However, s. 6 may nevertheless be relevant to a s. 15 analysis. In *Irshad*, Justice Doherty considered a s. 6(2)(a) and s. 6(3)(b)13 of the *Charter* to be relevant to the s. 15 analysis because the alleged discrimination arose from a law that imposed limits on eligibility for publicly funded services:

> [98] ... The meaning to be given to one section of the Charter must be informed by the language and meaning of other provisions in the Charter: R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at p. 344, 18 D.L.R. (4th) 321; R. v. Mills, [1999] 3 S.C.R. 668 at p. 688, 180 D.L.R. (4th) 1. Distinctions which are part of and integral to the mobility right recognized in s. 6(2) and s. 6(3)(b) cannot in and of themselves be discriminatory under s. 15: Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711 at p. 736, 90 D.L.R. (4th) 289.14

194 Because s. 6(2)(a) and s. 6(3)(b) recognize that a distinction may appropriately be made between residents who meet a reasonable residency requirement and those who do not, Justice Doherty held that such a distinction would not be discriminatory under s. 15.

195 Similarly, s. 6(2) of the *Charter* recognizes that a distinction may appropriately be made between citizens and permanent residents, and non-citizens and non-permanent residents, in respect of the right to live and work in a province. In this context, the appellant's submission that the tax is intended to exclude non-citizens from the social and economic franchise of home ownership cannot be sustained. Home ownership attains value "as a potent symbol of belonging" in the context of individuals or groups with a degree of permanence in Canada. While I appreciate that the appellant, as an individual, has an immigration status that permits her to live and work in Canada, this is not a right with permanence, nor is it a right protected by the *Charter*. I would not therefore characterize the nature of the interest affected -- the purchase of residential property in the GVRD -- to be vital to the livelihood and self-worth of the affected group of non-citizens here.

196 In any event, the focus is not on the intent of the law but on its concrete and material impact on the appellant as a non-citizen in the context of the actual circumstances of this group. Although the appellant may be disadvantaged by being politically marginalized, she is part of a group of non-citizens that has chosen to purchase residential property in the GVRD despite having no permanent right to reside in the province. The evidence does not support the contention that the tax has perpetuated a disadvantage to this subset of non-citizens in being able to acquire such property. This claimant group is far different from the group of disabled residents in long-term care facilities on whom an additional financial burden (an accommodation charge) was placed in *Elder Advocates of Alberta Society v. Alberta*, 2019 ABCA 342. Moreover, there was uncontroverted evidence among the three expert economists that foreign buyers were contributing to the rapid price escalation in the GVRD during the period preceding the imposition of the tax. Given this evidence, a distinction based on citizenship (and permanent residence) cannot reasonably be associated with the stereotypical application of presumed group or personal characteristics.

197 The appellant's evidence is that the tax made her feel unwelcome in Canada, and she submits that her subjective experience should be considered, again citing *Lavoie*. However, *Lavoie* makes it clear that there must be a rational foundation for a claimant's subjective view, and in fact applies the necessary "subjective-objective" evaluation to such evidence. Important in that evaluation is the fact that there was no apparent link between one's citizenship and one's ability to perform a particular job; thus, the distinction in *Lavoie* could reasonably be associated with stereotypical assumptions about matters such as loyalty and commitment to the country.

198 Here, the appellant has not identified a negative stereotypical assumption made against the affected subset of non-citizens that is perpetuated by the tax. Unlike *Lavoie*, there is a logical link between one's citizenship (and permanent residence) and the value of housing. That said, I appreciate that the appellant's subjective experience is an important consideration, but her evidence in this regard is primarily focused on her experience as a buyer from China, a further subset of non-citizens, which is the subject of her indirect discrimination claim.

199 As the foregoing discussion demonstrates, the fact that the tax draws a distinction on both citizenship and present or imminent permanent resident status has a significant impact on the discrimination analysis. Even if the distinction can be said to be based on citizenship, it cannot be said that the tax provisions have the effect of imposing or perpetuating a real disadvantage to the group of non-citizens affected in the social and political context of this claim.

b) Indirect discrimination on the basis of citizenship and national origin

200 Given these conclusions, the appellant's indirect discrimination claim, based on the "intersecting" grounds of citizenship and national origin, suffers from the absence of a significant foundational requirement of a distinction based on enumerated or analogous grounds. The ground of national origin is closely connected to the ground of citizenship, especially in the context of this case. Neither party addressed the trial judge's conclusion that the tax does not create a distinction based on national origin. However, I will address this in relation to the appellant's indirect discrimination claim.

Step 1 -- Distinction on enumerated or analogous grounds

201 For this indirect claim, it is alleged that the impugned tax provisions, while purporting to treat all foreign nationals alike, have a disproportionate impact on "buyers from Asian countries, especially buyers from China", thereby creating a distinction between this sub-group and other foreign nationals. The question here is whether this distinction is based on an enumerated or analogous ground.

202 This first step of the analysis is focused on establishing a "distinction", in the sense that the claimant is treated differently than others by reason of a personal characteristic that falls within the enumerated grounds of s. 15(1) or grounds analogous to them. To do so in an indirect discrimination claim is generally more difficult, as a claimant must establish that a law that purports to treat everyone the same has a disproportionately negative impact on her and the claimant group, which can be identified by factors relating to enumerated or analogous grounds. The focus will be on the effect of the law and the situation of the claimant group: see *Withler* at paras. 61-64.

203 In the absence of the ground of citizenship, to establish a distinction based on indirect discrimination, the appellant must show that the tax provisions have a disproportionate negative impact on her as a member of a group based on the ground of national origin. She does not have to prove that her national origin caused the disproportionate impact or that the law affects all members of the protected group in the same way: see *Fraser* at paras. 70, 72.

204 Notably, the appellant does not explain the basis for her reliance on the ground of national origin or why the trial judge erred in concluding that the distinction was not based on this ground. She submits that an adverse discrimination claim does not depend on a distinction based on citizenship but rather, the "distinction criteria can be met by indirect discrimination". She says that the burden of the tax has a disproportionate impact on buyers from China because of the unique historic and contemporary reality of discrimination they face, and asserts that the distinction is created by this disproportionate impact. To support this argument, she refers to *Withler* at para. 64 and *Taypotat* at para. 19.

205 In my view, this is a circular argument that is not supported by these and other authorities. In no case involving an indirect discrimination claim was there a question regarding the applicable enumerated or analogous ground. In this case, there is. The appellant does not expressly relate the adverse impact to national origin, and I do not see an indirect claim as a way to enable a claimant to establish a distinction simply based on adverse impact. The same legal tests apply to both types of discrimination: *Fraser* at para. 49. A distinction, whether direct or indirect, must be based on a protected ground.

206 The jurisprudence has always required the s. 15 analysis to "take place within the context of the enumerated grounds and those analogous to them": *Andrews* at 180. As Justice Abella stated in *Fraser*:

> [30] ...Adverse discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground.
>
> [Emphasis added.]

207 In *Withler*, the court referred to an indirect claim as dealing with a law having a disproportionate impact "on a group or individual that can be identified by factors relating to enumerated or analogous grounds": at para. 64. I do not read this as in any way diminishing the requirement that the adverse impact must be on a member of a protected group. Nor is there anything in *Taypotat* that suggests otherwise. The focus at the first step is to remain on the grounds of the distinction: *Alliance* at para. 26.

208 Therefore, the appellant must establish that she is a member of a protected group, or that the subset she identifies in her indirect claim is a subset of a protected group. Otherwise, she is seeking to establish a distinction that is not protected by s. 15. In my view, she cannot do so by identifying the affected group as "buyers from China" and simply assuming that this group is a subset of a group that is protected under s. 15 on the ground of national origin.

209 The appellant challenges the trial judge's conclusion that "any unequal burden on Asian persons" was due to "social forces" and there was "nothing about the Tax itself that would cause Asian buyers to be taxed at a higher rate". She submits that this is a formal equality approach that reduces s. 15 to identical treatment. She draws an analogy with *Vriend v. Alberta*, [1998] 1 S.C.R. 493 to support the proposition that a distinction can be created by a disproportionate impact on an affected group "because of the historic and contemporary reality of discrimination" present in society.

210 There are several problems with this submission. First, the appellant does not address the trial judge's conclusion that the tax does not create a distinction based on national origin because many people of foreign national origin are not subject to the tax. The fact that many people within this group are not subject to the tax burden is an important factor. As I indicated above, national origin is closely connected to citizenship and in the context of this case, similar considerations are relevant when considering whether the law creates a distinction on this basis. A person of a national origin other than Canada may be a permanent resident (or even a citizen) of Canada, and as with citizenship, the additional criterion of permanent residence changes the nature of the distinction. I do not see how the distinction based on immigration status can apply to the direct claim but not the indirect claim.

211 Secondly, the appellant's submission confuses the factors to be considered at the first step of the analysis with those in the second step. While I recognize the potential for overlap between the two steps in adverse effects cases, it remains important that the court answer the necessary questions relevant to the particular inquiry: see *Fraser* at para. 82. Here, the disproportionate impact asserted by the appellant on appeal is a rather imprecise impact of a social disadvantage to be considered with the historic and contemporary discrimination towards Asian and Chinese people. At step one, the focus is to be on a disproportionate impact, not whether that impact perpetuates a disadvantage, and evidence is important. However, the appellant does not refer to evidence that proves this assertion, especially in the context of Asian or Chinese people without permanent ties to the community. While disproportionate impact can be proven in different ways, evidence about the situation of the claimant group and the results of the law will be especially helpful. Both types of evidence must establish more than a "web of instinct": see *Fraser* at paras. 56-60.

212 On this issue, the appellant has not established an evidentiary basis for the disproportionate impact she asserts. Instead, she focuses her argument regarding this disadvantage at step two and relies on evidence that goes to the issue of discrimination rather than disproportionate impact.15 She has not simply overlapped the two inquiries but has essentially displaced the first with the second.

213 Notably, the appellant asserted a different impact before the trial judge: that the foreign buyers who are disproportionately affected by the tax come from Asian countries, with Chinese buyers being the most affected as the group most likely to purchase real estate. The evidence clearly showed that a higher proportion of foreign buyers were from China. It was in this context that the judge concluded that the tax applies equally to all "foreign nationals" regardless of country of origin and any unequal burden on "Asian persons" was due to "demand factors or the population size of the buyers". Facially, the judge's conclusion can be said to reflect a formal equality approach, as true equality does not necessarily result from identical treatment.

214 However, the deeper question is whether the distinction is disproportionate when considered in the context of the claimant group's situation. As Justice Abella noted in *Fraser*, adverse impact discrimination violates "the norm of substantive equality" when a facially neutral law ignores the "true characteristics" of a protected group: see para. 47. The evidence did not establish that buyers from China faced social, cultural or economic barriers. Even assuming that the distinction is based on national origin, in the context of this case, the impact on buyers from China cannot be said to be disproportionate to their situation; to the contrary, it is precisely proportionate to the demand for residential property from this group and their ability to buy it. As the evidence showed, many buyers from China have access to substantial financial resources to purchase residential property in a country to which they are not permanently tied. In this context, there is no *adverse* impact.

215 Finally, I do not consider *Vriend* to be a helpful analogy to this case. *Vriend* dealt with the application of the *Charter* to a provincial human rights statute that excluded sexual orientation as a ground of discrimination, which had an adverse impact on members of the LGBTQ+ community. The court rejected an argument that any distinction was not created by law, but rather existed independently of the legislation in society. It held that the reality of discrimination against LGBTQ+ persons provided the context in which the legislative distinction was to be analyzed, and concluded that the exclusion of the ground of sexual orientation, considered in that context, had a disproportionate impact on LGBTQ+ persons.

216 Two factors distinguish *Vriend* from this case. The first is that the distinction there was created by the under-inclusiveness of the statute. Here, there is no equivalent structural deficiency in the *PTTA*, which simply imposes an additional property transfer tax on "foreign nationals" for specified kinds of transactions. While a claimant does not have to prove that the legislation creates the discrimination existing in society, she cannot rely only on historic and social circumstances, especially when those circumstances involved Asian and Chinese persons in very different situations than the claimant group here. There must be some relationship between the structure or operation of the law and the alleged disproportionate impact: see *Symes v. Canada*, [1993] 4 S.C.R. 695 at 764-765; *Eldridge* at para. 76. The second is that the distinction in *Vriend* resulted in the denial of the equal benefit and protection of the law on the basis of a recognized analogous ground (sexual orientation).16 Here, the appellant has simply assumed, without establishing, a distinction on the basis of national origin.

217 Therefore, it is my view that the appellant has not established that the tax provisions have a disproportionate impact on her because of "the unique historic and contemporary reality of discrimination" faced by buyers from China, nor has she established that she is a member of a protected group under s. 15(1).

218 The distinction drawn in this case -- immigration status -- is not based on a personal characteristic inherent in the enumerated grounds in s. 15 or those analogous to them. As Justice Abella stated in *Taypotat*:

> [19] ... Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context" ...

219 This echoes the observations of Justice McIntyre in *Andrews* at 168:

> It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s. 15 of the *Charter*. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions...

Further observations

220 In light of my conclusions, it is not necessary to address the second step of the s. 15 analysis in the indirect claim, nor is it necessary to address s. 1. However, as the appellant focused much of her submissions on these aspects of this ground of appeal, I will close with some brief observations.

221 The appellant's primary submission regarding her indirect claim of discrimination is that the tax perpetuates a social disadvantage that must be understood with reference to the history of discrimination against Chinese persons in British Columbia. In this context, she says the tax perpetuates historical exclusion of Chinese people and enflames the prejudicial stereotype that "Chinese people are the cause of housing affordability".

222 A substantial portion of the appellant's argument in relation to this relies on alleged errors by the trial judge regarding the admissibility of expert evidence. These kinds of decisions are entitled to deference absent an error in principle or an unreasonable conclusion (see *R. v. McManus*, 2017 ONCA 188). In my view, the judge considered and applied the correct legal principles (reiterated in *R. v. Bingley*, 2017 SCC 12) and generally, his rulings were reasonable.

223 The judge excluded the report of Dr. Henry Yu, a historian, which included a history of discriminatory provincial and federal laws against Chinese people up to the 1960s. It also included an opinion that anti-Chinese rhetoric remains common despite demographic changes in the Lower Mainland that have increased the number of residents of Asian ancestry; and the "pervasive public discourse" that preceded the imposition of the tax conflated "Chinese" with foreign, thereby targeting Chinese foreign buyers. The judge considered the historical portion of this report to be unnecessary and the remainder to constitute argument rather than proper expert evidence. He expressed concern about the lack of references to source materials and Dr. Yu's reliance on Google searches, and letters to editors and provincial government ministers to support his conclusions.

224 The historical portion of Dr. Yu's report was relevant to the appellant's argument and some of this history was included in other reports that were admitted.17 I agree with the appellant that the exclusion of this portion of Dr. Yu's report was unreasonable. However, the judge had reason to be concerned about partiality in respect of the remainder of the report given the lack of rigor in Dr. Yu's supporting material and his attempt to present a conclusion on the essence of the discrimination issue before the court. As Cromwell J. cautioned in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, a trial judge must be alive to the need for expert opinion evidence to be fair, objective and non-partisan:

> [32] ... The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another.

225 The judge exercised his discretion to exclude this report after hearing testimony from Dr. Yu. His assessment of that testimony and his view that the benefits of admission did not outweigh the potential harm to the trial process are entitled to considerable deference. While he ought not to have excluded the entire report, the historical facts were not in dispute and this error had little effect on the analysis.

226 The judge also excluded parts of a report by Professor Nathanael Lauster, a sociologist, which discussed housing and home ownership in Canada, immigration patterns and the integration of immigrants. He considered the professor's review of Hansard and provincial government documents and his opinion on the legislative debates regarding the imposition of the tax to exceed the boundaries of an expert report by supplanting the court's role in interpreting government documents. He considered an opinion that the tax impeded the immigration process of a significant portion of immigrants, "especially those who use the purchase of a home as an anchoring point for a longer-term project of immigration" to be unsupported by empirical evidence. The judge excluded an opinion on whether the law had perpetuated or provoked any historical stereotypes or biases against immigrants to be the ultimate issue for the court to decide, and also outside the witness's area of expertise.

227 I see no basis for this court to interfere with these determinations. Professor Lauster's opinion regarding the legislative and government documents was unnecessary, as judges are able to assess such evidence, his conclusion regarding the immigration process was demonstrated in cross-examination to be unsupported by empirical data, and the issue of whether the tax is discriminatory was for the court to decide.18 It was well within the judge's discretion to reject this evidence.

228 The appellant also takes issue with the judge's acceptance of evidence of opinion polls that indicated a large majority (89%) of Asian residents in the GVRD supported the tax. She submits that polling data is inadmissible in *Charter* cases because its purpose is to protect constitutional rights, particularly when those rights affect minorities, citing *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 860. She contends that there is no support for the notion that a law cannot disadvantage a certain group even if the majority of that group supports the law.

229 I agree that evidence about majority public opinion is not to be used simply to generally support the position of a party in *Charter* litigation, which is the reason certain polling data was not admitted in *Cambie Surgeries*.19 However, statistical evidence is admissible in s. 15 cases, as discussed in *Fraser*: see paras. 56-67. Whether polling data constitutes proper statistical evidence depends on its quality and methodology, and the use to which it is put.20 In this case, the trial judge did not assess the quality and methodology of the polling data, but considered it along with other evidence adduced for the purpose of establishing the appellant's assertion that the tax perpetuates "prejudice, stereotyping, or disadvantages of Chinese people in B.C.". I do not perceive that the judge used this evidence simply to support the position of the Province, but rather as an attempt to come to grips with the appellant's reliance on disadvantage to "Chinese people", and the province's submission that support for the tax among Asian residents of Greater Vancouver undermined this assertion.

230 As I understand the record, underlying some of the judge's concerns was evidence about prejudicial public sentiments based on newspaper articles, letters to politicians, and comments from opposition MLAs, which could not qualify as reliable empirical evidence. I appreciate, however, that prejudicial comments were made in some of the public discourse leading up to the imposition of the tax, and the appellant was understandably affected by this. There is no question that the history of this province includes some shameful discriminatory laws and attitudes towards Asian and Chinese people, and prejudicial attitudes still exist.

231 That said, the current social context in which the tax provisions were enacted is very different from the discriminatory laws of the past, some of which were aimed at discouraging immigration from Asian countries. The evidence shows that the public discourse surrounding the tax, and the discussions within government, were largely focused on the extent of foreign ownership and its effect on housing affordability for residents. The concerns were confirmed by the expert evidence that showed overall foreign demand to have been one of multiple factors contributing to the escalation of the price of housing in the GVRD at the relevant time. I agree with the Province that the evidence does not support the contention that the tax was predicated on anti-Chinese prejudice. It does not send a message that Asian or Chinese people are unwelcome to immigrate. Those who do will not be subject to the tax if they purchase a home in the GVRD (or the other specified areas) once their immigration status is permanent or close to permanent.

232 The current social context also includes more recent history of government policy encouraging Asian immigration, which resulted in substantial immigration from Asian countries since 1986. Many Canadian citizens and permanent residents now living in Canada originated from China and other Asian countries. There are today multiple-generations of families of Asian descent living in British Columbia who form an important part of the communities here. They, too, are affected by the high cost of housing.

233 It is unfortunate that some of the public discourse surrounding the tax reflected unacceptable discriminatory attitudes towards Asian and Chinese persons, but there were also many people who simply sought to have a candid discussion about the problem of foreign demand on the local residential housing market. Within this discourse, government considered a range of solutions and settled on the foreign buyer's tax as one of them. In his final consideration of s. 1, the trial judge concluded that "the view that foreign nationals significantly contributed to the escalation of prices of housing in the GVRD is neither a stereotype nor a continuation of racist policies from the past". This is a conclusion supported by the substantial evidentiary record before him.

Conclusion

234 For all of these reasons, it is my opinion that the impugned tax provisions in the *PTTA* are constitutionally valid, primarily under the provincial power of property and civil rights pursuant to s. 92(13) of the *Constitution Act*, and do not violate the appellant's equality rights under s. 15 of the *Charter*. I would therefore dismiss the appeal.

B. FISHER J.A.
S.A. GRIFFIN J.A.:— I agree.
P.G. VOITH J.A.:— I agree.

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1 A "foreign corporation" is a corporation that is not incorporated in Canada or a non-public corporation that is controlled by a foreign national or a foreign corporation.

2 A "taxable trustee" is defined as "a trustee of a trust in respect of which any trustee is a foreign entity" or where a beneficiary of the trust is a foreign entity and holds a beneficial interest in the residential property upon the transfer.

3 See, for example, House of Commons Standing Committee comments on Bill C-20, *An Act respecting citizenship*, March 25, 1976 at pp. 45:11; 45:15; Senate Debates, April 29, 1976 at 2074.

4 That the federal power could not be invoked to give "aliens, naturalized persons or natural-born citizens" immunity from provincial legislation "simply because it may affect one class more than another or may affect all of them alike".

5 British Columbia, in particular, expressed the view that the province had the constitutional authority to prohibit land ownership by persons other than Canadian citizens and landed immigrants (now permanent residents): see British Columbia Position Paper on Foreign Ownership of Land, May 1973.

6 See *House of Commons Debates*, 30-1, Vol. VI (21 May 1975) at 5989-5990; 8 December 1975 at 9817-9818; *Senate Debates*, 20-1, Vol. III (29 April 1976) at 2074; 28 June 1976 at 2265-2267; 29 June 1976 at 2279-2286; 30 June 1976 at 2310; Standing Senate Committee on Foreign Affairs, *Senate Debates,* 30-1, No. 37 (8 June 1976) at 37:11-37:14.

7 Section 35(3)(b) provides that s. 35(1) does not operate so as to authorize or permit the Lieutenant Governor in Council of a province to take any action that "(b) conflicts with any legal obligation of Canada under any international law, custom or agreement". Section 35(3) is reproduced in full at para. 12.

8 Section 50 makes awards of arbitration tribunals that address claims of violations of Chapter 11 enforceable in Canadian courts by amending the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.).

9 Unless a treaty provision expresses a rule of customary international law or a peremptory norm, which is not the case here: see *Kazemi Estate* at para. 149 and *Nevsun Resources Ltd*. at paras. 165-166 (dissenting reasons).

10 Justice McIntyre's analysis of s. 15 was accepted by the majority of the court.

11 In the result, the law was found to be constitutional. Justice Kasirer agreed with Justice Abella on s. 15 but found the distinction justified under s. 1. Justice Côté did not consider it necessary to address the question.

12 The Province cites a long list of federal and provincial statutes that rely on the definition of "permanent resident" in the *IRPA* or require citizenship or permanent residence to access various benefits or rights. In British Columbia, see for example: *Home Owner Grant Act*, R.S.B.C. 1996, c. 194; *Land Act*, R.S.B.C. 1996, c. 245; *Land Tax Deferment Act*, R.S.B.C. 1996, c. 249; *Notaries Act*, R.S.B.C. 1996, c. 334.

13 Which provides that the rights specified in subsection (2) are subject to laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

14 In *Chiarelli*, a federal law authorizing the deportation of permanent residents convicted of serious offences was held not to be discriminatory because s. 6 of the Charter specifically provides for differential treatment of non-citizens for immigration purposes: see Lavoie at para. 37.

15 In particular, the appellant's evidence about experiencing discrimination in the workplace and while looking at property, as well as her perception of the public discourse about the tax.

16 The circumstances in *Eldridge* were the same: see para. 76.

17 See Report of N. Lauster, paras. 38-45; Report of D. Ley, paras. 5.0, 5.6-5.9.

18 The appellant also contended that the trial judge was unprincipled in his application of the ultimate issue rule by excluding Prof. Lauster's evidence but admitting similar evidence from the Province's experts. This is not borne out by the evidence. The Province's experts provided data and technical analyzes relating to the economic rationale for the tax, which provided evidence for the judge to assess in determining whether the tax was grounded in stereotypes.

19 In *Cambie Surgeries*, the question of polling data evidence was briefly considered in the context of a large number of documents sought to be admitted by means of a Brandeis brief. In an Appendix to the reasons, the judge noted that the "thrust of the information" in the polling data was "apparently to demonstrate that public opinion supports the plaintiffs' position in one way or another. Essentially, that the plaintiffs' position is supported by the majority of a defined group."

20 Polling data has been relied upon at the s. 1 stage of the analysis: see, for example *Thomson Newspaper Co. v. Canada*, [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12.

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Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc., [2021] B.C.J. No. 2094

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

R. Goepel, G.B. Butler and P.G. Voith JJ.A.

Heard: September 9, 2021.

Judgment: October 1, 2021.

Docket: CA47428

[2021] B.C.J. No. 2094 | 2021 BCCA 362

Between Mercantile Office Systems Private Limited and Sanjib Raj Bhandari, Appellants (Plaintiff and Defendant by Counterclaim), and Worldwide Warranty Life Services Inc., Respondent (Defendant)

(60 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Appeal by plaintiff from a decision dismissing its application to strike out the respondent's response to civil claim and counterclaim allowed -- response and counterclaim were struck with leave to amend — Appellant sued for breach of settlement agreement — In its response, respondent asserted settlement was void or that it had entered the settlement under duress — Counterclaim simply repeated all of facts in response and added no further material facts — Response and counterclaim suffered from numerous and pervasive difficulties that caused them to be prolix and both confusing and inconsistent.

Appeal by the plaintiff from a decision dismissing its application to strike out the respondent's response to civil claim and counterclaim. The appellant sued for breach of a settlement agreement. The appellant alleged it provided services to the respondent. The parties then settled the dispute by the respondent agreeing to pay a $312,500 US over time. While the respondent made some payments, the appellant alleged it ceased making payments in 2018. In its response, the respondent asserted that the settlement was void or that it had entered the settlement under duress. The counterclaim simply repeated all of the facts contained in the response and added no further material facts. The response relied on the common law of contract and the law of negligence. The counterclaim purported to rely on the common law of contract, the law of negligence, the law of fraudulent misrepresentation, and the law of conversion. The chambers judge her that the appellant's application was structure-driven, in that the appellant sought to have the respondent organize its pleadings differently. She considered that she was being asked to micro-manage the respondent's pleading style. She concluded that the respondent's pleadings were proper, complete and should not be disturbed at all.
HELD: Appeal allowed.

The response and counterclaim suffered from the numerous and pervasive difficulties that caused the response and counterclaim to be prolix and both confusing and inconsistent in various respects. They offended various mandatory requirements of the Rules and frustrated the important objects that were served by proper pleadings. Both the response and counterclaim were struck with leave to amend. The respondent had not set out its version of the facts alleged in the civil claim, or the basis upon which it had denied those Several of the paragraphs of the notice of civil claim that were denied in the response were not expressly addressed in the response, and the respondent had not set out its version of the facts that had been alleged. Although there might be instances where the material facts underlying a response and a counterclaim overlapped or mirrored each other, a counterclaim remained a distinct claim, and the material facts that pertained to that claim must be concisely identified. The claims in this counterclaim were different, broader and would necessarily rely on different material facts. Including in the response all material facts that related to both pleadings made that pleading unnecessarily lengthy and rendered the pleading confusing. The judge's assertion that a pleading could contain the evidence, as opposed to the material facts, that a party might be entitled to establish at trial, was an error in principle. The chambers judge's conclusion that the response did not set out evidence or present argument was palpably wrong.

Statutes, Regulations and Rules Cited:

Supreme Court Civil Rules, Rule 3-1(1), Rule 3-1(2), Rule 3-3, Rule 3-4, Rule 3-5, Rule 3-7, Rule 3-7(15), Rule 9-5(1), Rule 9-5(1)(b), Rule 9-5(1)(c), Rule 22-3(1)

Court Summary:

Appeal from the dismissal of an application to strike the respondent's response to civil claim and counterclaim. Held: Appeal allowed. Both the response to civil claim and counterclaim are struck out with leave to amend. The respondent's response and counterclaim suffer from numerous deficiencies that hinder the goals of the Supreme Court Civil Rules. The chambers judge erred in concluding that it was appropriate to merge the facts in both pleadings. A counterclaim is a distinct claim, and a defendant has no broad ability to adopt material facts from a response to civil claim in their counterclaim. The response incorrectly sets out evidence and arguments that are unrelated to the material facts. The pleadings offend several mandatory requirements in the Rules, they improperly plead evidence and they provide evasive responses to points of substance.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated March 29, 2021 (*Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCSC 561, Vancouver Docket S204832).

Counsel

Counsel for the Appellants: S.A. Dawson, K. Smith.

Counsel for the Respondent: A.M. Beddoes, J.M. Wiebe.

Reasons for Judgment

The judgment of the Court was delivered by

P.G. VOITH J.A.

1 Mercantile Office Systems Private Limited sued the respondent, Worldwide Warranty Life Services Inc., for breach of contract. Warranty Life filed a response to civil claim ("Response") and a counterclaim ("Counterclaim"), which added Sanjib Raj Bhandari as a defendant to the action. The appellants, Mercantile and Mr. Bhandari, applied to strike those pleadings. The application was dismissed by the chambers judge. Mercantile and Mr. Bhandari appeal that determination. For the reasons that follow, I would allow the appeal.

I. BACKGROUND

2 Mercantile sued Warranty Life on May 1, 2020, seeking judgment in the amount of Canadian currency needed to purchase $283,750US on the basis that:

a. Mercantile had supplied services to and at the request of Warranty Life in 2016, 2017 and 2018, for which Mercantile was to be paid at least $382,500US;

b. Disputes arose between the parties in July 2018 over the fees claimed, the quality of Mercantile's work and its value to Warranty Life;

c. Mercantile and Warranty Life settled their disputes on September 6, 2018, in writing. Pursuant to the settlement, Warranty Life agreed to pay over time, and Mercantile agreed to accept, $312,500US in satisfaction of Mercantile's fee;

d. The settlement involved fresh consideration and was partially implemented;

e. Warranty Life made some payments under the settlement but stopped doing so in or about December 2018, thereby breaching the settlement; and

f. Mercantile is entitled to the balance of the payments due from Warranty Life under the settlement as an account stated claim or, in the alternative, as liquidated damages for breach of the settlement agreement.

3 The Response filed by Warranty Life, properly distilled, should have been equally succinct and straightforward. Warranty Life denied, for various reasons, that Mercantile had an account stated claim. Warranty Life pleaded that it entered the settlement on the basis of various representations made by Mercantile and Mr. Bhandari that were "false, inaccurate, and misleading" and made negligently. In the result, it asserted that the settlement was void. Further, or in the alternative, Warranty Life pleaded that it had entered the settlement under duress. Under Part 3: Legal Basis, it relied on "the common law of contract and the law of negligence."

4 The Counterclaim simply repeated all of the facts contained in Part 1, Division 2 of the Response. It added no further material facts. Under Part 3: Legal Basis, Warranty Life relied on "the common law of contract, the law of negligence, the law of fraudulent misrepresentation, and the law of conversion." The Counterclaim sought, *inter alia*, various categories of damages and either the return of the shares Mr. Bhandari had received in Warranty Life pursuant to an agreement or a declaration that the shares are void.

II. STANDARD OF REVIEW

5 The appellants originally brought their application under R. 9-5(1) of the *Supreme Court Civil Rules* [*Rules*] without identifying the particular sub-paragraph they relied on, though, as a practical matter, the application appears to have been primarily addressed under subrule (b). Rule 9-5(1) states:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

6 Although decisions under subrule 9-5(1)(a) typically involve questions of law, decisions made under subrules 9-5(1)(b),(c) and (d) are generally discretionary and determined by contextual and factual considerations: *Krist v. British Columbia*, 2017 BCCA 78 at para. 24. A decision involving the exercise of judicial discretion is owed deference on appeal, unless it is clear that insufficient weight was given to relevant considerations, the decision involves a palpable and overriding error, there is an extricable error in principle or it appears that the decision may result in injustice: *Timberwolf Log Trading Ltd. v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2013 BCCA 24 at para. 19, citing *Stone v. Ellerman*, 2009 BCCA 294, leave to appeal ref'd [2009] S.C.C.A. No. 364; *Hirji v. The Owners Strata Corporation Plan VR 44*, 2020 BCCA 285 at para. 23; *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 1-6.

III. THE REASONS OF THE CHAMBERS JUDGE

7 The appellants raised numerous concerns before the chambers judge with both the Response and Counterclaim. Most of those issues are again raised on appeal. In the interest of clarity, I have chosen to address the judge's reasons in relation to each issue as I address it.

8 Generally speaking, the judge's reasons properly identified several of the concerns the applicants had raised. She referred to a number of relevant authorities that identified the role or function of pleadings. She concluded that the application alleged "technical deficiency 'in the air'." By this she meant that the applicants had not identified specific paragraphs as nonresponsive, argumentative or containing evidence. She was of the view that the application before her was "structure-driven," in that the applicants sought to have Warranty Life organize its pleadings differently. She considered that she was being asked to "micro-manage Warranty Life's pleading style". She concluded that Warranty Life's pleadings were proper, complete and should not be disturbed at all, though she granted Warranty Life leave to move a defined term from Part 3 to Part 1 of the Response. She dismissed the application before her and ordered that Warranty Life was entitled to costs of the application in any event of the cause.

IV. THE RELEVANT LEGAL FRAMEWORK

9 When considering the purpose, structure and content of a pleading, the starting point is the *Rules.* The formal requirements for both form, or structure, and content for notices of civil claim, responses to civil claim, counterclaims and third party claims are found in Rules 3-1, 3-3, 3-4 and 3-5 respectively. Each of these Rules is expressly supplemented by R. 3-7, which is found under the heading "Pleadings Generally."

10 Rules 3-1(1) and (2) provide:

> **Notice of civil claim**
>
> (1) To start a proceeding under this Part, a person must file a notice of civil claim in Form 1.
>
> **Contents of notice of civil claim**
>
> (2) A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the plaintiff against each named defendant;
>
> (c) set out a concise summary of the legal basis for the relief sought;
>
> ...
>
> (g) otherwise comply with Rule 3-7.
>
> [Emphasis added.]

11 Form 1 of Appendix A of the *Rules*, in turn, mirrors the requirements of R. 3-1(2). Its relevant parts, for the purposes of this appeal, provide:

> **Form 1 (Rule 3-1 (1))**
>
> ...
>
> **NOTICE OF CIVIL CLAIM** *[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]*
>
> ...
>
> Claim of the Plaintiff(s)
>
> **Part 1: STATEMENT OF FACTS**

[*Using numbered paragraphs,* *set out a concise statement of the material facts* *giving rise to the plaintiff's(s') claim.*]

1

2

...

Part 2: RELIEF SOUGHT

[*Using numbered paragraphs, set out the relief sought and indicate against which defendant(s) that relief is sought. Relief may be sought in the alternative.*]

1

2

Part 3: LEGAL BASIS

[*Using numbered paragraphs,* *set out a concise summary of the legal bases* *on which the plaintiff(s) intend(s) to rely in support of the relief sought and specify any rule or other enactment relied on. The legal bases for the relief sought may be set out in the alternative.*]

1

2

[Italics in original; underline emphasis added.]

12 Rules 3-3(1) and (2), which govern responses to civil claims, provide:

Filing a response to civil claim

(1) To respond to a notice of civil claim, a person must, within the time for response to civil claim referred to in subrule (3),

(a) file a response to civil claim in Form 2, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

Contents of response to civil claim

(2) A response to civil claim under subrule (1)

(a) must

(b) indicate, for each fact set out in Part 1 of the notice of civil claim, whether that fact is

(A) admitted,

(B) denied, or

(C) outside the knowledge of the defendant,

(ii) for any fact set out in Part 1 of the notice of civil claim that is denied, concisely set out the defendant's version of that fact, and

(iii) set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim,

(b) must indicate whether the defendant consents to, opposes or takes no position on the granting of the relief sought against that defendant in the notice of civil claim,

(c) must, if the defendant opposes any of the relief referred to in paragraph (b) of this subrule, set out a concise summary of the legal basis for that opposition, and

(d) must otherwise comply with Rule 3-7.

[Emphasis added.]

13 Form 2 mirrors these requirements and it provides:

Form 2 (Rule 3-3 (1))

...

RESPONSE TO CIVIL CLAIM *[Rule 22-3 of the Supreme Court Civil Rules applies to all forms.]*

...

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 -- Defendant's(s') Response to Facts *[Indicate, for each paragraph in Part 1 of the notice of civil claim, whether the fact(s) alleged in that paragraph is(are) admitted, denied or outside the knowledge of the defendant(s).]*

1 The facts alleged in paragraph(s) ....[*list paragraph numbers*]........ of Part 1 of the notice of civil claim are admitted.

2 The facts alleged in paragraph(s) ....[*list paragraph numbers*]........ of Part 1 of the notice of civil claim are denied.

3 The facts alleged in paragraph(s) ....[*list paragraph numbers*]........ of Part 1 of the notice of civil claim are outside the knowledge of the defendant(s).

Division 2 -- Defendant's(s') Version of Facts *[Using numbered paragraphs, set out the defendant's(s') version of the facts alleged in those paragraphs of the notice of civil claim that are listed above in paragraph 2 of Division 1 of this Part.]*

1

2

Division 3 -- Additional Facts *[If additional material facts are relevant to the matters raised by the notice of civil claim, set out, in numbered paragraphs, a concise statement of those additional material facts.]*

1

2

Part 2: RESPONSE TO RELIEF SOUGHT

[Indicate, for each paragraph in Part 2 of the notice of civil claim, whether the defendant(s) consent(s) to, oppose(s) or take(s) no position on the granting of that relief.]

1 The defendant(s) consent(s) to the granting of the relief sought in paragraphs ....[*list paragraph numbers*]........ of Part 2 of the notice of civil claim.

2 The defendant(s) oppose(s) the granting of the relief sought in paragraphs ....[*list paragraph numbers*]........ of Part 2 of the notice of civil claim.

3 The defendant(s) take(s) no position on the granting of the relief sought in paragraphs ....[*list paragraph numbers*]........ of Part 2 of the notice of civil claim.

Part 3: LEGAL BASIS

[Using numbered paragraphs, set out a concise summary of the legal bases on which the defendant(s) oppose(s) the relief sought by the plaintiff(s) and specify any rule or other enactment relied on. The legal bases for opposing the plaintiff's(s') relief may be set out in the alternative.]

1

2

...

[Italics in original; underline emphasis added.]

14 A similar relationship exists between Rules 3-4 and 3-5, which deal with counterclaims, responses to counterclaims and third-party claims, and Forms 3, 4 and 5. They do so in terms that are similar to Rules 3-1 and 3-3, and their accompanying forms, with respect to their prescriptive requirements, their emphasis on being concise, and the requirement that the pleading party set out the material facts they rely on.

15 Rule 22-3(1), found under the heading "Forms and Documents," provides:

> (1) The forms in Appendix A or A.1 must be used if applicable, with variations as the circumstances of the proceeding require, and each of those forms must be completed by including the information required by that form in accordance with any instructions included on the form.
>
> [Emphasis added.]

16 It will be apparent that the foregoing rules and forms address both issues of structure and content. The requirement in R. 22-3(1) to adhere, "with variations as the circumstances of the proceedings require," to the structure prescribed by a specific rule and its corresponding form is clear.

17 Aspects of the content of a pleading are also prescribed. Other types of content are prohibited. Thus, for example, we have seen that R. 3-1(2) states that a claimant "must" set out each of: (a) "a concise statement of the material facts giving rise to the claim"; (b) "the relief sought by the plaintiff against each named defendant"; and (c) "a concise summary of the legal basis for the relief sought". Form 1 mirrors these requirements and this language.

18 Rule 3-3(2) and Form 2 and R. 3-4(1) and Form 3 similarly mandate aspects of the contents of a response to civil claim and a counterclaim respectively.

19 Rule 3-7 contains numerous requirements and prohibitions. For present purposes the following subrules are relevant:

> (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
>
> ...
>
> (6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.
>
> (7) Subrule (6) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.
>
> ...
>
> (12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that
>
> > ...
> >
> > (b) if not specifically pleaded, might take the other party by surprise,
>
> ...
>
> (15) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party must not do so evasively but must answer the point of substance.
>
> [Emphasis added.]

20 I have addressed these various Rules and their accompanying forms at some length because they establish how comprehensive and prescriptive the requirements for specific categories of pleadings are. These formal and content-based requirements are neither anachronistic nor technical. Instead, they are necessary and serve to further the purposes of the *Rules*. Those purposes and their importance have been expressed on numerous occasions by both this Court and by trial judges.

21 Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.

22 Pleadings also give effect to the underlying policy objectives of the *Rules*, which are to ensure the litigation process is fair and to promote justice between the parties: *Wong v. Wong*, 2006 BCCA 540 at paras. 22-23. They enable the parties and the court "to ascertain with precision the matters on which parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision": *1076586 Alberta Ltd. v. Stoneset Equities Ltd.*, 2015 BCCA 182 at para. 55, citing D.B. Casson & I.H. Dennis, eds, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed (London: Stevens & Sons, 1975) at 75-76.

23 For the court, pleadings serve the ultimate function of defining the issues of fact and law that will be determined by the court. In order for the court to fairly decide the issues before them, the pleadings must state the material facts succinctly: *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 15-22; *Shoolestani v. Ichikawa*, 2018 BCCA 155 at para. 30; *Weaver v. Corcoran*, 2017 BCCA 160 at para. 63. They must be organized in such a way that the court can understand what issues the court will be called upon to decide: Frederick M. Irvine, ed., *McLachlin & Taylor, British Columbia Practice*, 3rd ed, vol 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) (loose-leaf updated 2021) at 3-6; *Simon v. Canada (Attorney General)*, 2015 BCSC 924 at paras. 17-18, aff'd 2016 BCCA 52.

V. ANALYSIS

24 With this legal framework in hand, I turn to the various difficulties that are found in the Response and Counterclaim.

A. Issues of Structure

25 The judge found, as I have said, that the appellants' application was "structure-driven." The appellants accept that an aspect of their application did relate to issues of structure. This concern, they argue, is supported by the *Rules* and it is reflected in two broad difficulties with Warranty Life's pleadings.

26 First, R. 3-3(2) and Form 2 mandate the requirements of Part 1 of a response to civil claim. One aspect of these requirements is, again, that for each fact set out in Part 1 of the notice of civil claim, the defendant "must" clearly identify whether that fact is admitted, denied or outside the knowledge of the defendant. If a fact set out in Part 1 of a notice of civil claim is denied, the defendant "must ... concisely set out [their] version of that fact". This is to be done in Division 2 of Form 2.

27 In addition, the defendant "must ... set out, in a concise statement, any additional material facts that the defendant believes relate to the matters raised by the notice of civil claim". This requirement is to be undertaken in Division 3 of Form 2.

28 In this case, Warranty Life merged these various requirements. Specifically, it included both its "version of facts" and the "additional facts" it sought to rely on under Division 2 of Form 2. It then indicated that Division 3 was "N/A."

29 I leave aside for the time being that the Response simply does not comply with a mandatory requirement of the *Rules*. This noncompliance, however, has several practical consequences. First, the Response is approximately 100 paragraphs and sub-paragraphs in length. Division 2 of the Response is nearly 70 paragraphs and sub-paragraphs in length. Warranty Life has not set out its version of the facts that are alleged in the appellant's notice of civil claim, or the basis upon which it has denied those facts, in any organized way. Instead, those facts are interspersed within Warranty Life's "additional facts." Thus, it is necessary to parse the whole of Division 2 of the Response in order to find the basis upon which Warranty Life has denied the material facts advanced by the appellants. For example, the first express response to a fact from the notice of civil claim is at paragraph 17 of the Response. The next express response is found several pages later at paragraph 36.

30 Furthermore, several of the paragraphs of the notice of civil claim that are denied in Division 1 of the Response are not expressly addressed in the Response, and Warranty Life has not set out its version of the facts that have been alleged. Thus, though a fact is denied there is no explanation of why that is so. This gives rise to further practical difficulties that I will return to.

31 The second broad structural difficulty arising from the Response and Counterclaim is that all of the facts that Warranty Life relies on are found in its Response. The Counterclaim simply adopts all of the facts that are set out in Part 1, Division 2 of the Response. The judge correctly noted that there is no hard and fast rule requiring individual pleadings to be able to stand in isolation. She also correctly noted that "[a] given counterclaim may be more or less factually entwined with the claim it counters." However, she concluded that merging the facts of the Response and Counterclaim was, in the circumstances of this case, appropriate. In my view, this conclusion reflected an underlying error in principle.

32 A counterclaim is an independent claim raised by the defendant, which is in the nature of a cross-claim. Rule 3-4(1) requires that a counterclaim be pleaded separately from a response to civil claim. Furthermore R. 3-4(6) indicates that, except to the extent that R. 3-4 provides otherwise, Rules 3-1, 3-7 (pleadings generally) and 3-8 (default judgment) apply to a counterclaim as if it were a notice of civil claim. Form 3, under Part 1: Statement of Facts, requires that the claimant "set out a concise statement of the material facts giving rise to the counterclaim."

33 Thus, though there may be instances where the material facts underlying a response and the material facts that underlie a counterclaim overlap or mirror each other, a counterclaim remains a distinct claim and the material facts that pertain to that claim must be concisely identified. There is no broad ability on the part of a defendant to include material facts in its response to civil claim that are simply irrelevant to that response. Similarly, there is no broad ability on the part of that same party to rely on material facts in its counterclaim that are adopted from a response to civil claim and that have nothing to do with the counterclaim itself. Otherwise both the response and counterclaim would contain material facts that have nothing to do with the defences and claims being advanced in the respective pleadings.

34 In this case, both of these prohibitions are engaged. I have said that the Response relied on "the common law of contract and the law of negligence." The Counterclaim purports to rely on "the common law of contract, the law of negligence, the law of fraudulent misrepresentation, and the law of conversion." The claims in the Counterclaim are different, broader and would necessarily rely on different material facts.

35 For example, Warranty Life has alleged in the Response that "Warranty Life shipped certain mobile devices to Mercantile" that were never returned and for which no credit was provided. That assertion of fact has nothing to do with the defences that are raised in the Response. It is, however, the narrow basis on which Warranty Life advances its claim in conversion. Those facts should be removed from the Response and included in the Counterclaim.

36 By way of further example, Warranty Life pleaded in the Response that Mr. Bhandari received common shares in Warranty Life pursuant to an "Advisor Agreement," and it describes the material terms of that agreement. The Advisor Agreement is not referred to again in the Response. Instead Warranty Life seeks, in the Counterclaim, to declare the "Advisor Agreement Shares" void on the basis that Mr. Bhandari breached the agreement in various respects. Reference to the Advisor Agreement, the shares that were issued under the agreement, and the conditions that may have attached to that agreement have no place in the Response. Instead, they are material facts that should have been pleaded in the Counterclaim.

37 Similarly, the Response develops, at considerable length, the harm and loss that Warranty Life suffered as a result of the misrepresentations and breaches of contract that were allegedly made by the appellants. These material facts again are irrelevant to the Response. Instead they are facts that are directed to the claims made in the Counterclaim and they should be included in that pleading.

38 Including in the Response all material facts that relate to both pleadings makes that pleading unnecessarily lengthy. It also renders the pleading confusing because many of the facts that are pleaded have little or nothing to do with the defences that are raised. The same difficulty arises when all material facts from the Response are simply adopted into the Counterclaim with no attempt to discern or identify what belongs where.

39 A further related difficulty arises. Warranty Life asserts in its Response that the appellants made various representations to it. In Part 1, Division 2, it pleads various facts in this regard. On the basis of these facts it then pleads, in Part 3: Legal Basis, that the representations were made negligently. Nevertheless, in its Counterclaim, and on the basis of these same facts, it pleads that these representations were made either negligently or fraudulently. The Counterclaim contains no additional material facts that would support a pleading of fraudulent misrepresentation.

40 A representation cannot be both negligent and fraudulent. The difference between a negligent and fraudulent misrepresentation is a dishonest state of mind. Either the requisite dishonest state of mind is present or it is not: *C.R.F. Holdings Ltd. v. Fundy Chemical International Limited* (1980), 21 B.C.L.R. 345 at 365-66, 1980 CanLII 586 (S.C.). The presence of a dishonest state of mind is a material fact in an action for fraudulent misrepresentation that should be expressly pleaded: Hon Mr. Justice Blair et al., eds, *Bullen & Leake & Jacob's Precedents of Pleadings*, 17th ed, vol 2, (London, UK: Thomson Reuters, 2012) at 948; *Kripps v. Touche Ross & Co.*, (1997), 33 B.C.L.R. (3d) 254 at para. 102, 1997 CanLII 2007 (C.A.).

41 In addition, R. 3-7(18) states that "full particulars ... must be stated in the pleading" if a pleading relies, *inter alia*, on fraud. No such material facts or particulars are contained in the Counterclaim.

B. The Narrative Issue

42 The chambers judge's reasons state that a pleading is a "factual narrative" that can contain "facts Warranty Life is entitled to attempt to establish at trial" even if that includes "information which, strictly speaking, is not necessary nor entirely proper." A "narrative" is defined in the Concise Oxford English Dictionary as a "written account of connected events; a story": Catherine Soanes et al, eds, *Concise Oxford English Dictionary*, 11th ed (New York: Oxford University Press, 2008).

43 Once again, elements of the judge's assertions are accurate. Drafting a pleading is not a mathematical exercise. It involves the exercise of judgment and it requires some degree of flexibility. This is reflected, for example, in R. 22-3(1) and in the numerous decisions where judges have considered the adequacy of a pleading. In addition, R. 1-1(2) confirms that, unless a contrary intention appears, the *Interpretation Act*, R.S.B.C. 1996, c. 238, applies to the *Rules*. Section 8 of the *Act* confirms that every enactment is to be construed as remedial and be given such "fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

44 Nevertheless, none of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the *Rules* and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

45 What constitutes a material fact is well understood. Material facts are the elements essential to formulate a claim or a defence. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, Justice Binnie said:

> [54] A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court .... Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. ...

46 This Court adopted a similar definition of material facts in *Young v. Borzoni et al*, 2007 BCCA 16 at para. 20:

> [20] ... "Material fact" is defined in *Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc*., 2005 BCSC 371 at paragraph 9 as, "one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded."

47 In *Jones v. Donaghey*, 2011 BCCA 6 at para. 18, the Court said:

> [18] Thus, a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or "relevant" facts. ...

48 Most recently, in *Muldoe v. Derzak*, 2021 BCCA 199 at para. 31, this Court said:

> [31] ... A material fact is one that is essential to formulate a cause of action. If supporting material facts are omitted, a cause of action is not effectively pleaded ....

49 The judge's assertion that a pleading can contain the evidence, as opposed to the material facts, that a party may be entitled to establish at trial is an error in principle. In saying this, I recognize that there are times where the distinction between what constitutes a material fact and what constitutes evidence may be blurred and difficult to apply. There are also times when, as a practical matter, some limited evidence may be necessary to make a pleading more comprehensible. But the distinction between what constitutes evidence and what constitutes a material fact is important. Furthermore, what evidence may be relevant at trial and what material facts are relevant to a pleading are two different things. This distinction is expressly identified in the *Rules* and in the relevant case law, and it is central to a proper pleading.

50 In *Gittings v. Caneco Audio-Publishers Inc.* (1988), 26 B.C.L.R. (2d) 349 at 352, 1988 CanLII 2832 (C.A.), Justice Esson, as he then was, and in circumstances that are apposite, said:

> That leaves the matter of the order striking out portions of the statement of claim. It is a very long document. In the words of counsel for the plaintiffs, it sets out to tell a story. Perhaps it does but, in approaching these complex issues in this way, it does not serve the purposes of a pleading. There is a mixture of material facts, evidence and background facts; and the difficulty is greatly compounded by the fact that there is no real segregation of the various issues that are raised by the action.

C. Evidence and Argument

51 The chambers judge concluded that "Part 1 of the [Response] does not set out evidence or present argument." In my view, this is palpably wrong. The following are some examples of pleas in the nature of evidence, sometimes with a component of argument, that are found in Part 1 of the Response:

a. What "[a] reasonably prudent person in Warranty Life's position would have considered based on Bhandari's words and conduct";

b. The allegation that Mercantile "inexplicably started work 'from scratch'";

c. Various pleas concerning the approval rating of the computer application that Mercantile created;

d. What "became apparent" to Warranty Life concerning Mercantile's conduct;

e. Why Warranty Life paid for programming at the invoiced amount in the alleged absence of an agreement on compensation;

f. Why historical source code is appropriately kept in source code repositories;

g. What amounts to a commercially reasonable approach for a business providing software services and, conversely, what a commercially reasonable and competent software development business "would never" do;

h. What Warranty Life intended to do after obtaining Mercantile's work product and why;

i. Warranty Life's post-settlement impressions of the quality of the work it had received;

j. Warranty Life's allegation about what it would have done had it not engaged Mercantile; and

k. The plea concerning what "[s]oftware developers possessing a commercially reasonable level of competency" can do, and that the software application "would have received higher reviews" if

> Warranty Life had "engaged a commercially reasonable provider of software development services".

52 Such evidence and arguments are unrelated to the material facts Warranty Life was required to plead and have no place in the Response.

D. A Response Must Clearly Answer the Point of Substance

53 Just as the requirement to concisely plead material facts requires clarity, so too does R. 3-7(15), which prohibits evasive denials. An example of an evasive plea is found in *Patym Holdings Ltd. v. Michalakis*, 2005 BCCA 636:

> [30] With respect, the master and the chambers judge were diverted from a proper analysis by their misunderstanding of Rule 19(21) and its reference to the "point of substance". The purpose of Rule 19(21) is to prohibit evasive pleading. For example, in *Tildesley v. Harper* (1877), 7 Ch. D. 403, it was held that a plea "that the defendant never offered a bribe of [pounds]500" was evasive and that the words "or any other sum" should be added. The "point of substance" was the allegation that the defendant offered a bribe: the amount of the alleged bribe was a particular. The defensive plea did not answer the point of substance of the plaintiff's plea since it left unanswered the bribery allegation by leaving open the possibility that the defendant offered a bribe of some amount other than [pounds]500. Similarly, in *Thorp v. Holdsworth* (1876), 3 Ch. D. 637, a defence in the words, "The terms of the arrangement were never definitely agreed upon as alleged" was evasive and failed to meet the point or points of substance in the statement of claim. Jessel, M.R., said, at 641, that the defendant
>
>> . . . is bound to deny that any agreements or any terms of arrangement were ever come to, if that is what he means; if he does not mean that, he should say that there were no terms of arrangement come to, except the following terms, and state what the terms were.

54 I have said that the Response does not follow the structure required by R. 3-3(2)(a) or Form 2 and that Warranty Life, though it denied the facts alleged by the appellants, failed in some instances to concisely set out its version of that denied fact. The result of this is that Warranty Life's position in relation to various alleged facts remains unclear. This is partly because its various responses are interspersed throughout the length of the Response and partly because the positions it has expressed appear to be inconsistent.

55 Though there are various examples of this, one example is sufficient to make the point. In its notice of civil claim, Mercantile pleaded that it entered into an agreement in 2016 with Warranty Life in which the parties agreed that "Mercantile would perform, and be compensated for, computer software programming undertaken for Warranty Life ... (the "Services")," on the terms and conditions that are described.

56 The Response advances different positions in relation to this assertion. At paragraph 16 it asserts that "In or around September, 2016, ... Warranty Life was induced to engage Bhandari and Mercantile ... to perform the Services." At paragraph 27 it asserts, *inter alia*, that "[d]espite the lack of a formal agreement, Warranty Life began paying Bhandari in good faith". At paragraph 41 it pleads, "First, prior to the Settlement, the parties had never formally agreed upon the terms on which Bhandari and Mercantile would provide the Services. Accordingly, no fees were due and payable pursuant to any agreement of any kind."

57 These various assertions are both inconsistent and evasive.

VI. CONCLUSION

58 I am of the view that the Response and Counterclaim suffer from the numerous and pervasive difficulties that I have described. These difficulties cause the Response and Counterclaim to be prolix and both confusing and inconsistent in various respects. They offend various mandatory requirements of the *Rules* and they frustrate the important objects that are served by proper pleadings.

59 I would strike out both the Response and Counterclaim and grant Warranty Life leave to amend those pleadings.

60 The appellants seek special costs of the application in the court below. I see no basis for such an award. I would, however, grant the appellants the costs of both the application in the court below and of this appeal.

P.G. VOITH J.A.
R. GOEPEL J.A.:— I agree.
G.B. BUTLER J.A.:— I agree.

End of Document

Mousa v. Institute of Electrical and Electronics Engineers Inc., [2014] B.C.J. No. 2647

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

E.C. Chiasson, N.J. Garson and A.W. MacKenzie J.A.

Heard: September 22, 2014.

Judgment: October 29, 2014.

Docket: CA041631

[2014] B.C.J. No. 2647 | 2014 BCCA 415

Between Abdul M. Mousa, Appellant (Plaintiff), and The Institute of Electrical and Electronics Engineers, Incorporated, Respondent (Defendant)

(37 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Appeal by plaintiff from order striking claim against Institute of Electrical and Electronics Engineers dismissed — Plaintiff voted against amended professional standard adopted by Institute on basis that it was technically deficient — Plaintiff believed process was corrupted by corporate interests — Plaintiff brought claim alleging defamation, misrepresentation and breach of duty — Motion judge did not err in striking claim in its entirety without leave to amend — Proposed amendments based on breach of contract did not disclose cause of action — Motion judge carefully applied correct principles to each category of allegations.

Professional responsibility — Self-governing professions — Governing body — Liability of governing body — Professions — Professional engineers — Appeal by plaintiff from order striking claim against Institute of Electrical and Electronics Engineers dismissed — Plaintiff voted against amended professional standard adopted by Institute on basis that it was technically deficient — Plaintiff believed process was corrupted by corporate interests — Plaintiff brought claim alleging defamation, misrepresentation and breach of duty — Motion judge did not err in striking claim in its entirety without leave to amend — Proposed amendments based on breach of contract did not disclose cause of action — Motion judge carefully applied correct principles to each category of allegations.

Appeal by the plaintiff, Mousa, from an order striking his claim against the defendant, the Institute of Electrical and Electronics Engineers (IEEE), without leave to amend. Mousa was an engineer and former member of the IEEE, a professional standards association. He worked on the development of a particular standard that was subsequently amended and approved by a vote of IEEE members. Mousa participated in the process and voted against the amended standard on the basis it was technically deficient. Mousa believed the IEEE had allowed itself to be corrupted by corporate interests in adopting the amended standard. Litigation ensued. The plaintiff claimed he was defamed as a professional by being listed among the members of the IEEE that had voted on the standard. He claimed the adoption of the standard was a breach of the IEEE's duty to protect the public and that it contained misrepresentations. He sought a declaration that the standard was null and void, plus, nominal and punitive damages. The motion judge struck Mousa's claim in its entirety for failure to disclose a reasonable claim. Listing Mousa's name on the voting ballot was not defamatory and there was nothing in the standard suggesting Mousa

approved it. No reasonable person would link the list of members' names to incompetence, bribery or corruption. No statements of the IEEE contained misrepresentations to Mousa or actionable misrepresentations to the public. His claim of breach of duty had no chance of success, as the IEEE had no duty to act in the public interest. The claim was struck without leave to amend. Mousa appealed.
HELD: Appeal dismissed.

The motion judge properly refused leave to amend on the basis that proposed amendments did not support a claim for breach of contract. Even if a contract existed, Mousa failed to identify anything approximating a breach thereof. The motion judge correctly articulated the legal principles applicable to a motion to strike and properly and carefully applied those principles to each category of allegations. There was no basis for appellate interference with the conclusion that the claim did not disclose a reasonable cause of action. There was no basis for interference with the motion judge's discretion to award lump sum costs fixed at $5,000.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Civil Rules, Rule 6-1, Rule 9-5(1)(a)

Court Summary:

Mr. Mousa has a long standing disagreement with the respondent. He contends that its approval of a technical standard for the protection of electrical substations from lightning strikes was wrong. He sued the respondent and appeals the decision of a chambers judge to strike his notice of civil claim and the refusal to allow him to amend the claim in an attempt to allege a sustainable cause of action.

Held: appeal dismissed. Although Mr. Mousa could have amended his pleading without leave, he did not do so. The Rules entitled him to amend his notice of civil claim as a matter of right; they did not entitle him to an adjournment to enable him to do so. The judge correctly determined that Mr. Mousa's assertions would not result in an amendment that would cure the problem with the pleading. The judge applied the proper test for striking a pleading. He made no error in his analysis that led to the conclusion that the notice of civil claim did not disclose a reasonable cause of action. The judge's award of lump sum costs was an appropriate exercise of discretion. Lump sum costs of the appeal are awarded.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated February 5, 2014 (*Mousa v. The Institute of Electrical and Electronics Engineers, Incorporated*, 2014 BCSC 186, Vancouver Docket S135534).

Counsel

The Appellant appeared in person: A.M. Mousa.

Counsel for the Respondent: J.R. Schmidt and D.L. Yaverbaum.

Reasons for Judgment

The judgment of the Court was delivered by

E.C. CHIASSON J.A.

Introduction

1 Mr. Mousa appeals the decision of a chambers judge to strike his notice of civil claim and the refusal to allow him to amend the claim in an attempt to allege a sustainable cause of action.

Background

2 The Institute of Electrical and Electronic Engineers, Incorporated ("IEEE") is a not-for-profit corporation registered pursuant to the law of the State of New York, United States of America. The chambers judge noted at para. 3 that Mr. Mousa "is a retired electrical engineer with extensive experience and expertise in the design of systems for the protection of electrical installations from lightning strikes". He resides in British Columbia and has been a member of the IEEE since 1979.

3 The judge provided further background information at paras. 4-7:

> [4] In 1996, IEEE published a technical standard for the protection of electrical substations from lightning strikes. The plaintiff was a contributor to that standard.
>
> [5] In 1998, IEEE delegated the administration of its standards to the IEEE Standards Association ("IEEE-SA").
>
> [6] In 2006, revisions to the 1996 standard were proposed and, on December 5, 2012, approved by the IEEE and IEEE-SA as Standard 988-2012 (the "Standard").
>
> [7] The plaintiff perceives the Standard to be technically deficient and the process by which it was approved to be corrupt.

He continued at paras. 10-11:

> [10] The plaintiff is obviously an extremely intelligent man. However, to say that the plaintiff is passionate about and obsessed with what he perceives as wrongful conduct on the part of the IEEE and IEEE-SA in respect of the process by which its standards are approved would be an understatement.
>
> [11] After his many complaints and appeals to IEEE and other bodies since 2006 were either dismissed or not considered, the plaintiff commenced this action on July 23, 2013. His pleadings are lengthy, prolix and in many respects legally incoherent. He seeks:
>
> a) a declaration that the actions of the IEEE in the course of developing Standard 988-2012 constituted fraud and breach of a duty to the public;
>
> b) a declaration that IEEE violated its obligations as a not-for-profit tax-exempt corporation when it delegated the administration of its standards to IEEE-SA without compelling the IEEE-SA to honour the obligations of the IEEE under the terms of its Certificate of Incorporation;
>
> c) a declaration that the IEEE acted without authority when it permitted the adoption of Standard 998-2012 despite the concerns that were raised by lightning experts regarding its potential negative impact on public safety and public interest;
>
> d) a declaration that the IEEE's decision to adopt Standard 988-2012 was null and void;
>
> e) a declaration that the conduct of the administration of IEEE/IEEE-SA in connection with Standard 998-2012 defamed the lightning experts of the IEEE and diminished their works;
>
> f) an order that the IEEE cease the defamation by disclosing how each member of the ballot group voted by providing that information within every distributed copy of Standard 998-2012;
>
> g) nominal damages for defamation in the amount of $1 payable to the plaintiff;
>
> h) punitive damages in the amount of $100,000 to be paid into court by the IEEE and disbursed to a registered Canadian charity to be named by the plaintiff; and
>
> i) costs.

4 The IEEE applied to strike Mr. Mousa's pleading on the ground that it did not disclose a reasonable claim. Alternatively, it sought to strike the portion of the claim alleging breach of duty on the basis that the court did not have subject-matter jurisdiction over the IEEE. Mr. Mousa applied for an order requiring the IEEE to pay interim costs of $200,000.

The chambers decision

5 The judge observed that the IEEE filed no affidavits and that Mr. Mousa "filed seven voluminous affidavits", which the judge listed (para. 15):

> a) Mousa Affidavit No. 1 - Involvement of IEEE with British Columbia;
>
> b) Mousa Affidavit No. 2 - Opposition of Lightning Experts Against IEEE Standard 998;
>
> c) Mousa Affidavit No. 3 - Lack of Credibility of the IEEE;
>
> d) Mousa Affidavit No. 4 - Appeal Record of IEEE Standard 988;
>
> e) Mousa Affidavit No. 5 - IEEE's Mishandling of the Safety Issue and the Resulting Tarnishing of its Image;
>
> f) Mousa Affidavit No. 6 - Re: Application for Interim Costs; and
>
> g) Mousa Affidavit No. 7 - Reply to the IEEE Re: Interim costs.

He stated that these affidavits were "replete with speculation, hearsay, expressions of opinion and argument...such evidence is inadmissible" (para. 16).

6 The IEEE's application was brought pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. It states:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be, ...

No evidence is admissible on an application under Rule 9-5(1)(a).

7 The judge addressed the law applicable to the application at paras. 18-21:

> [18] The test for striking pleadings under Rule 9-5(1)(a) was recently stated by the Court of Appeal in *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91:
>
>> [10] The test for striking pleadings because they fail to disclose a reasonable cause of action is well-known. In *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, Chief Justice McLachlin stated it in these terms:
>>
>>> [17] The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R.83; *Odhavji Estate; Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> [19] Relevant guidelines the court considers include (a) whether there is a question fit to be tried regardless of complexity or novelty; (b) whether the outcome of the claim is beyond a reasonable doubt; (c) whether serious questions of law or questions of general importance are raised or if facts should be known before

> rights are decided; (d) that pleadings might be amended; and (e) whether there is an element of abuse of process: *Owners, Strata Plan LMS 1328 v. Surrey (City of)*, 2001 BCCA 693 at para. 5.
>
> [20] The Notice of Civil Claim should be read as generously as possible in determining whether a cause of action is disclosed: *Evergreen Holdings v. IBI Leaseholds Ltd.*, 2005 BCSC 1929 at para. 2.
>
> [21] Where the pleading makes wide-sweeping and inflammatory accusations, the court is entitled to treat such accusations as speculation and not as true: *Stephen v. HMTQ*, 2008 BCSC 1656 at para. 60; *Young v. Borzoni*, 2007 BCCA 16 at paras. 30-32.

8 We are advised by counsel for the IEEE that on the first day of the hearing the judge raised the issue of breach of contract. Mr. Mousa indicated that he wanted to amend his notice of civil claim to include allegations of "breach of his membership agreement, breach of competition law and tax evasion". On the second day of the hearing, Mr. Mousa provided a document entitled "Alternative Pleading". The judge dealt with this situation at paras. 24-28:

> [24] The plaintiff's affidavit evidence disclosed that he received legal advice on September 24, 2013 to the effect that his pleadings, as drafted, had the potential for being struck out and that he should amend them to include a claim for breach of contract. He did nothing in response to that advice.
>
> [25] The proposed alternative pleadings do not set out when the alleged contract was made, how it arose, how the alleged terms came to form part of the contract, what consideration there was for the contract or what damages have been suffered as a result of its alleged breach. Further, they do not disclose a private cause of action under any Canadian combines or taxation legislation.
>
> [26] I am not prepared to allow the plaintiff to amend his pleadings to add entirely new causes of action without notice. Moreover, I am not persuaded that the proposed amendments disclose a reasonable cause of action or cure the problems that exist with the pleadings as they now exist.
>
> [27] The plaintiff submitted that, regardless, the Notice of Civil Claim already supports, at a minimum, a claim for breach of his membership agreement and hence no formal amendment is necessary. He relies on paragraph 111 of the Notice of Civil Claim, which states:
>
>> [111] Adoption of Standard 998-2012 by the IEEE constituted breach of duty toward both the public and its own members.
>
> [28] That plea does not raise an allegation of breach of contract. Rather, it alleges that IEEE breached a duty owed to its members.

9 The judge referred to Mr. Mousa's contention that the case could be characterized "as a quest for a remedy against oppression" and stated at paras. 30-34:

> [30] In essence, the plaintiff is attempting in this action to claim something akin to a derivative action on behalf of himself and other unnamed members of IEEE who he says agree with his views. He does so by pleading private interest claims yet asserts his claims are made in the public interest. He conceded as much during his submissions. He advised the Court that he considers himself a defender of the public interest and feels he has an obligation in that regard.
>
> [31] Although the plaintiff's aspirations may be laudable, they are misplaced.
>
> [32] Generally, courts only give standing to those whose private rights are at stake or who are specifically affected by the issue: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 1 ("*DESWUAVS")*. These limitations serve to ensure, among other things, that scarce judicial resources are not spent on marginal or redundant cases, that courts have the benefit of contending points of view from those most directly affected by the issues, and that courts maintain their proper role within our democratic system of government. As Cromwell J. commented in *DESWUAVS* at para. 1, "it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter."
>
> [33] The general rule has been relaxed to allow courts to grant some litigants public interest standing in public law cases. This is largely a recognition that in the face of increased governmental regulation and

> after the coming into force of the *Canadian Charter of Rights and Freedoms*, some public interest litigants are well placed to challenge legislation and government action: *DESWUAVS* at para. 22.
>
> [34] However, the plaintiff is a private individual who is attempting to claim against another private party. He does not seek to challenge a law or government action. Despite his candour in admitting that he brings this action primarily to protect the public, rather than to assert any right of his own, he does not seek public interest stading [*sic*] nor does he meet the criteria for it: *DESWUAVS* at para. 2.

10 The judge then turned to the specific claims advanced by Mr. Mousa in his notice of civil claim. He addressed each in turn.

11 Mr. Mousa alleged he was defamed because the IEEE listed the names of the members of the working group that approved the standard to which Mr. Mousa objected and stated:

> The following members of the individual balloting committee voted on this guide. Balloters may have voted for approval, disapproval, or abstention.
>
> Mr. Mousa did not approve of the standard and voted "no".

12 The judge observed at para. 37:

> Although evidence is not admissible on an application under Rule 9-5(1)(a), if the claim alleges defamation, the alleged defamatory publication is incorporated by reference into the Notice of Civil Claim and can be considered in determining whether the claim should be struck: *Johnstone v. Gardiner*, 2011 BCSC 1843 at para. 14, reversed on appeal based on the application of the law to the pleadings: 2012 BCCA 184.

13 He stated Mr. Mousa's position at para. 40:

> The plaintiff alleges that, because the Standard is flawed and was adopted in a corrupt manner and because it includes a list of the members of IEEE-SA (including the plaintiff) who voted on whether or not the Standard should be adopted without disclosing how each of them voted, anyone reading the Standard would suspect that the plaintiff was incompetent or had been bribed by the Vendor. The plaintiff alleges that, because the Standard is corrupt, a reader of the Standard may believe that the plaintiff too is corrupt.

14 Referring to *Isaac v. Guardian Capital Group*, 2004 BCSC 254, the judge noted that truth is an absolute defence to a claim for defamation and that the alleged defamatory statement was true. He referred to Mr. Mousa's assertion that the statement was "capable of implying to the reader of the Standard that he was one of the balloting committee members who voted to approve it" and rejected it stating at para. 45:

> In my view, from the perspective of a reasonable person of ordinary intelligence, the Standard is not capable of supporting the defamatory imputation alleged by the plaintiff. There is nothing in the Standard suggesting that, among the 174 voting members, the plaintiff is included among those who voted for approval. No reasonable person would link the list of members' names to incompetence, bribery or corruption.

15 The judge set out the details of the allegations Mr. Mousa made to support his claim of fraud at para. 107 of the notice of civil claim:

> a) attaching the name of the IEEE to Standard 988-2012 when they knew that the lightning experts of the IEEE opposed it;
>
> b) implying that the Standard met the requirements of the American National Standards Institute ("ANSI") process when they knew that it did not and that it would have faced overwhelming opposition if it was subjected to the public review requirement of that process;
>
> c) asserting during a related ANSI hearing that the ANSI status of Standard 998 will be maintained, then stripping the Standard of its ANSI status thereafter;

d) asserting that the safety concerns of the opponents will be addressed prior to the adoption of the Draft, which false claim was maintained over a period of about 22 months, then adopting the Standard without doing a review of its safety aspects;

e) implying that the Standard represents a consensus of concerned interests when they knew that a large number of affected stakeholders were excluded from its development process;

f) approving a standard that falsely implies that the disputed [CVM] Model is widely used in designing the lightning protection systems of substations, contrary to the finding of the Hearing Panel of the IEEE Substations Committee;

g) implying that the Standard reflects "good practice" and is in accordance with "state-of-the-art" despite the contrary evidence;

h) implying that the subject Document has the status of a "standard" when in fact it has the lower status of a "guide";

i) approving the Draft despite the evidence that it exceeded its authorized scope; and

j) approving the Draft despite its lack of balance, and ignoring the related contrary recommendations of the Hearing Panel of the IEEE Substations Committee.

16 The merits of the claim were addressed at paras. 49-51:

> [49] An allegation of fraud must be scrupulously pleaded and fully particularized: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 19. Here, it is not possible in many respects to decipher whether the alleged actions of the IEEE were representations of fact. In some instances, they are clearly not: see subparagraphs (a), (i) and (j). In others the impugned actions appear to be promises or statements of present intention which are not actionable: see subparagraphs (c) and (d).
>
> [50] Moreover, the plaintiff has failed to plead that [the] IEEE's actions were intended to deceive him, induced him to act or alter his position and that he suffered damages as a result, all of which are required elements of the tort of fraud: *Bruno Appliance and Furniture, Inc v. Hryniak*, 2014 SCC 8 at paras. 19 and 20.
>
> [51] Indeed, the plaintiff conceded during his submissions that he was not deceived in any way. Rather, he feels that the public has been deceived and this deception may result in future harm. The law does not recognize the notion of an anticipatory tort or a tort that anticipates future harm to the public: *Lee v. Li*, [2002 BCCA 209] at paras. 28-29.

17 The judge dealt with Mr. Mousa's assertion of breach of duty at paras. 54-56:

> [54] The plaintiff alleges that IEEE's conduct breached duties owed to the public and members of IEEE (Notice of Civil Claim Part 1 para. 111; Part 3 paras. 6-7), duties to serve the public good by virtue of IEEE's status as a not-for-profit tax-exempt corporation (Notice of Civil Claim Part 1 paras. 112-115; Part 3, paras. 9-10) and the terms of IEEE's "Certificate of Incorporation" (Notice of Civil Claim Part 3, para. 11).
>
> [55] IEEE submits that the plaintiff's claim for breach of duty does not establish a cause of action and does not advance a claim known to law for two reasons:
>
> a) the plaintiff has not identified any breach by IEEE of any recognized obligation in common law or statute; and
>
> b) the plaintiff has not claimed to have suffered any loss as a result of the alleged breach of duty.
>
> [56] I agree. The plaintiff has not identified any basis upon which a general duty on the part of a private entity to act in the public interest can be founded. A similar claim alleging breach of a public duty of care was struck out in *Bingo City Games Inc. & Other v. B.C. Lottery Corp.*, 2003 BCSC 637.

18 At para. 58, the judge noted that, "[a]n action for declaratory relief must be in relation to a right and must have some utility: *Lee v. Li*, at para. 19". He accepted the contention of the IEEE stating at paras. 59-60:

> [59] I agree with counsel for IEEE that the following declarations sought by the plaintiff are not in relation to any right owed by IEEE to the plaintiff and have no utility because any such declaration would have no binding effect on IEEE:
>
> a) a declaration that the IEEE acted without authority when it permitted the adoption of Standard 998-2012 despite the concerns that were raised by lightning experts regarding its potential negative impact on public safety and public interest; and
>
> b) a declaration that the decision of the IEEE/ IEEE-SA to adopt Standard 998-2012 was hence null and void.
>
> [60] In my view, the plaintiff's concerns with the Standard and the manner in which it was adopted are within the internal affairs and part of the governance of IEEE. I agree with IEEE that they are outside the subject-matter jurisdiction of this court.

19 The judge concluded that it was not necessary to deal with Mr. Mousa's application for interim costs because he was satisfied the notice of civil claim should be struck, but held that even if this were not the case, Mr. Mousa is not entitled to an order for interim costs. No evidence was adduced concerning Mr. Mousa's ability to pay costs.

20 The IEEE sought special costs or lump sum costs because Mr. Mousa made serious allegations of misconduct. The judge stated at paras. 71-74:

> [71] I agree with IEEE's counsel that these allegations are inflammatory and unsupported. However, I am not prepared to find that the plaintiff's conduct was sufficiently reprehensible that it should attract an order for special costs on a full indemnity basis. Although misguided, the plaintiff's actions were the result of a passionate belief that public safety is potentially at risk.
>
> [72] However, I am satisfied that the plaintiff's obsessive conduct is deserving of some form of sanction that will perhaps make him think twice about continuing his crusade against the IEEE.
>
> [73] The court has the power to fix costs summarily, although such power should be exercised sparingly: *Dawson v. Dawson*, 2014 BCSC 44 at para. 65.
>
> [74] I am satisfied that this is a case where such power should be exercised. I am awarding costs on the basis of the "rough and ready" approach. IEEE is entitled to its costs of this action which I am summarily fixing at $5000.

21 The IEEE seeks special costs on this appeal because Mr. Mousa has continued to make serious allegations.

Discussion

Proposed amendment

22 Mr. Mousa asserts, and the IEEE agrees, that pursuant to Rule 6-1 he was entitled to amend his notice of civil claim without leave. Counsel for the IEEE advised us that the judge was aware of this. The issue must be placed into context.

23 Fresh evidence proposed by Mr. Mousa contains an "Access Pro Bono Client Advice Form" dated October 3, 2013. It was not before the chambers judge, but he was apprised of its content. The advising lawyer noted that the IEEE was applying to strike Mr. Mousa's claim. The advice given was to draft an amendment to the claim to provide the elements of each claim and to look for personal damage. Potentially there were claims of misrepresentation, breach of fiduciary duty and "breach of contract [of the] membership agreement". The lawyer stated, "have draft reviewed by lawyer".

24 The judge noted correctly that Mr. Mousa had not amended his notice of civil claim. In his submissions, Mr. Mousa also acknowledged that a formal amendment was not proposed. Essentially, the issue was whether he should be allowed to do so in the middle of a hearing. The judge exercised his discretion and concluded that this would not be fair to the IEEE. He was reinforced in this conclusion by his assessment of the merits of Mr. Mousa's assertions that he could amend his claim properly to plead breach of contract.

25 The document containing those assertions was before the judge and reviewed by him. I agree with the judge's conclusion that they do not support a claim by Mr. Mousa for breach of contract. They are general allegations of misconduct asserted on behalf of public interests.

26 While there are a number of cases which recognize the existence of a contract between a society and its members, these cases involve members' explicit responsibilities and entitlements, such as payment of membership dues, or the legitimacy of expelling members from an organization: *Senez v. Montreal Real Estate Board*, [1980] 2 S.C.R. 555; *Whittall v. Vancouver Lawn Tennis & Badminton Club*, 2005 BCCA 439; *Bector v. Vedic Hindu Cultural Society*, 2014 BCSC 230.

27 In the current case, Mr. Mousa has not identified any clear bylaw violation or other action taken by IEEE which directly impacts his membership entitlement. Put simply, even if a contract does exist between the IEEE and Mr. Mousa - an analysis that this Court does not need to undertake - Mr. Mousa has failed to identify anything approximating a breach of contract.

28 Although an adjournment was not addressed specifically, the effect of Mr. Mousa's position would have required an adjournment in order to allow him to amend his pleading. The Rules entitled him to amend his notice of civil claim as a matter of right; they did not entitle him to an adjournment to enable him to do so. The judge correctly determined that the assertions would not result in an amendment that would cure the problem with the pleading and that the IEEE's application should proceed on the basis of the existing pleadings.

The application to strike the notice of civil claim

29 The judge correctly articulated the correct legal principles applicable to a motion to strike pursuant to Rule 9-5(1)(a). The only issue in this Court can be whether he properly applied those principles.

30 I set out in detail the judge's review of each of the categories of allegations advanced by Mr. Mousa. It is clear that he examined Mr. Mousa's positions carefully. The judge was satisfied that Mr. Mousa's allegations did not disclose a reasonable cause of action.

31 At the hearing of this appeal, each of Mr. Mousa's claims was discussed with him. This Court and the chambers judge provided to Mr. Mousa the opportunity to review the basis on which he contends he has a cause of action against the IEEE. Having listened carefully to Mr. Mousa's positions and having reviewed the judge's detailed assessment of them, I see no basis on which this Court could interfere with the judge's conclusions.

32 Mr. Mousa is aggrieved and upset with the standard that has been adopted. He has done his best to make his concerns known. Some matters simply are not dealt with appropriately in a court of law. In my view, this is one of them. Although it would be difficult to do so, it is time for Mr. Mousa to move on. He has done his best to change the minds of others. That they have not done so is their responsibility.

Interim costs

33 Mr. Mousa agrees that the issue of interim costs does not arise if the dismissal of his claim is sustained. I need not deal with the application for interim costs.

Costs of the chambers hearing

34 An award of costs is highly discretionary. The judge rejected the request of the IEEE for special costs. He had the jurisdiction to award lump sum costs. While such an award may reflect a judge's concern with the conduct of a party, often it is an appropriate expedient to avoid further conflict and proceedings over the quantum of costs.

35 The judge was concerned with Mr. Mousa's obsessive conduct. While he is entitled to hold firmly to his views, they must not be advanced capriciously or maliciously. I would not disturb the judge's exercise of discretion in awarding lumpsum costs in the amount of $5,000.

Costs of the appeal

36 The allegations advanced by Mr. Mousa on appeal mirrored to some extent his contentions in chambers. Arguably, they had to do so for him to advance his appeal. While I consider the legal battle sought to be waged by Mr. Mousa to be misplaced, I would not condemn him to special costs. In my view, it is appropriate to attempt to bring this conflict to an end and to reflect this Court's concern with the very serious allegations that Mr. Mousa makes. This Court has the discretion to order costs that depart from standard assessment, and to award costs in a fixed amount: *Dawson v. Dawson*, 2013 BCCA 344 at para. 25. I would award costs of this appeal in the fixed amount of $3,000.

Conclusion

37 I would dismiss this appeal and order that Mr. Mousa pay to the IEEE lump sum costs of the appeal in the amount of $3,000.

E.C. CHIASSON J.A.
N.J. GARSON J.A.:— I agree.
A.W. MacKENZIE J.A.:— I agree.

End of Document

Nevsun Resources Ltd. v. Araya, [2020] S.C.J. No. 5

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, C. Gascon, S. Côté, R. Brown, M. Rowe and S.L. Martin JJ.

Heard: January 23, 2019;

Judgment: February 28, 2020.

File No.: 37919.

[2020] S.C.J. No. 5 | [2020] A.C.S. no 5 | 2020 SCC 5 | EYB 2020-347809 | 2020EXP-588 | 462 C.R.R. (2d) 87 | [2020] 4 W.W.R. 1 | 32 B.C.L.R. (6th) 1 | 44 C.P.C. (8th) 225 | 443 D.L.R. (4th) 183 | 2020 CarswellBC 447

Nevsun Resources Ltd., Appellant; v. Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle, Respondents, and International Human Rights Program, University of Toronto Faculty of Law, EarthRights International, Global Justice Clinic at New York University School of Law, Amnesty International Canada, International Commission of Jurists, Mining Association of Canada and MiningWatch Canada, Interveners

(313 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Public international law — Human rights — Act of state doctrine — Customary international law — Jus cogens — Peremptory norms — Doctrine of adoption — Direct remedy for breach of customary international law - - Eritrean workers commencing action against Canadian corporation in British Columbia — Workers alleging they were forced to work at mine owned by Canadian corporation in Eritrea and subjected to violent, cruel, inhuman and degrading treatment and seeking damages for breaches of customary international law prohibitions and of domestic torts — Corporation bringing motion to strike pleadings on basis of act of state doctrine and on basis that claims based on customary international law have no reasonable prospect of success — Whether act of state doctrine forms part of Canadian common law — Whether customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity can ground claim for damages under Canadian law — Whether claims should be struck.

Court Summary:

Three Eritrean workers claim that they were indefinitely conscripted through Eritrea's military service into a forced labour regime where they were required to work at a mine in Eritrea. They claim they were subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd. The Eritrean workers started proceedings in British Columbia against Nevsun and sought damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. They also sought damages for breaches of domestic torts including conversion, battery, unlawful confinement, conspiracy and negligence. Nevsun brought a motion to strike the pleadings on the basis of the act of state doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun also took the position that the claims based on customary international law should be struck because they have no reasonable prospect of success. The chambers judge dismissed Nevsun's motion to strike, and the Court of Appeal agreed.

Held (Brown and Rowe JJ. dissenting in part and Moldaver and Côté JJ. dissenting): The appeal should be dismissed.

Per Wagner C.J. and **Abella**, Karakatsanis, Gascon and Martin JJ.: The act of state doctrine and its underlying principles as developed in Canadian jurisprudence are not a bar to the Eritrean workers' claims. The act of state doctrine has played no role in Canadian law and is not part of Canadian common law. Whereas English jurisprudence has reaffirmed and reconstructed the act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine: conflict of laws and judicial restraint. Both principles have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing act of state doctrine. As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence. Canadian courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.

Nor has Nevsun satisfied the test for striking the pleadings dealing with customary international law. Namely it has not established that it is "plain and obvious" that the customary international law claims have no reasonable likelihood of success.

Modern international human rights law is the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

While states were historically the main subjects of international law, it has long-since evolved from this state-centric template. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights. The rapid emergence of human rights signified a revolutionary shift in international law to a human-centric conception of global order. The result of these developments is that international law now works not only to maintain peace between states, but to protect the lives of individuals, their liberty, their health, and their education. The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. It is therefore not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of obligatory, definable, and universal norms of international law.

Customary international law is the common law of the international legal system, constantly and incrementally evolving based on changing practice and acceptance. Canadian courts, like all courts, play an important role in its ongoing development. There are two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal right or obligation. When international practice develops from being intermittent into being widely accepted and believed to be obligatory, it becomes a norm of customary international law.

Within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, from which no derogation is permitted. The workers claim breaches not only of norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*. Crimes against humanity have been described as among the least controversial examples of violations of *jus cogens*. Compelling authority confirms that the prohibitions against slavery, forced labour and cruel, inhuman and degrading treatment have attained the status of *jus cogens*. Refusing to acknowledge the differences between existing domestic torts and forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct.

Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the law of Canada. Therefore, customary international law is automatically adopted into domestic law without any need for legislative action. The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.

A compelling argument can therefore be made that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied. Since the workers' claims are based on norms that already form part of our common law, it is not "plain and obvious" that our domestic common law cannot recognize a direct remedy for their breach. Appropriately remedying the violations of *jus cogens* and norms of customary international law requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

Nevsun has not demonstrated that the Eritrean workers' claim based on breaches of customary international law should be struck at this preliminary stage. The Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. It is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun. Since the customary international law norms raised by the Eritrean workers form part of the Canadian common law, and since Nevsun is a company bound by Canadian law, the claims of the Eritrean workers for breaches of customary international law should be allowed to proceed.

Per **Brown** and **Rowe** JJ. (dissenting in part): The appeal should be allowed in part. There is agreement with the majority that the dismissal of Nevsun's application to strike the pleadings should be upheld as it regards the foreign act of state doctrine. However, there is disagreement on the matter of the use of customary international law. The workers' claims for damages based on breach of customary international law disclose no reasonable cause of action and are bound to fail.

Two separate theories have been advanced upon which the pleadings of the Eritrean workers could be upheld. The majority's theory is that the workers seek to have Canadian courts recognize a cause of action for breach of customary international law and to prosecute a claim thereunder. The second theory is that the workers seek to have Canadian courts recognize four new nominate torts inspired by customary international law: use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. The latter theory is more consistent with the pleadings and with how the workers framed their claims before the Court. Regardless, the workers' claims are bound to fail on either theory.

The claims are bound to fail on the first theory. On this theory, the workers' pleading is viable only if international law is given a role that exceeds the limits placed upon it by Canadian law. For this pleading to succeed, then, Canadian law must change. Such a change would require an act of a competent legislature, as it does not fall within the competence of the courts. Without change, the pleading is doomed to fail.

Substantively, the content of customary international law is established by the actions of states on the international plane. A rule of customary international law exists when state practice evidences a custom and the practicing states accept that custom as law. These two requirements are called state practice and *opinio juris*.

The high bar established by the twin requirements of state practice and *opinio juris* reflects the extraordinary nature of customary international law: it leads courts to adopt a role otherwise left to legislatures; and, unless a state persistently objects, its recognition binds states to rules to which they have not affirmatively consented. Once a norm of customary international law has been established, it can become a source of Canadian domestic law unless it is inconsistent with extant statutory law.

The primacy given to contrary legislation preserves the legislature's ability to control the effects of international laws in the domestic legal system. If the legislature passes a law contravening a prohibitive norm of international law, that law is not subject to review by the courts. Similarly, if the legislature does not pass a law in contravention of a mandatory norm of international law, the courts cannot construct that law for them, unless doing so is otherwise within the courts' power. Courts may presume the intent of the legislature is to comply with customary international law norms, but that presumption is rebuttable: customary international law has interpretive force, but it does not formally constrain the legislature. Canada and the provinces have the ability, should they choose to exercise it, to violate norms of customary international law. But that is a choice that only Parliament or the provincial legislatures can make; the federal and provincial governments cannot do so without the authorization of those legislative bodies.

To determine whether a statute prevents amending the common law, courts must precisely identify the norm, determine how the norm would best be given effect and then determine whether any legislation prevents the court from changing the common law to create that effect. If no legislation does, courts should implement that change to the common law. If any legislation does, the courts should respect that legislative choice, and refrain from changing the common law.

Procedurally, the content of customary international law is established in Canada by the court first finding the facts of state practice and *opinio juris*. When there is or can be no dispute about the existence of a norm of customary international law, it is appropriate for the courts to take judicial notice. Courts will also be called on to evaluate both whether there exists a custom generally among states that is applied uniformly, and whether the practicing states respect the custom out of the belief that doing so is necessary in order to fulfil their obligations under customary international law. Once the facts of state practice and *opinio juris* are found, the second step is to identify which, if any, norms of customary international law must be recognized to best explain these facts. This is a question of law. The final step is to apply the norms, as recognized, to the facts of the case at bar. This is a question of mixed fact and law.

Applying this structure to the majority's theory, there is agreement with the majority that: there are prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, and degrading treatment; these prohibitions have the status of *jus cogens*; individuals and states both must obey some customary international law prohibitions, and it is a question for the trial judge whether they must obey these specific prohibitions; and individuals are beneficiaries of these prohibitions.

There is, however, disagreement that the majority's reasons provide a viable path to showing that a corporation may be civilly liable in Canada for a breach of customary international law norms. It is plain and obvious that corporations are excluded from direct liability at customary international law. Corporate liability for human rights violations has not been recognized under customary international law; at most, the proposition that such liability has been recognized is equivocal. Customary international law is not binding if it is equivocal. Absent a binding norm, the workers' cause of action is clearly doomed to fail.

It is unclear how the majority deduces the potential existence of a liability rule from an uncontroversial statement of a prohibition. Perhaps it sees a prohibition of customary international law as requiring Canada to provide domestic liability rules; perhaps it sees the prohibition as itself containing a liability rule; or perhaps it sees the doctrine of adoption as producing a liability rule in response to a prohibition. None of these options provide an interpretation of the majority's theory of the case that makes the claims viable.

The workers did not plead the necessary facts of state practice and *opinio juris* to support the proposition that a prohibition of customary international law requires states to provide domestic civil liability rules Indeed, states are typically free to meet their international obligations according to their own domestic institutional arrangements and preferences. A civil liability rule is but one possibility. A prohibition could also be effected through, for example, the criminal law or through administrative penalties.

The workers also did not plead the necessary facts to support the proposition that a prohibition of customary international law itself contains a liability rule. An essay that states it would not make sense to argue that international law may impose criminal liability on corporations, but not civil liability does not constitute state practice or *opinio juris*. State practice is the difference between civil liability and criminal liability at customary international law. Outside the sphere of criminal law, there is no corresponding acceptance-of-liability rules regarding individuals. For a customary international law prohibition to create a civil liability rule would require there to be widespread state practice that does not exist today.

Nor can the doctrine of adoption play the role of converting a general prohibition upon states and criminal prohibitions upon individuals into a civil liability rule. Applying the three-step process for determining whether to amend private common law rules in response to the recognition of a mandatory norm of customary international law, the relevant norms here are that Canada must prohibit and prevent slavery by third parties, *mutatis mutandis* for each of the claims. Although such norms may exist, they are appropriately given effect through, and only through the criminal law. The criminal law does not provide private law causes of action. Moreover, adopting the norms as crimes cannot be done because Parliament has, in s. 9 of the *Criminal Code*, clearly prohibited courts from creating criminal laws via the common law.

The majority's theory is no more tenable if a step back is taken and it is considered more conceptually. Essentially, the majority's theory amounts to saying that the doctrine of adoption has what jurists in Europe would call horizontal effect. It would be astonishing were customary international law to have horizontal effect where the *Canadian Charter of Rights and Freedoms* does not. The majority's approach also amounts to recognizing a private law cause of action for simple breach of customary international public law. This would be similarly astonishing, since there is no private law cause of action for simple breach of statutory Canadian public law.

Nor does the presence of international criminal liability rules make necessary the creation of domestic torts, at least outside the American context. In that country, the hoary and historically unique *Alien Tort Statute* requires courts to treat international law as creating civil liabilities. Essentially, the majority's approach would amount to Americanizing the Canadian doctrine of adoption. Canadian courts cannot adopt an U.S. statute when Parliament and the legislatures have not.

While there is agreement that where there is a right, there must be a remedy, the right to a remedy does not necessarily mean a right to a particular form, or kind of remedy. Further, a difference merely of damages or the extent of harm will not suffice to ground a new tort.

Canadian law, as is, furnishes an appropriate cause of action. When there is a breach of rights that is more grave or that needs to be deterred, increased damages are available under existing tort law. Punitive damages have as a goal the denunciation of misconduct. Moreover, a court can express its condemnation of wrongful conduct through its reasons, by stating in them that a party committed human rights abuses, even if the ultimate legal conclusion is that they committed assault, battery or other wrongs. Other states also recognize that such ordinary private law actions provide mechanisms to address the harm arising out of a grave breach of international criminal law. Even were this part of Nevsun's motion to strike to be granted, the workers could pursue in Canada the same relief they could obtain in most other states.

The only remaining way to support the majority's theory of the case is for the doctrine of adoption to change so that it provides a civil liability rule for breaches of prohibitions at customary international law. The Court cannot make such a change Although, it is open to Parliament and the legislatures to make such a change, absent statutory intervention, the ability of the courts to shape the law is, as a matter of common-law methodology, constrained.

Courts develop the law incrementally. For a change to be incremental, it cannot have complex and uncertain ramifications. To alter the doctrine of adoption would set the law on an unknown course whose ramifications cannot be accurately gauged. It is thus for Parliament to decide whether to change the doctrine of adoption to provide courts the power to convert prohibitive rules of international law into free-standing torts. Parliament has not done so.

The claims are also bound to fail on the second theory that the workers sought to have the court recognize four new nominate torts inspired by international law: use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

Three clear rules for when the courts will not recognize a new nominate tort have emerged: where there are adequate alternative remedies; where it does not reflect and address a wrong visited by one person upon another; and where the change wrought upon the legal system would be indeterminate or substantial. The first rule, that of necessity, acknowledges at least three alternative remedies that could make recognizing a new tort unnecessary: an existing tort, an independent statutory scheme, and judicial review. A difference merely of damages or the extent of harm will not suffice. The second rule is reflected in the courts' resistance to creating strict or absolute liability regimes. The third rule reflects the courts' respect for legislative supremacy and the courts' mandate to ensure that the law remains stable, predictable and accessible.

The proposed tort of cruel, inhuman or degrading treatment should not be recognized as a new nominate tort, because it is encompassed by the extant torts of battery or intentional infliction of emotional distress. The proposed tort of crimes against humanity also should not be recognized, because it is too multifarious a category to be the proper subject of a nominate tort. It is, however, possible that the proposed torts of slavery and use of forced labour would pass the test for recognizing a new nominate tort.

Nevertheless, these proposed torts should not be recognized for the first time in a proceeding based on conduct that occurred in a foreign territory. In general, tortious conduct abroad will not be governed by Canadian law, even where the wrong is litigated before Canadian courts, except when the foreign state's law is so repugnant to the fundamental morality of the Canadian legal system as to lead the court not to apply it. Developing Canadian law in such circumstances is inadvisable because the law that is appropriate for regulating a foreign state may not also be law that is appropriate for regulating Canada and because doing so would take courts outside the limits of their institutional competence. The domain of foreign relations is perhaps the most obvious example of where the executive is competent to act, but where courts lack the institutional competence to do so. Setting out a novel tort in the exceptional circumstance of a foreign state's law being held by the court to be so repugnant to Canadian morality would be an intrusion into the executive's dominion over foreign relations. The courts' role within Canada is, primarily, to adjudicate on disputes within Canada, and between Canadian residents.

Not granting the motion to strike in this case offers this lesson: the more nebulous the pleadings and legal theory used to protect them, the more likely they are to survive a motion to strike.

The creation of a cause of action for breach of customary international law would require the courts to encroach on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs). It is not up to the Court to ignore the foundations of customary international law, which prohibits certain state conduct, in order to create a cause of action against private parties. Nor is it for the courts to depart from foundational principles of judicial law-making in tort law. The result of doing so will be instability and uncertainty.

Per Moldaver and **Côté** JJ. (dissenting): There is agreement with Brown and Rowe JJ.'s analysis and conclusion concerning the workers' claims inspired by customary international law. It is plain and obvious that they are bound to fail. In addition, the extension of customary international law to corporations represents a significant departure in this area of law. The widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations.

There is disagreement with the majority concerning the existence and applicability of the act of state doctrine. The workers' claims here are not amenable to adjudication within Canada's domestic legal order. Instead, they are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. They are therefore not justiciable and should be dismissed in their entirety.

There is agreement with the majority that Canada's choice of law jurisprudence plays a similar role to that of certain aspects of the act of state doctrine; however, the act of state doctrine includes a second branch distinct from choice of law which renders some claims non-justiciable. This second branch of the doctrine bars the adjudication of civil actions which have their foundation in allegations that a foreign state has violated public international law. Whether referred to as a branch of the act of state doctrine or as a specific application of the more general doctrine of justiciability, these claims are not justiciable because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations.

Justiciability is rooted in a commitment to the constitutional separation of powers. A court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders. A court has the institutional capacity to consider international law questions, and its doing so is legitimate, if they also implicate questions with respect to constitutional rights, the legality of an administrative decision or the interface between international law and Canadian public institutions. If, however, a court allows a private claim which impugns the lawfulness of a foreign state's conduct under international law, it will be overstepping the limits of its proper institutional role. The adjudication of such claims impermissibly interferes with the conduct by the executive of Canada's international relations. Litigation between private parties founded upon allegations that a foreign state has violated public international law is not the proper subject matter of judicial resolution because questions of international law relating to internationally wrongful acts of foreign states are not juridical claims amenable to adjudication on judicial or manageable standards.

While a court may consider the legality of acts of a foreign state under municipal or international law if the issue arises incidentally, a claim will not be justiciable if the allegation that the foreign state acted unlawfully is central to the litigation. In the instant case, the workers' claims are not justiciable because the issue of the legality of Eritrea's acts under international law is central to those claims and requires a determination that Eritrea has committed an internationally wrongful act. As the workers allege that Nevsun is liable because it was complicit in the Eritrean authorities' alleged internationally wrongful acts, Nevsun can be liable only if the acts of the actual alleged perpetrators -- Eritrea and its agents -- were unlawful as a matter of public international law. Since the workers' claims, as pleaded, requires a determination that Eritrea has violated international law, they must fail.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Willcock and Dickson JJ.A.), 2017 BCCA 401, 4 B.C.L.R. (6th) 91, 419 D.L.R. (4th) 631, 12 C.P.C. (8th) 225, [2017] B.C.J. No. 2318 (QL), 2017 CarswellBC 3232 (WL Can.), affirming a decision of Abrioux J., 2016 BCSC 1856, 408 D.L.R. (4th) 383, [2016] B.C.J. No. 2095 (QL), 2016 CarswellBC 2786 (WL Can.). Appeal dismissed, Brown and Rowe JJ. dissenting in part and Moldaver and Côté JJ. dissenting.

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The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Martin JJ. was delivered by

R.S. ABELLA J.

1 This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

2 The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases.

3 Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle are refugees and former Eritrean nationals. They claim that they were indefinitely conscripted through their military service into a forced labour regime where they were required to work at the Bisha mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd.

4 The Eritrean workers started these proceedings in British Columbia as a class action against Nevsun on behalf of more than 1,000 individuals who claim to have been compelled to work at the Bisha mine between 2008 and 2012. In their pleadings, the Eritrean workers sought damages for breaches of domestic torts including conversion, battery, "unlawful confinement" (false imprisonment), conspiracy and negligence. They also sought damages for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.1

5 Nevsun brought a motion to strike the pleadings on the basis of the "act of state doctrine", which precludes domestic courts from assessing the sovereign acts of a foreign government. This, Nevsun submits, includes Eritrea's National Service Program. Its position was also that the claims based on customary international law should be struck because they have no reasonable prospect of success.2

6 Both the Chambers Judge and the Court of Appeal dismissed Nevsun's motions to strike on these bases. For the reasons that follow, I see no reason to disturb those conclusions.

Background

7 The Bisha mine in Eritrea produces gold, copper and zinc. It is one of the largest sources of revenue for the Eritrean economy. The construction of the mine began in 2008. It was owned and operated by an Eritrean corporation, the Bisha Mining Share Company, which is 40 percent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 percent owned by Nevsun, a publicly-held corporation incorporated under British Columbia's *Business Corporations Act*, S.B.C. 2002, c. 57.

8 The Bisha Company hired a South African company called SENET as the Engineering, Procurement and Construction Manager for the construction of the mine. SENET entered into subcontracts on behalf of the Bisha Company with Mereb Construction Company, which was controlled by the Eritrean military, and Segen Construction Company which was owned by Eritrea's only political party, the People's Front for Democracy and Justice. Mereb and Segen were among the construction companies that received conscripts from Eritrea's National Service Program.

9 The National Service Program was established by a 1995 decree requiring all Eritreans, when they reached the age of 18, to complete 6 months of military training followed by 12 months of "military development service" (2016 BCSC 1856, at para. 26). Conscripts were assigned to direct military service and/or "to assist in the construction of public projects that are in the national interest".

10 In 2002, the period of military conscription in Eritrea was extended indefinitely and conscripts were forced to provide labour at subsistence wages for various companies owned by senior Eritrean military or party officials, such as Mereb and Segen.

11 For those conscripted to the Bisha mine, the tenure was indefinite. The workers say they were forced to provide labour in harsh and dangerous conditions for years and that, as a means of ensuring the obedience of conscripts at the mine, a variety of punishments were used. They say these punishments included "being ordered to roll in the hot sand while being beaten with sticks until losing consciousness" and the "'helicopter' which consisted of tying the workers' arms together at the elbows behind the back, and the feet together at the ankles, and being left in the hot sun for an hour".

12 The workers claim that those who became ill -- a common occurrence at the mine -- had their pay docked if they failed to return to work after five days. When not working, the Eritrean workers say they were confined to camps and not allowed to leave unless authorized to do so. Conscripts who left without permission or who failed to return from authorized leave faced severe punishment and the threat of retribution against their families. They say their wages were as low as US$30 per month.

13 Gize Yebeyo Araya says he voluntarily enlisted in the National Service Program in 1997 but instead of being released after completing his 18 months of service, was forced to continue his military service and was deployed as a labourer to various sites, including the Bisha mine in February 2010. At the mine, he says he was required to work 6 days a week from 5:00 a.m. to 6:00 p.m., often outside in temperatures approaching 50 degrees Celsius. He escaped from Eritrea in 2011.

14 Kesete Tekle Fshazion says he was conscripted in 2002 and remained under the control of the Eritrean military until he escaped from Eritrea in 2013. He says he was sent to the Bisha mine in 2008 where he worked from 6:00 a.m. to 6:00 p.m. six days a week and 6:00 a.m. to 2:00 p.m. on the seventh day.

15 Mihretab Yemane Tekle says he was conscripted in 1994 and, after completing his 18 months of service, was deployed to several positions, mainly within the Eritrean military. He says he was transported to the Bisha mine in February 2010 where he worked 6 days a week from 6:00 a.m. to 6:00 p.m., often outside, uncovered, in temperatures approaching 50 degrees Celsius. He escaped Eritrea in 2011.

Prior Proceedings

16 Nevsun brought a series of applications seeking: an order denying the proceeding the status of a representative action; a stay of the proceedings on the basis that Eritrea was a more appropriate forum (*forum non conveniens*); an order striking portions of the evidence -- first-hand affidavit material and secondary reports -- filed by the Eritrean workers; an order dismissing or striking the pleadings pursuant to rule 21-8 or, alternatively, rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, on the grounds that British Columbia courts lacked subject matter jurisdiction as a result of the operation of the act of state doctrine; and an order striking that part of the pleadings based on customary international law as being unnecessary and disclosing no reasonable cause of action, pursuant to rule 9-5 of the *Supreme Court Civil Rules*.

17 The Chambers Judge, Abrioux J., observed that since it controlled a majority of the Board of the Bisha Company and Nevsun's CEO was its Chair, Nevsun exercised effective control over the Bisha Company. He also observed that there was operational control: "Through its majority representation on the board of [the Bisha Company, Nevsun] is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation".

18 He denied Nevsun's *forum non conveniens* application, concluding that Nevsun had not established that convenience favours Eritrea as the appropriate forum. There was also a real risk of an unfair trial occurring in Eritrea. Abrioux J. admitted some of the first-hand affidavit material and the secondary reports for the limited purpose of providing the required social, historical and contextual framework, but he denied the proceeding the status of a representative action, meaning the Eritrean workers were not permitted to bring claims on behalf of the other individuals, many of whom are still in Eritrea.

19 As to the act of state doctrine, Abrioux J. noted that it has never been applied in Canada, but was nonetheless of the view that it formed part of Canadian common law. Ultimately, however, he concluded that it did not apply in this case.

20 In dealing with Nevsun's request to strike the claims based on customary international law, Abrioux J.

characterized the issue as "whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law ... may form the basis of a civil proceeding in British Columbia". He said that claims should only be struck if, assuming the pleaded facts to be true, it is "plain and obvious" that the pleadings disclose no reasonable likelihood of success and are bound to fail. He rejected Nevsun's argument that there is no reasonable prospect at trial that the court would recognize either "claims based on breaches of [customary international law]" or claims for "new torts based on the adoption of the customary norms advanced by the [workers]". He held that customary international law is incorporated into and forms part of Canadian common law unless there is domestic legislation to the contrary. Neither the *State Immunity Act*, R.S.C. 1985, c. S-18, nor any other legislation bars the Eritrean workers' claims. In his view, while novel, the claims stemming from Nevsun's breaches of customary international law should proceed to trial where they can be evaluated in their factual and legal context, particularly since the prohibitions on slavery, forced labour and crimes against humanity are *jus cogens*, or peremptory norms of customary international law, from which no derogation is permitted.

21 On appeal, Nevsun argued that Abrioux J. erred in refusing to decline jurisdiction on the *forum non conveniens* application; in admitting the Eritrean workers' reports, even for a limited purpose; in holding that the Eritrean workers' claims were not barred by the act of state doctrine; and in declining to strike the Eritrean workers' claims that were based on customary international law. The Eritrean workers did not appeal from Abrioux J.'s ruling denying the proceeding the status of a representative action.

22 Writing for a unanimous court, Newbury J.A. upheld Abrioux J.'s rulings on the *forum non conveniens* and evidence applications (2017 BCCA 401). As for the act of state doctrine, Newbury J.A. noted that no Canadian court has ever directly applied the doctrine, but that it was adopted in British Columbia by virtue of what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which recognizes that the common law of England as it was in 1858 is part of the law of British Columbia. She concluded, however, that the act of state doctrine did not apply in this case because the Eritrean workers' claims were not a challenge to the legal validity of a foreign state's laws or executive acts. Even if the act of state doctrine did apply, it would not bar the Eritrean workers' claims since one or more of the doctrine's acknowledged exceptions would apply.

23 Turning to the international law issues, Newbury J.A. noted that in actions brought against foreign states, courts in both England and Canada have not recognized a private law cause of action since they involved the principle of state immunity, codified in Canada by the *State Immunity Act*. But because the Eritrean workers' customary international law claims were not brought against a foreign state, they were not barred by the *State Immunity Act*.

24 Finally, Newbury J.A. was alert to what she referred to as a fundamental change that has occurred in public international law, whereby domestic courts have become increasingly willing to address issues of public international law when appropriate. With this in mind, she characterized the central issue on appeal as being "whether Canadian courts, which have thus far not grappled with the development of what is now called 'transnational law', might also begin to participate in the change described". She concluded that the fact that aspects of the Eritrean workers' claims were actionable as private law torts, did not mean that they had no reasonable chance of success on the basis of customary international law.

25 Ultimately, Newbury J.A. held that since the law in this area is developing, it cannot be said that the Eritrean workers' claims based on breaches of customary international law were bound to fail.

Analysis

26 Nevsun's appeal focussed on two issues:

(1) Does the act of state doctrine form part of Canadian common law?

(2) Can the customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity ground a claim for damages under Canadian law?

Nevsun did not challenge the Court of Appeal's decision on the admissibility of the reports or on *forum non conveniens*. As a result, there is no dispute that if the act of state doctrine does not bar the matter from proceeding, British Columbia courts are the appropriate forum for resolving the claims.

The Act of State Doctrine

27 Nevsun's first argument is that the entire claim should be struck because the act of state doctrine makes it non-justiciable.

28 The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law. Nonetheless, Nevsun asserts that these proceedings are barred by its operation. It is helpful, then, to start by examining what the doctrine is.

29 There is no single definition that captures the unwieldly collection of principles, limitations and exceptions that have been given the name "act of state" in English law. A useful starting point, however, is Lord Millett's description: "the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state" (*R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3*), [2000] 1 A.C. 147 (H.L.), at p. 269).

30 The act of state doctrine shares some features with state immunity, which extends personal immunity to state officials for acts done in their official capacity. But the two are distinct, as Lord Sumption explained in *Belhaj v. Straw*, [2017] UKSC 3:

> Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. *But it is wholly the creation of the common law*. Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. *The foreign act of state doctrine is at best permitted by international law*. [Emphasis added; para. 200.]

31 The outlines of the act of state doctrine can be traced to the early English authorities of *Blad v. Bamfield* (1674), 3 Swans 604, and *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, (see also *Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No. 2)*, [2012] EWCA Civ 855, at para. 40).

32 In *Blad*, Bamfield and other English traders brought a claim in the English courts against a Danish trader who had been granted letters patent by the King of Denmark as ruler of Iceland "for the sole trade of Iceland" (p. 993). The trader seized Bamfield's goods in Iceland for allegedly fishing contrary to his letters patent. Bamfield challenged the validity of the letters patent. Lord Nottingham ruled that Bamfield's action was barred on the grounds that "to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd" (p. 993).

33 In the subsequent case of *Duke of Brunswick*, the deposed Duke sued the King of Hanover in England, alleging that, through acts done in Hanover and elsewhere abroad, he had aided in depriving the Duke of his land and title. The House of Lords refused to judge the acts of a sovereign in his own country. In the words of the Lord Chancellor:

> [A] foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign. [pp. 998-99]

34 Since then, the English act of state doctrine has developed a number of qualifications and limitations, and it no longer includes the sweeping proposition that domestic courts cannot adjudicate the lawfulness of foreign state acts. This became clear in the case of *Oppenheimer v. Cattermole*, [1976] A.C. 249, where the House of Lords refused to recognize and apply a Nazi decree depriving Jews of their German citizenship and leading to the confiscation of all their property on which the state could "lay its hands" (p. 278). Lord Cross held that such a discriminatory law "constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all", noting that it is "part of the public policy of this country that our courts should give effect to clearly established rules of international law" (p. 278). The House of Lords elaborated on this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, where Lord Nicholls held that foreign laws "may be fundamentally unacceptable for reasons other than human rights violations" (para. 18).

35 There has also been a proliferation of limitations on, and exceptions to, the act of state doctrine in England, reflecting an attempt to respond to the difficulties of applying a single doctrine to a heterogeneous collection of issues. This challenge was identified by Lord Wilberforce in his influential account of the English act of state doctrine in *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), a defamation action that arose in the context of two conflicting oil concessions granted by neighbouring states in the Arabian Gulf. He referred to the act of state doctrine as "a generally confused topic", adding that "[n]ot the least of its difficulty has lain in the indiscriminating use of 'act of state' to cover situations which are quite distinct, and different in law" (p. 930). He explained that, though often referred to using the general terminology of "act of state", English law differentiates between Crown acts of state (concerning the acts of officers of the Crown committed abroad) and foreign acts of state (concerning the justiciability in domestic courts of actions of foreign states). He went on to observe that within the foreign act of state doctrine, the cases support the existence of two separate principles: a more specific principle guiding courts to consider the choice of law in cases involving whether and when a domestic court will give effect in its law to a rule of foreign law; and the more general principle that courts refrain from adjudicating the transactions of foreign states.

36 And in the 2012 *Yukos* case, Rix L.J., writing for the Court of Appeal of England and Wales, modernized the description of the doctrine*:*

> It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances ... may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable. The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae,* closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state. [para. 66]

37 Rix L.J. noted the numerous limitations or exceptions to the doctrine which he grouped into five categories. First, the impugned act must occur within the territory of the foreign state for the doctrine to apply. Second, "the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights" (para. 69). Third, judicial acts are not "acts of state" for the purposes of the doctrine. Fourth, the doctrine will not apply to the conduct of a state that is of a commercial (rather than sovereign) character. Fifth, the doctrine does not apply where the only issue is whether certain acts have occurred, not the legal effectiveness of those acts.

38 *The effect of all these limitations, as he noted, was to dilute the doctrine substantially:*

> The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed. That after all would explain why it has become wholly

> commonplace to adjudicate upon or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility or other matters ... . That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. *It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law*. The idea that the rights of a state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era. That is perhaps why our courts have sometimes struggled, albeit ultimately successfully, to give effective support to their abhorrence of the persecutions of the Nazi era [as in *Oppenheimer*]. [Emphasis added; para. 115.]

39 The doctrine was again recently assessed by the English courts in *Belhaj*, where Mr. Belhaj and his wife alleged that English officials were complicit with the Libyan State in their illegal detention, abduction and removal to Libya in 2004. The court of first instance concluded that most of the claims were barred by the foreign act of state doctrine. On appeal, Lloyd Jones L.J. for the court cited with approval the modern description of the doctrine and its limitations set out in *Yukos* and held that the action could proceed in light of compelling public policy reasons ([2014] EWCA Civ 1394).

40 Upholding the Court of Appeal, a divided Supreme Court provided four separate sets of reasons, each seeking to clarify the doctrine but disagreeing on how to do so.

41 Lord Mance held that the doctrine should be disaggregated into three separate rules, subject to limitations. He concluded that the doctrine did not apply to the circumstances of the case and, if it did, a public policy exception like the one articulated in *Yukos* would apply. Lord Neuberger separated the doctrine into different rules from those of Lord Mance. Like Lord Mance, he concluded that the doctrine did not apply in this case and, even if it did, a public policy exception would preclude its application. Lady Hale and Lord Clarke agreed with Lord Neuberger and Lord Mance that the foreign act of state doctrine did not apply to the case and, notwithstanding the differing list of rules provided by Lords Mance and Neuberger, considered their reasons on the matter to be substantially the same. Lord Sumption maintained a more unified version of the doctrine, holding that it would have applied but for a public policy exception.

42 As the conflicting judgments in *Belhaj* highlight, the attempt to house several unique concepts under the roof of the act of state doctrine in English jurisprudence has led to considerable confusion. *Attempting to apply a doctrine which is largely* defined by its limitations has also caused some confusion in *Australia.* In *Habib v. Commonwealth of Australia*, [2010] FCAFC 12, Jagot J. observed that the act of state doctrine has been described as "a common law principle of uncertain application" (para. 51 (AustLII)).

43 Similarly, in *Moti v. The Queen*, [2011] HCA 50, the court rejected the contention that the act of state doctrine jurisprudence established "a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law" (para. 50 (AustLII)). The court noted that "the phrase 'act of State', must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula" (para. 52).

44 The Canadian common law has grown from the same roots. As in England, the foundational cases concerning foreign act of state are *Blad* and *Duke of Brunswick*. But since then, whereas English jurisprudence continually reaffirmed and reconstructed the foreign act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine articulated in *Buttes Gas*: conflict of laws and judicial restraint. Both principles have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing "act of state doctrine". As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence.

45 Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.

46 *Laane and Baltser v. Estonian State Cargo & Passenger Line*, [1949] S.C.R. 530, is an early example of how the law has developed in Canada. (see Martin Bühler, "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 343, at pp. 346-48 and 351). In *Laane*, this Court considered whether Canada would give effect to a 1940 decree of the Estonian Soviet Socialist Republic purporting to nationalize all Estonian merchant ships, including those in foreign ports, with compensation to the owners at a rate of 25 percent of each ship's value. One of the ships was in the port of Saint John, New Brunswick, when it was sold by court order at the insistence of crew members who were owed wages. The balance of the sale proceeds was claimed by the Estonian State Cargo and Passenger Steamship Line. This Court refused to enforce the 1940 decree because it was confiscatory and contrary to Canadian public policy. None of the four judges who gave reasons had any hesitation in expressing views about the lawfulness of Estonia's conduct, whether as a matter of international law or Canadian public policy. As Rand J. noted: "... there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy" (p. 545). No act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court. Instead, the case was dealt with as a straightforward private international law matter about whether to enforce the foreign law despite its penal and confiscatory nature.

47 Our courts also exercise judicial restraint when considering foreign law questions. This restraint means that courts will refrain from making findings which purport to be legally binding on foreign states. But our courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court.

48 In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, this Court confirmed that Canadian courts should not hesitate to make determinations about the validity of "foreign" laws where such determinations are incidental to the resolution of legal controversies properly before the courts. The issue in *Hunt* was whether the courts in British Columbia had the authority to determine the constitutionality of a Quebec statute. In concluding that British Columbia courts did have such authority and, ultimately, that the statute in question was constitutionally inapplicable to other provinces, La Forest J. made no reference to act of state:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation... .
>
> ...
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. [pp. 308-9]

49 The decision in *Hunt* confirms that there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where "the question arises merely incidentally" (p. 309). And in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, this Court noted that, in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within our legal system, and in these cases, adjudicating these questions is "not only permissible but unavoidable" (para. 23; see also Gib van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (2019), 501).

50 Our courts are also frequently asked to evaluate foreign laws in extradition and deportation cases. In these instances, our courts consider comity but, as in other contexts, the deference accorded by comity to foreign legal systems "ends where clear violations of international law and fundamental human rights begin" (*R. v. Hape*, [2007] 2 S.C.R. 292, at para. 52; see also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1047; *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, at paras. 18 and 26; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, at para. 16). In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, an extradition case, La Forest J. recognized that

> in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. [p. 522]

51 McLachlin J. endorsed this principle in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, where she explained that "[t]he test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state 'sufficiently shocks' the Canadian conscience" (p. 849, citing *Schmidt*, at p. 522). As part of the inquiry, the reviewing court must consider "the nature of the justice system in the requesting jurisdiction" in light of "the Canadian sense of what is fair, right and just" (*Kindler*, at pp. 849-50).

52 And in *United States v. Burns*, [2001] 1 S.C.R. 283, this Court unanimously held that "[a]n extradition that violates the principles of fundamental justice will always shock the conscience" (para. 68 (emphasis in original)). The Court concluded that it was a violation of s. 7 of the *Canadian Charter of Rights and Freedoms* for the Minister to extradite Canadian citizens to the United States without, as a condition of extradition, assurances that the death penalty would not be sought.

53 In the deportation context, the Court's unanimous decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, concluded that the Minister, and by extension the reviewing court, should consider the human rights record of the foreign state when assessing whether the potential deportee will be subject to torture there.

54 The question of whether and when it is appropriate for a Canadian court to scrutinize the human rights practices of a foreign state in the context of deportation hearings was also squarely before the Court in *India v. Badesha*, [2017] 2 S.C.R. 127. Moldaver J., writing for the Court, said: "I am unable to accept ... that evidence of systemic human rights abuses in a receiving state amounts to a general indictment of that state's justice system", concluding that the Minister and the reviewing court are entitled to "consider evidence of the general human rights situation" in a foreign state (para. 44).

55 Even though all of these cases dealt to some extent with questions about the lawfulness of foreign state acts, none referred to the "act of state doctrine".

56 Despite the absence of any cases applying the act of state doctrine in Canada, Nevsun argues that the doctrine was part of the English common law received into the law of British Columbia in 1858.

57 While the English common law, including some of the cases which are now recognized as forming the basis of the act of state doctrine, was generally received into Canadian law at various times in our legal history, as the preceding analysis shows, Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence.

58 To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts.

59 The doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims.

Customary International Law

60 The Eritrean workers claim in their pleadings that customary international law is part of the law of Canada and, as a result, a "breach of customary international law ... is actionable at common law". Specifically, the workers' pleadings claim:

> 7. The plaintiffs bring this action for damages against Nevsun under customary international law as incorporated into the law of Canada and domestic British Columbia law.
>
> ...
>
> 53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
>
> ...
>
> 56. The plaintiffs claim:
>
> (a) damages at customary international law as incorporated into the law of Canada;
>
> ...
>
> 60. The use of forced labour is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> ...
>
> 63. Slavery is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> ...
>
> 66. Cruel, inhuman or degrading treatment is a breach of customary international law and is actionable at common law.
>
> ...
>
> 70. Crimes against humanity are a breach of customary international law and *jus cogens* and are actionable at common law.

61 As these excerpts from the pleadings demonstrate, the workers broadly seek damages from Nevsun for breaches of customary international law as incorporated into the law of Canada.

62 As the Chambers Judge and the Court of Appeal noted, this Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. The question before us is whether Nevsun has demonstrated that the Eritrean workers' claims based on breaches of customary international law should be struck at this preliminary stage.

63 Nevsun's motion to strike these customary international law claims was based on British Columbia's *Supreme Court Civil Rules* permitting pleadings to be struck if they disclose no reasonable claim (rule 9-5(1)(a)), or are unnecessary (rule 9-5(1)(b)).

64 A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, at para. 17; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at paras. 14-15). When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455).

65 Under rule 9-5(1)(b), a pleading may be struck if "it is unnecessary, scandalous, frivolous or vexatious". Fisher J. articulated the relevant considerations in *Willow v. Chong*, 2013 BCSC 1083, stating:

> Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC (in chambers)); *Skender v. Farley*, 2007 BCCA 629. [at para. 20 (CanLII)]

66 This Court admonished in *Imperial Tobacco* that the motion to strike

> is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed... . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]

67 The Chambers Judge in this case summarized the issues as follows:

> The proceeding raises issues of transnational law being the term used for the convergence of customary international law and private claims for human rights redresses and which include:
>
> (a) whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding in British Columbia;
>
> (b) the potential corporate liability for alleged breaches of both private and customary international law. This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims.

He concluded that though the workers' claims raised novel and difficult issues, the claims were not bound to fail and should be allowed to proceed for a full contextual analysis at trial.

68 In the British Columbia Court of Appeal, Newbury J.A. also believed that a private law remedy for breaches of the international law norms alleged by the workers may be possible. In her view, recognizing such a remedy may be an incremental first step in the development of this area of the law and, as a result, held that the claims based on breaches of customary international law should not be struck at this preliminary stage.

69 For the reasons that follow, I agree with the Chambers Judge and the Court of Appeal that the claims should be allowed to proceed. As the Chambers Judge put it: "The current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success".

70 Canadian courts, like all courts, play an important role in the ongoing development of international law. As La Forest J. wrote in a 1996 article in the *Canadian Yearbook of International Law*:

> [I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international

> experience. Thus our courts -- and many other national courts -- are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.
>
> (Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 *Can. Y.B. Intl Law* 89, at pp. 100-1)

71 Since "[i]nternational law not only percolates down from the international to the domestic sphere, but ... also bubbles up", there is no reason for Canadian courts to be shy about implementing and advancing international law (Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011), 60 *I.C.L.Q.* 57, at p. 69; Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at pp. 4-6, 8 and 56; see also Hugh M. Kindred, "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 5, at p. 7).

72 Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the "choir" of domestic court judgments around the world shaping the "substance of international law" (Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 *Cardozo J. Intl & Comp. L.* 587, at p. 616; see also René Provost, "Judging in Splendid Isolation" (2008), 56 Am. J. Comp. L. 125, at p. 171).

73 Given this role, we must start by determining whether the prohibitions on forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, the violations of which form the foundation of the workers' customary international law claims, are part of Canadian law, and, if so, whether their breaches may be remedied. To determine whether these prohibitions are part of Canadian law, we must first determine whether they are part of customary international law.

74 Customary international law has been described as "the oldest and original source of international law" (Philip Alston and Ryan Goodman, *International Human Rights* (2013), at p. 72). It is the common law of the international legal system -- constantly and incrementally evolving based on changing practice and acceptance. As a result, it sometimes presents a challenge for definitional precision.

75 But in the case of the norms the Eritrean workers claim Nevsun breached, the task is less onerous, since these norms emerged seamlessly from the origins of modern international law, which in turn emerged responsively and assertively after the brutality of World War II. It brought with it acceptance of new laws like prohibitions against genocide and crimes against humanity, new institutions like the United Nations, and new adjudicative bodies like the International Court of Justice and eventually the International Criminal Court, all designed to promote a just rule of law and all furthering liberal democratic principles (Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (2016), at pp. 361-64; Lloyd Axworthy, *Navigating A New World: Canada's Global Future* (2003), at pp. 200-1).

76 The four authoritative sources of modern international law, including customary international law, are found in art. 38(1) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, which came into force October 24, 1945:

...

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;

> c. the general principles of law recognized by civilized nations;
>
> d... . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Professors Brunnée and Toope have described art. 38 as the "litmus test for the sources of international law" (Brunnée and Toope (2002), "A Hesitant Embrace", at p. 11).

77 There are two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal obligation (United Nations, International Law Commission, *Report of the International Law Commission*, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018, at p. 124; *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p. 3, at para. 71; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, at para. 38; Harold Hongju Koh, "Twenty-First Century International Lawmaking" (2013), 101 Geo. L.J. 725, at p. 738; Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005), 87 *Int'l Rev. Red Cross* 175, at p. 178; Antonio Cassese, *International Law* (2nd ed. 2005), at p. 157).

78 To meet the first requirement, the practice must be sufficiently general, widespread, representative and consistent (International Law Commission, at p. 135). To meet the second requirement, *opinio juris*, the practice "must be undertaken with a sense of legal right or obligation", as "distinguished from mere usage or habit" (International Law Commission, at p. 138; *North Sea Continental Shelf*, at para. 77).

79 The judicial decisions of national courts are also evidence of general practice or *opinio juris* and thus play a crucial role in shaping norms of customary international law. As the Permanent Court of International Justice noted in *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)* (1926), P.C.I.J. Ser. A, No. 7, legal decisions are "facts which express the will and constitute the activities of States" (p. 19; see also *Prosecutor v. Jelisiae*, IT-95-10-T, Judgment, 14 December 1999 (ICTY, Trial Chamber), at para. 61; *Prosecutor v. Krstiae*, IT-98-33-T, Judgment, 2 August 2001 (ICTY, Trial Chamber), at paras. 541, 575 and 579-89; *Prosecutor v. Erdemoviae*, IT-96-22-A, Joint separate opinion of Judge McDonald and Judge Vohrah, 7 October 1997 (ICTY, Appeal Chamber), at paras. 47-55).

80 When an international practice develops from being intermittent and voluntary into being widely accepted and believed to be obligatory, it becomes a norm of customary international law. As Professor James L. Brierly wrote:

> Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor.
>
> (James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963), at p. 59, cited in John H. Currie, et al., *International Law: Doctrine, Practice, and Theory* (2nd ed. 2014), at p. 116)

81 This process, whereby international practices become norms of customary international law, has been variously described as "accretion", "crystallization", "ripening" and "gel[ling]" (see, e.g., Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988), 12 *Aust. Y.B.I.L.* 82, at p. 104; *The Paquete Habana*, 175 U.S. 677 (1900), at p. 686; Jutta Brunnée and Stephen J. Toope, "International Law and the Practice of Legality: Stability and Change" (2018), 49 *V.U.W.L.R.* 429, at p. 443).

82 Once a practice becomes a norm of customary international law, by its very nature it "must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour" (*North Sea Continental Shelf*, at para. 63).

83 Within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, which have been "accepted and recognized by the international community of States as a whole ... from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), art. 53). This Court acknowledged that "a peremptory norm, or *jus cogens* norm is a fundamental tenet of international law that is non-derogable" (*Kazemi*, at para. 47, citing John H. Currie, *Public International Law* (2nd ed. 2008), at p. 583; Claude Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (3rd ed. 2010), at pp. 168-69; *Vienna Convention on the Law of Treaties*, art. 53).

84 Peremptory norms have been accepted as fundamental to the international legal order (Ian Brownlie, *Principles of Public International Law* (7th ed. 2008), at pp. 510-12; see also Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*" (2008), 19 *E.J.I.L.* 491; Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009), 34 *Yale J. Intl L.* 331).

85 How then does customary international law apply in Canada? As Professor Koh explains, "[l]aw-abiding states *internalize* international law by incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms" (Harold Hongju Koh, "Transnational Legal Process" (1996), 75 Neb. L. Rev. 181, at p. 204 (emphasis in original)). Some areas of international law, like treaties, require legislative action to become part of domestic law (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at pp. 160-61 and 173-74; Currie, *Public International Law*, at pp. 225-26).

86 On the other hand, customary international law is automatically adopted into domestic law without any need for legislative action (Currie, *Public International Law*, at pp. 225-26; *Hape*, at paras. 36 and 39, citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.), per Lord Denning; Hersch Lauterpacht, "Is International Law a Part of the Law of England?", in *Transactions of the Grotius Society*, vol. 25, *Problems of Peace and War: Papers Read Before the Society in the Year 1939* (1940), 51). In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption. As Professor Brownlie explains:

> The dominant principle ... is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority. [p. 41]

87 The adoption of customary international law as part of domestic law by way of automatic judicial incorporation can be traced back to the 18th century (Gib van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 184-208). Blackstone's 1769 *Commentaries on the Laws of England: Book the Fourth*, for example, noted that "the law of nations ... is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land", at p. 67; see also *Triquet v. Bath* (1764), 3 Burr. 1478, (K.B.)). Similarly, in the frequently cited case of *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.), Lord Atkin wrote:

> The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. [p. 168]

88 Direct incorporation is also far from a niche preserve among nations. In a study covering 101 countries over a period between 1815 and 2013, Professors Pierre-Hugues Verdier and Mila Versteeg found widespread acceptance of the direct application of customary international law:

> [P]erhaps the most striking pattern that emerges from our data is that in virtually all states, CIL [Customary International Law] rules are in principle directly applicable without legislative implementation... . [M]ost countries that require treaty implementation do not apply the same rule to international custom, but rather apply it directly.
>
> (Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation" (2015), 109 *Am. J. Intl L.* 514, at p. 528)

89 In Canada, in *The Ship "North" v. The King* (1906), 37 S.C.R. 385, Davies J., in concurring reasons, expressed the view that the Admiralty Court was "bound to take notice of the law of nations" (p. 394). Similarly, in *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483, Taschereau J., drawing on *Chung Chi Cheung*, held that the body of rules accepted by nations are incorporated into domestic law absent statutes to the contrary (pp. 516-17).

90 As these cases show, Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation. This approach was more recently confirmed by this Court in *Hape*, where LeBel J. for the majority held:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law *should* be incorporated into domestic law in the absence of conflicting legislation. The *automatic* incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; para. 39.]

It is important to note that he concluded that rules of customary international law should be automatically incorporated into domestic law in the absence of conflicting legislation. His use of the word "may" later in the paragraph cannot be taken as overtaking his clear direction that, based on "a long line of cases", customary international law is automatically incorporated into Canadian law. Judicial decisions are not Talmudic texts whereby each word attracts its own exegetical interpretation. They must be read in a way that respects the author's overall intention, without permitting a stray word or phrase to undermine the overarching theory being advanced.

91 Justice LeBel himself, in an article he wrote several years after *Hape*, explained that the Court's use of the word "may" in *Hape* was in no way meant to diverge from the traditional approach of directly incorporating customary norms into Canadian common law:

> Following [*Hape*], there was some comment and concern to the effect that the [statement that "courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law" (para. 39)] left the law in a state of some doubt. These comments pointed out that this sentence could be read as holding that prohibitive norms are not actually part of the domestic common law, but may only serve to aid in its development. In my view, this was not the sense of this passage, for at least three reasons. First, the sentences immediately preceding this last sentence stated, without reservation, that prohibitive rules of customary international law are incorporated into domestic law in the absence of conflicting legislation. Second, the entire discussion of incorporation was for the purpose of showing how the norm of respect for the sovereignty of foreign states, forming, as it does, part of our common law, could shed light on the interpretation of s. 32(1) of the *Charter.* Third, the majority reasons also explicitly held that the customary principles of non-intervention and territorial sovereignty "may be adopted into the common law of Canada in the absence of conflicting legislation". The gist of the majority opinion in *Hape* was that accepting incorporation of customary international [law] was the right approach. *In conclusion, the law in Canada today appears to be settled on this point: prohibitive customary norms are directly incorporated into our common law and must be followed by courts absent legislation which clearly overrules them.* [Emphasis added.]
>
> (Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 U.N.B.L.J. 3, at p. 15)

92 As for LeBel J.'s novel use of the word "prohibitive", we should be wary of concluding that he intended to create a new category of customary international law unique to Canada. In the same article, LeBel J. clarified that "prohibitive" norms simply mean norms that are "mandatory", in the sense that they are obligatory or binding (LeBel, at p. 17). As Professor Currie observes, the word "prohibitive" is a "puzzling qualification [that] does not figure in any of the authorities cited by LeBel J. for the doctrine, nor is it a feature of the doctrine of adoption that operates in the United Kingdom" (John H. Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007), 45 *Can. Y.B. Intl Law* 55, at p. 70; see also Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008), 53 McGill L.J. 573, at p. 587).

93 The use of the word "prohibitive", therefore, does not add a separate analytic factor, it merely emphasizes the mandatory nature of customary international law (see van Ert, *Using International Law in Canadian Courts*, at pp. 216-18). This aligns with LeBel J.'s statement in *Hape* that the "automatic incorporation" of norms of customary international law "is justified on the basis that *international custom, as the law of nations, is also the law of Canada*" (para. 39 (emphasis added)).

94 Therefore, as a result of the doctrine of adoption, norms of customary international law -- those that satisfy the twin requirements of general practice and *opinio juris* -- are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law (Oonagh E. Fitzgerald, "Implementation of International Humanitarian and Related International Law in Canada", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 625, at p. 630). Legislatures are of course free to change or override them, but like all common law, no legislative action is required to give them effect (Kindred, at p. 8). To suggest otherwise by requiring legislative endorsement, upends a 250 year old legal truism and would put Canada out of step with most countries (Verdier and Versteeg, at p. 528). As Professor Toope noted, "[t]he Canadian story of international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law', because international law is partly *our* law" (Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U.N.B.L.J. 11, at p. 23 (emphasis in original)).

95 There is no doubt then, that customary international law is also the law of Canada. In the words of Professor Rosalyn Higgins, former President of the International Court of Justice: "In short, there is not 'international law' and the common law. International law is part of that which comprises the common law on any given subject" (Rosalyn Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 *Commonwealth L. Bull.* 1268, at p. 1273). The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.

96 In other words, "Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact" (Gib van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; see also van Ert, *Using International Law in Canadian Courts*, at pp. 62-69).

97 Unlike foreign law in conflict of laws jurisprudence, therefore, which is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed (van Ert, "The Reception of International Law", at p. 6; van Ert, *Using International Law in Canadian Courts*, at pp. 62-69). Professor Higgins explains this as follows: "There is not a legal system in the world where international law is treated as 'foreign law'. It is everywhere part of the law of the land; as much as contracts, labour law or administrative law" (p. 1268; see also James Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 52; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. 2008), vol. 1, at p. 57; van Ert, *Using International Law in Canadian Courts*, at p. 64).

98 And just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law. Taking judicial notice -- in the sense of not requiring formal proof by evidence -- is appropriate and an inevitable implication both of the doctrine of adoption3 and legal orthodoxy (Anne Warner La

Forest, "Evidence and International and Comparative Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 367, at pp. 381-82; van Ert, *Using International Law in Canadian Courts*, at pp. 42-56 and 62-66).

99 Some academics suggest that when recognising *new* norms of customary international law, allowing evidence of state practice may be appropriate. While these scholars acknowledge that permitting such proof departs from the conventional approach of judicially noticing customary international law, they maintain that this in no way derogates from the nature of international law as law (Anne Warner La Forest, at pp. 384 and 388; van Ert, *Using International Law in Canadian Courts*, at pp. 67-69). The questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.

100 Crimes against humanity have been described as among the "least controversial examples" of violations of *jus cogens* (Louis LeBel and Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 S.C.L.R. (2d) 23, at p. 33).

101 The prohibition against slavery too is seen as a peremptory norm. In 2002, the Office of the United Nations High Commissioner for Human Rights confirmed that "it is now a well-established principle of international law that the 'prohibition against slavery and slavery-related practices have achieved the level of customary international law and have attained "*jus cogens*" status'" (David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, U.N. Doc. HR/PUB/02/4 (2002), at p. 3).

102 Compelling authority also confirms that the prohibition against forced labour has attained the status of *jus cogens*. The International Labour Organization, in a report entitled "Forced labour in Myanmar (Burma)", *I.L.O Official Bulletin: Special Supplement*, vol. LXXXI, 1998, Series B, recognized that, "there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights" (para. 203). To the extent that debate may exist about whether forced labour is a peremptory norm, there can be no doubt that it is at least a norm of customary international law.

103 And the prohibition against cruel, inhuman and degrading treatment has been described as an "absolute right, where no social goal or emergency can limit [it]" (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at p. 627). This is reflected in the ratification of several international covenants and treaties such as the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (entered into force March 23, 1976), art. 7; the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can T.S. 1987 No. 36 (entered into force June 26, 1987), art. 16; the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 3; the *American Declaration of the Rights and Duties of Man*, April 30, 1948, art. 26; the *American Convention on Human Rights*, 1144 U.N.T.S. 123, art. 5; the *African Charter on Human and Peoples' Rights*, 1520 U.N.T.S. 217, art. 5; the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 37; the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1561 U.N.T.S. 363; and the *Inter-American Convention to Prevent and Punish Torture*, O.A.S.T.S. No. 67 (Currie et al., *International Law: Doctrine, Practice, and Theory*, at p. 627).

104 Nevsun argues, however, that even if customary international law norms such as those relied on by the Eritrean workers form part of the common law through the doctrine of adoption, it is immune from their application because it is a corporation.

105 Nevsun's position, with respect, misconceives modern international law. As Professor William S. Dodge has observed, "[i]nternational law ... does not contain general norms of liability or non-liability applicable to categories of actors" (William S. Dodge, "Corporate Liability Under Customary International Law" (2012), 43 *Geo. J. Int'l L.* 1045, at p. 1046). Though certain norms of customary international law, such as norms governing treaty making, are of a strictly interstate character and will have no application to corporations, others prohibit conduct regardless of whether the perpetrator is a state (see, e.g., Dodge; Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at pp. 265-267; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006), at p. 58).

106 While states were classically the main subjects of international law since the Peace of Westphalia in 1648 (Cassese, at pp. 22-25; Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), at p. xix), international law has long-since evolved from this state-centric template. As Lord Denning wrote in *Trendtex Trading Corp.*: "I would use of international law the words which Galileo used of the earth: 'But it does move'" (p. 554).

107 In fact, international law has so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between states. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights.

108 Professor Payam Akhavan notes that "[t]he rapid emergence of human rights signified a revolutionary shift in international law, from a state-centric to a human-centric conception of global order" (Payam Akhavan, "Canada and international human rights law: is the romance over?" (2016), 22 *Canadian Foreign Policy Journal* 331, at p. 332). The result of these developments is that international law now works "not only to maintain peace between States, but to protect the lives of individuals, their liberty, their health, [and] their education" (Emmanuelle Jouannet, "What is the Use of International Law? International Law as a 21st Century Guardian of Welfare" (2007), 28 Mich. J. Int'l L. 815, at p. 821). As Professor Christopher Joyner adds: "The rights of peoples within a state now transcend national boundaries and have become essentially a common concern under international law" (Christopher C. Joyner, "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" (2007), 47 Va J. Int'l L. 693, at p. 717).

109 This represents the international law actualization of Professor Hersch Lauterpacht's statement in 1943 that "[t]he individual human being ... is the ultimate unit of all law" (Sands, at p. 63).

110 A central feature of the individual's position in modern international human rights law is that the rights do not exist simply as a contract with the state. While the rights are certainly enforceable against the state, they are not defined by that relationship (Patrick Macklem, *The Sovereignty of Human Rights* (2015), at p. 22). They are discrete legal entitlements, held by individuals, and are "to be respected by everyone" (Clapham, *Human Rights Obligations*, at p. 58).

111 Moreover, as Professor Beth Stephens has observed, these rights may be violated by private actors:

> The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. Human rights law in the past several decades has moved decisively to prohibit violations by private actors in fields as diverse as discrimination, children's rights, crimes against peace and security, and privacy... . It is clear that individuals today have both rights and responsibilities under international law. Although expressed in neutral language, many human rights provisions must be understood today as applying to individuals as well as to states.
>
> (Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 *B.J.I.L.* 45, at p. 73)

There is no reason, in principle, why "private actors" excludes corporations.

112 Canvassing the jurisprudence and academic commentaries, Professor Koh observes that non-state actors like corporations can be held responsible for violations of international criminal law and concludes that it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability" (Koh, "Separating Myth from Reality", at p. 266). He describes the idea that domestic courts cannot hold corporations civilly liable for violations of international law as a "myth" (Koh, "Separating Myth from Reality", at pp. 264-68; see also Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32). Professor Koh also notes that

> [t]he commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals *act through* corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation? [Emphasis in original.]
>
> (Koh, "Separating Myth from Reality", at p. 265)

113 As a result, in my respectful view, it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in what Professor Clapham calls "complicity offenses" (Koh, "Separating Myth from Reality", at pp. 265 and 267; Andrew Clapham, "On Complicity", in Marc Henzelin and Robert Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.

114 Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun. The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.

115 On the contrary, the Canadian government has adopted policies to ensure that Canadian companies operating abroad *respect* these norms (see, e.g., Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, last updated July 31, 2019 (online); Global Affairs Canada, *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, April 8, 2019 (online) (announcing the creation of an Ombudsperson for Responsible Enterprise, and a Multi-stakeholder Advisory Body on Responsible Business Conduct)). With respect to the Canadian Ombudsperson for Responsible Enterprise, mandated to review allegations of human rights abuses of Canadian corporations operating abroad, the Canadian government has explicitly noted that "[t]he creation of the Ombudsperson's office does not affect the right of any party to bring a legal action in a court in any jurisdiction in Canada regarding allegations of harms committed by a Canadian company abroad" (Global Affairs Canada, *Responsible business conduct abroad -- Questions and answers*, last updated September 16, 2019 (online); Yousuf Aftab and Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (2019), at pp. 47-48).

116 In the absence of any contrary law, the customary international law norms raised by the Eritrean workers form part of the Canadian common law and potentially apply to Nevsun.

117 Is a civil remedy for a breach of this part of our common law available? Put another way, can our domestic common law develop appropriate remedies for breaches of adopted customary international law norms?

118 Development of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; see also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; *Watkins v. Olafson*, [1989] 2 S.C.R. 750). In my respectful view, recognizing the possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development. As Lord Scarman noted:

> Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty: but merely the application of the principle *ubi jus ibi remedium* [for every wrong, the law provides a remedy].
>
> (*Sidaway v. Board of Governors of the Bethlem Royal Hospital*, [1985] 1 A.C. 871, at p. 884 (H.L.))

119 With respect specifically to the allegations raised by the workers, like all state parties to the *International Covenant on Civil and Political Rights*, Canada has international obligations to ensure an effective remedy to victims of violations of those rights (art. 2). Expounding on the nature of this obligation, the United Nations Human Rights Committee -- which was established by states as a treaty monitoring body to ensure compliance with the *International Covenant on Civil and Political Rights* -- provides additional guidance in its *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004. In this document, the Human Rights Committee specifies that state parties must protect against the violation of rights not just by states, but also by private persons and entities. The Committee further specifies that state parties must ensure the enjoyment of *Covenant* rights to all individuals, including "asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (para. 10). As to remedies, the Committee notes:

> [T]he enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. [para. 15]

120 In the domestic context, the general principle that "where there is a right, there must be a remedy for its violation" has been recognized in numerous decisions of this Court (see, e.g., *Kazemi*, at para. 159; *Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214, at para. 65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 25; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para. 20; *Great Western Railway v. Brown* (1879), 3 S.C.R. 159, at p. 179).

121 The right to a remedy in the context of allegations of human rights violations was discussed by this Court in *Kazemi*, where a Canadian woman's estate sought damages against the Islamic Republic of Iran for torture. The majority did not depart from the position in *Hape* that customary international law, including peremptory norms, are part of Canadian common law, absent express legislation to the contrary. However, it concluded that the *State Immunity Act* was the kind of express legislation that prevented a remedy against the State of Iran for the breach of the *jus cogens* prohibition against torture, which it agreed was part of domestic Canadian law. LeBel J. for the majority noted that "[w]hile rights would be illusory if there was never a way to remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars" (para. 159). In effect, the majority in *Kazemi* held that the general right to a remedy was overridden by Parliament's enactment of the *State Immunity Act*. However, the *State Immunity Act* protects "foreign states" from claims, not individuals or corporations.

122 Unlike *Kazemi*, there is no law or other procedural bar precluding the Eritrean workers' claims. Nor is there anything in *Kazemi* that precludes the possibility of a claim against a Canadian corporation for breaches in a foreign jurisdiction of customary international law, let alone *jus cogens*. As a result, it is not "plain and obvious" that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law.

123 Nevsun additionally argues that the harms caused by the alleged breaches of customary international law can be adequately addressed by the recognized torts of conversion, battery, "unlawful confinement", conspiracy and negligence, all of which the Eritrean workers have also pleaded. In my view, it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts.

124 Customary international law norms, like those the Eritrean workers allege were violated, are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these norms "shock[s] the conscience of humanity" (M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63, at p. 69).

125 Refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct. As Professor Virgo notes, in the context of allegations of human rights violations, the symbolism reflected by the characterization or labelling of the allegations is crucial:

> From the perspective of the victim ... the fact that torture is characterized as a tort, such as battery, will matter -- simply because characterising torture in this way does not necessarily reflect the seriousness of the conduct involved. In the context of human rights ... symbolism is crucial.
>
> ...
>
> [In this context, accurately labelling the wrong is important] because the main reason why the victim wishes to commence civil proceedings will presumably be to ensure public awareness of the violation of fundamental human rights. The remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern.
>
> (Graham Virgo, "Characterisation, Choice of Law, and Human Rights", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at p. 335)

126 While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity. The profound harm resulting from their violation is sufficiently distinct in nature from those of existing torts that, as the workers say, "[i]n the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment". Accepting this premise, which seems to be difficult to refute conceptually, reliance on existing domestic torts may not "do justice to the specific principles that already are, or should be, in place with respect to the human rights norm" (Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 45, at p. 62, fn 4; see also Sandra Raponi, "Grounding a Cause of Action for Torture in Transnational Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 373; Virgo).

127 The workers' customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge. The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible route to resolving the Eritrean workers' claims. A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.

128 The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary (Gib van Ert, "What Is Reception Law?", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 85, at p. 89). That may mean that the Eritrean workers' customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.

129 Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" (*Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, at para. 22, citing *Dunlea v. Attorney-General*, [2000] NZCA 84). The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

130 As Professor Koh wrote about civil remedies for terrorism:

> Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.
>
> (Harold Hongju Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675)

131 This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate. These are complex questions but, as Wilson J. noted in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959:

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law ... will continue to evolve to meet the legal challenges that arise in our modern industrial society. [pp. 990-91]

132 Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.

133 I would dismiss the appeal with costs.

The following are the reasons delivered by

R. BROWN AND M. ROWE JJ. (dissenting in part)

I. Introduction

134 At the British Columbia Supreme Court, Nevsun Resources Ltd. applied to strike 67 paragraphs of the Eritrean workers' notice of civil claim ("NOCC"). The chambers judge dismissed Nevsun's application, holding that the claim was not bound to fail (2016 BCSC 1856, 408 D.L.R. (4th) 383). His decision was upheld on appeal (2017 BCCA 401, 4 B.C.L.R. (6th) 91). The majority would also uphold the dismissal of Nevsun's application to strike the pleadings of the workers.

135 We would allow Nevsun's appeal in part. We agree with the majority that the dismissal of Nevsun's application should be upheld as it regards the foreign act of state doctrine, and we concur in the majority reasons from paras. 27 to 59. We would, however, allow Nevsun's appeal on the matter of the use of customary international law in creating tort liability. As we will explain, we part ways from the majority on this issue in several respects: the characterization of the content of international law; the procedure for identifying international law; the meaning of "adoption" of international law in Canadian law; and the availability of a tort remedy.

136 Our reasons are structured as follows. We begin by explaining the theories of the case which are advanced to defend the pleadings from the motion to strike. We then set out our view of the proper approach to customary international law: it is to determine what practices states in fact engage in out of the belief that these practices are mandated by customary international law. We then explain how the rules of customary international law (frequently termed "norms") are given effect in Canada. When the norms are prohibitive, this question is simple; when the norms are mandatory, the matter is more complicated. We then do our best to explain why, on its theory of the case, the majority finds it not plain and obvious the claim is doomed to fail. We identify three domains of disagreement: the content of international law in fact; how the doctrine of adoption operates; and the differences between the effect of international law on domestic criminal law and tort law. In the final section, we turn to the theory of the case upon which the chambers judge relied in dismissing the motion to strike: the workers seek recognition of new common law torts. After stating the test for determining whether a new tort should be recognized, we explain why the causes of action advanced in the pleadings do not meet it.

II. Two Theories of the Case

137 The majority explains that the pleadings are broadly worded and identifies two separate theories upon which they could be upheld (Majority Reasons, at para. 127). One of these is the focus of the majority's reasons with regard to customary international law; the other is the focus of the chambers judge's reasons. We would summarize these two theories as follows:

> a)*The majority's theory*: The workers seek to have Canadian courts recognize a cause of action for "breach of customary international law" and to prosecute a claim thereunder (para. 127). (While the majority never describes the workers' pleadings as raising a "tort" claim, we observe that its theory of the case describes a cause of action that can only be understood in Canadian common law as a "tort". A tort is simply a wrong against a third party, actionable in law, typically for money damages (*Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at pp. 404-5). That is the very substance of the allegation here, and we will treat it as such. If the cause of action the majority is proposing is not a "tort", then it must be a species of action not known to Canadian common law, and so should fail simply on that basis).
>
> b)*The chambers judge's theory*: The workers seek to have Canadian courts recognize four new nominate torts *inspired by* customary international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.4 The workers then seek to prosecute claims under those torts.

In our respectful view, the latter theory is more consistent with the pleadings before us, but both must be defeated in order for Nevsun to succeed on its motion to strike.

138 The following paragraphs of the workers' amended NOCC describe the proposed cause of action:

> 53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
>
> ...
>
> 57. Forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity are prohibited under international law. This prohibition is incorporated into and forms a part of the law of Canada.
>
> ...

> 60. The use of forced labour is a breach of customary international law and jus cogens and is actionable at common law.
>
> (A.R., vol. III, at pp. 170 and 172-73)

139 Paragraphs 63, 66, and 70 are to the same effect as para. 60, except "use of forced labour" is replaced by "slavery", "cruel, inhuman, or degrading treatment" and "crimes against humanity", respectively (A.R., vol. III, at pp. 173-75).

140 In our view, paras. 60, 63, 66 and 70 suggest that the workers sought to have four nominate torts recognized.

141 The chambers judge's theory accords with how the workers framed their claims before this Court, as the following excerpts from their factum demonstrate:

> 98. The development of the common law will be aided by the recognition of torts which fully capture the prohibited injurious conduct, rather than treating these kinds of claims as a variant or hybrid of traditional torts ... .
>
> ...
>
> 102... . In assessing whether to recognize new nominate torts, *Charter* values inform the assessment of the societal importance of the rights at issue ... .
>
> ...
>
> 117. To be clear, the [workers] do not contend that the adoption of *jus cogens* norms into Canadian law leads automatically to a civil remedy for the violation of those norms. Rather, the *jus cogens* norms serve as a source for development of the common law, and the test for recognition of new common law torts must still be satisfied.
>
> 118... . the recognition of these new torts is desirable given the factors outlined at paragraphs 97 to 110 above.
>
> ...
>
> 149. Here, recognizing new nominate torts for slavery or crimes against humanity under the common law complements and advances Parliament's broader intent in enacting legislation such as the *Crimes Against Humanity and War Crimes Act* that there be accountability for serious human rights abuses. [Emphasis added.]

142 We also observe that, at para. 117 of their factum, the workers specifically disavow the majority's theory of the case.

143 The second theory should be preferred also because, in deciding whether a pleading is bound to fail, it ought to be read generously. For example, the pleading ought to be considered as it might reasonably be amended (*British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142, 75 B.C.L.R. (5th) 69, at para. 15; *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.)). In our view, the second theory is the *more* plausible claim. That said, the workers could reasonably amend their pleadings to clearly engage the first theory, so both must be considered.

144 As the majority has explained, we ask whether it is plain and obvious a pleading is "certain to fail" or "bound to fail" because this is the test that courts apply on a motion to strike (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980). This question is to be determined "in the context of the law and the litigation process", assuming the facts pleaded by the non-moving party are true (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 23 and 25 (emphasis omitted)).

145 Any confusion over whether a novel question of law can be answered on a motion to strike should be put to bed: it can. If a court would not recognize a novel claim when the facts as pleaded are taken to be true -- that is, in the most favourable factual context possible in the litigation process -- the claim is plainly doomed to fail (S.G.A. Pitel and M.B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344, at p. 351). As Justice Karakatsanis explained for this Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, judges can and should resolve legal disputes promptly to facilitate rather than frustrate access to justice (paras. 24-25 and 32). Answering novel questions of law on a motion to strike is one way they can do so (Pitel and Lerner, at p. 358). But there also are some questions that the court *could* answer on a motion to strike, but ought not to. They include, for example, questions related to the interpretation of the *Canadian Charter of Rights and Freedoms*, or questions where the facts are unlikely, if not implausible. Deciding a question of law without proof of the facts in such circumstances risks distorting the law for an ultimately fruitless purpose.

146 The majority would find that it is not plain and obvious that the workers' cause of action is doomed to fail. So far as we can discern, the majority's reasons concern entirely extricated questions of law. In refraining to decide a question of law, there appears to be no pressing concern for judicial economy or for the integrity of the common law. The uncertainty in the majority's reasons relates to *which* theory the workers should rely on, not *whether* the workers' claim can succeed on either theory. We can only understand the inevitable effect of its reasons to be that, if the facts pleaded by the workers are proven, the workers' claim should succeed. In other words, in its view, the phoenix will fly. And concomitantly, it means that if the workers continue these proceedings relying on the majority's theory of the case, a court should recognize a new cause of action for tortious breach of customary international law.

147 That observation aside, however, our disagreement with the majority in this matter about the better theory of the case does not affect either our, or its, proposed disposition of the appeal. As previously mentioned, the question to be decided on a motion to strike is whether the pleadings are bound to fail on all reasonable theories of the case. In its view, the workers' claims are not bound to fail on either theory. In our view, they are, for four reasons.

148 First, the claims run contrary to how norms of international law become binding in Canada. According to the doctrine of adoption, the courts of this country recognize legal prohibitions that mirror the prohibitive rules of customary international law. Courts do not convert prohibitive rules into liability rules. Changing the doctrine of adoption to do so runs into the second problem, which is that doing so would be inconsistent with the doctrine of incrementalism and the principle of legislative supremacy. Nor does developing a theory of the case that does not rely on the doctrine of adoption rescue the pleadings: the third problem is that some of the claims are addressed by extant torts. And, finally, the viability of other claims requires changing the common law in a manner that would infringe the separation of powers and place courts in the unconstitutional position of conducting foreign relations, which is the executive's domain. We therefore find the workers' claims for damages based on breach of customary international law disclose no reasonable cause of action and are bound to fail.

III. On the First Theory, the Claim Is Bound to Fail

149 The majority maintains that, because international law is incorporated into Canadian law, it is not plain and obvious that a claim to remedy such a breach brought in a Canadian court is doomed to fail. But to give effect to this claim would displace international law from its proper role within the Canadian legal system. In the following section, we will explain why this is so. We will also explain why changing the role of international law within Canadian law exceeds the limits of the judicial role.

A. *The Operation of International Law in Canada*

150 One essential point of disagreement we have with the majority concerns which law is supreme in Canadian courts: Canadian law, or international law. The majority (at para. 94) adopts the opinion of Professor Stephen J. Toope, who has opined that "[i]nternational law ... speaks directly to Canadian law and requires it to be shaped in certain directions" ("Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U.N.B.L.J. 11, at p. 23). We disagree.

151 The conventional -- and, in our view, correct -- approach to the supremacy of legal systems is that each court treats its own constituting document as supreme (J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 101). An international tribunal or international court will apply the law of its constituting treaty. Canadian law cannot require international law to be shaped in certain directions, except insofar as international law grants that power to Canadian law.

152 It follows that Canadian courts will apply the law of Canada, including the supreme law of our Constitution. And it is that law -- Canadian law -- which defines the limits of the role international law plays within the Canadian legal system. To hold otherwise would be to ignore s. 52(1) of the *Constitution Act, 1982*, and s. 96 of the *Constitution Act, 1867*. To be clear, then: international law cannot require Canadian law to take a certain direction, except inasmuch as Canadian law allows it.

153 On the majority's theory, the workers' pleadings -- which seek the remedy of money damages -- are viable only if international law is given a role that exceeds the limits placed upon it by Canadian law. These limits are set out in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 39, where this Court stated that "prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation". These prohibitive rules of customary international law, by their nature, *could not* give rise to a remedy. On its terms then, for these pleadings to succeed, Canadian law must change. And, in our view, such a change would require an act of a competent legislature. It does not fall within the competence of this Court, or any other. And yet, without that change, the pleadings are doomed to fail.

154 Below, we set out the existing limits of the role that public international law can play according to Canadian law. Public international law has two main sources: custom and convention, which have different effects on and in Canadian law. While the focus of this appeal is customary international law, its role and function can best be understood in relation to its counterpart, conventional international law. Below, we describe these two main sources of international law in more detail.

(1) Conventional International Law: the Role of Treaties

155 Although customary international law was historically the primary source of international law (J.H. Currie, *Public International Law* (2nd ed. 2008), at p. 124), convention, most often in the form of treaties, has become the source of much substantive international law today (J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y. B. Intl Law* 3, at p. 13). This trend originated in the late 19th and early 20th centuries, with the growth of international bodies and the elaboration of broader-based treaty regimes, mostly concerned with the conduct of war and humanitarian law (Currie, at p. 124).

156 A treaty is much like a contract, in the sense that it records the terms to which its signatories consent to be bound (J. Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005), 50 McGill L.J. 465, at p. 470): "The essential idea [of treaties] is that states are bound by what they expressly consent to" (Brunnée and Toope, at p. 14). It sets out the parties' mutual legal rights and obligations, and are governed by international law (Currie, at p. 123). Article 38(1)(a) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, contains an implicit definition of treaty when it specifies that the International Court of Justice shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" (see also Brunnée and Toope, at p. 14). A treaty may be bilateral (recording reciprocal undertakings among two or more states) or multilateral (recording a generalized agreement between several states) (Currie, at p. 123). In either form, it permits states to enter into agreements with other states on specific issues or projects, or to establish widely applicable norms intended to govern legal relationships with as many states as will expressly agree to their terms (p. 123).

157 Because a treaty is concerned with express agreement between states, certain formalities govern the process of entering a binding treaty (Brunnée and Toope, at p. 14), which we discuss below.

158 In Canada, each order of government plays a different role in the process of entering a treaty. Significantly, it is *the executive* which controls the negotiation, signature and ratification of treaties, in exercise of the royal prerogative power to conduct foreign relations. Its signature manifests initial consent to the treaty framework, but does not indicate consent to be bound by specific treaty obligations; that latter consent is given by ratification. It is only when a treaty enters into force that the specific treaty obligations become binding. For multilateral treaties, entry into force usually depends on the deposit of a specific number of state ratifications. If a treaty is in force and ratified by Canada, the treaty binds Canada as a matter of international law (Brunnée and Toope, at pp. 14-15).

159 Many treaties do not require a change in domestic law to bind the state to a course of action. Where it does, however, and even when internationally binding, a treaty has no formal legal effect domestically until it is transformed or implemented through a domestic-law making process, usually by legislation (Harrington, at pp. 482-85; Currie, at p. 235). Giving an unimplemented treaty binding effect in Canada would result in the executive creating domestic law -- which, absent legislative delegation, it cannot do without infringing on legislative supremacy and thereby undermining the separation of powers. Any domestic legal effect therefore depends on Parliament or a provincial legislature adopting the treaty rule into a domestic law that can be invoked before Canadian courts (Currie, at p. 237). For example, the environmental commitments in the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 (entered into force January 1, 1994) ("*NAFTA*") were implemented by provincial governments through a Canadian Interprovincial Agreement (Harrington, at pp. 483-84). The formalities associated with treaties respect the role that each order of the state is competent to play, in accordance with the separation of powers and the principle of legislative supremacy.

(2) Customary International Law

160 As with conventional international law, the content of customary international law is established by the actions of states on the international plane. The relevance of customary international law to domestic law has both a substantive and a procedural aspect. Substantively, customary international law norms can have a direct effect on public common law, without legislative enactment. But for that substantive effect to be afforded a customary international law norm, the existence of the norm must be proven as a matter of fact according to the normal court process.

(a) *Sources of Customary International Law*

161 As the majority describes (at para. 77), customary international law is a general practice accepted as law that is concerned with the principles of custom at the international level. A rule of customary international law exists when state practice evidences a "custom" and the practicing states accept that custom as law (Currie, at p. 188).

162 A custom exists where a state practice is applied both generally and uniformly. To be general, it must be a sufficiently widespread practice. To be uniform, the states that apply that practice must have done so consistently. A state practice need not, however, be perfectly widespread or consistent at all times. And for good reason: if that were true, the moment one state departs from either requirement, the custom would cease to exist (Currie, pp. 188-93).

163 The requirement that states, which follow the practice, do so on the basis that they subjectively believe the practice to be legally mandated is known as *opinio juris* (Currie, at p. 188; J. L. Slama, "*Opinio Juris* in Customary International Law" (1990), 15 Okla. City U.L. Rev. 603, at p. 656). The practicing state must perform the practice out of the belief that this practice is necessary in order to fulfil its obligations under customary international law, rather than simply due to political, security or other concerns.5

164 The high bar established by the twin requirements of state practice and *opinio juris* reflects the extraordinary nature of customary international law: it leads courts to adopt a role otherwise left to legislatures; and, unless a state persistently objects, its recognition binds states to rules to which they have not affirmatively consented (Currie, at p. 187). And, if a rule becomes recognized as peremptory (i.e., as *jus cogens*) then even persistent objection will not relieve a state of the rule's constraints (J. A. Green, *The Persistent Objector Rule in International Law* (2016), at pp. 194-95).

(b) *The Adoption of Customary International Law in Canada*

165 Once a norm of customary international law has been established, it can become a source of Canadian domestic law unless it is inconsistent with extant statutory law. This doctrine is called "adoption" in Canada and "incorporation" in its English antecedents. *Hape* explains the doctrine as follows:

> The English tradition follows an adoptionist approach to the reception of customary international law. Prohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action. According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule: I. Brownlie, *Principles of Public International Law* (6th ed. 2003), at p. 41. Although it has long been recognized in English common law, the doctrine received its strongest endorsement in the landmark case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.). Lord Denning considered both the doctrine of adoption and the doctrine of transformation, according to which international law rules must be implemented by Parliament before they can be applied by domestic courts. In his opinion, the doctrine of adoption represents the correct approach in English law. Rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation ... .
>
> ...
>
> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; paras. 36 and 39.]

166 In our view, two features of this passage are noteworthy: (1) that prohibitive rules of customary international law can be incorporated into domestic law "in the absence of conflicting legislation"; and (2) that adoption only operates with respect to "prohibitive rules of international custom". Taken together, these elements respect legislative supremacy in the incorporation of customary international law into domestic law.

167 The primacy given to contrary legislation preserves the legislature's ability to control the effect of international laws in the domestic legal system. As Currie writes, the adoption of customary international law preserves "the domestic legal system's ultimate ability, primarily through its legislative branch, to control the content of domestic law through express override of a customary rule" (p. 234).

168 The majority (at paras. 91-93) suggests that there is no difference between "mandatory" norms of international law and "prohibitive" norms, citing the extrajudicial writing of Justice LeBel (L. LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 U.N.B.L.J. 3). We agree that this is not a distinction that is generally drawn in international law jurisprudence. It is, however, a helpful distinction for explaining the capacity of a common law court to remedy a breach of an international law norm. As James Crawford (a judge of the International Court of Justice) has explained, the first question when considering a rule of customary international law is to ask whether it is susceptible to domestic application (p. 65). Although a common law court adopts both prohibitive and mandatory norms, the domestic legal effect of the adoption of a prohibitive norm is different from the domestic legal effect of the adoption of a mandatory norm. This distinction becomes clear when comparing the roles of the various branches of the state.

169 To illustrate the difference between prohibitive and mandatory norms, it may be helpful to analogize to *certiorari* and *mandamus* or to acts and omissions. When a norm is prohibitive, in the sense that it prohibits a state from acting in a certain way, the doctrine of adoption means that actions by the executive branch contravening the norm can be set aside through judicial review, as is the case with *certiorari*. When a norm is mandatory, in the sense that it mandates a state to act in a certain way, the doctrine of adoption means that omissions in contravention of the norm can be remedied through judicial review, as is the case with *mandamus*.6 *Mandamus* is a limited remedy -- it allows courts to enforce a clear public duty, but not to devise a regulatory scheme out of whole cloth.

170 When the legislative branch contravenes an adopted norm, there is no difference between prohibitive norms and mandatory norms. If the legislature passes a law contravening a prohibitive norm of international law, that law is not subject to review by the courts. Similarly, if the legislature does not pass a law in contravention of a mandatory norm of international law, the courts cannot construct that law for them, unless doing so is otherwise within the courts' power. Courts may presume the intent of the legislature is to comply with customary international law norms (see, for example, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 182), but that presumption is rebuttable: customary international law has interpretive force, but it does not formally constrain the legislature. The interpretive force comes from the presumption that the legislature would not mean to inadvertently violate customary international law (J. M. Keyes and R. Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law", in O. E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 277, at p. 297).

171 The final question is what happens when private common law contravenes a norm.7 We are aware of no case where private common law has violated a prohibitive norm. Nor are we aware of any case where private common law has violated a mandatory norm. In the case that has come closest, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, this Court found that Canada was not under an obligation to provide a private law civil remedy for violations of a norm:

> While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate (and is also very likely a principle of fundamental justice), the question in this case is whether this norm extends in such a way as to require each state to provide a civil remedy for torture committed abroad by a foreign state.
>
> Several national courts and international tribunals have considered this question, and they have consistently confirmed that the answer is no: customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. [paras. 152-53]

172 In short, even if a plaintiff can prove that, (1) a prohibition lies on nation states at international law; and (2) that prohibition is *jus cogens*, these two considerations are nonetheless insufficient to support the proposition that international law requires every state to provide a civil remedy for conduct in breach of the prohibition.

173 There are good reasons for distinguishing between executive action and legislative action. Canada - - and the provinces -- have the ability, should they choose to exercise it, to violate norms of customary international law. But that is a choice that only Parliament or the provincial legislatures can make; the federal and provincial governments cannot do so without the authorization of those legislative bodies.

174 But how does this inform the development of private common law? If there were a private common law rule that contravened a prohibitive norm -- we confess that such a combination of norm and private law rule is beyond our imagination, but perhaps it could exist -- we would agree that judges must alter that law. When the private common law contravenes a mandatory norm, the court is faced with determining whether any existing statutes prevent the court from amending the common law as necessary for it to comply with that norm.

175 How, then, to determine whether a statute prevents so amending the common law? We would suggest that courts should follow a three-step process. First, precisely identify the norm. Second, determine how the norm would best be given effect. Third, determine whether any legislation prevents the court from changing the common law to create that effect. If no legislation does so, courts should implement that change to the common law. If any legislation does so, the courts should respect that legislative choice, and refrain from changing the common law. In such circumstances, judicial restraint respects both legislative supremacy and the superior institutional capacity of the legislatures to design regulatory schemes to comply with Canada's international obligations. These are foundational considerations, going to the proper roles of courts, legislatures and the executive. The incorporation of a rule of customary international law must yield to such constitutional principles (*R. v. Jones (Margaret)*, [2006] UKHL 16, [2007] 1 A.C. 136, at para. 23, per Lord Bingham; Crawford, at pp. 65-66).

176 One final point on the doctrine of adoption. *Hape* is ambivalent as to whether incorporation means that rules of customary international law are incorporated (at para. 36), should be incorporated (at para. 39) or simply may aid in the interpretation of the common law (at para. 39). The traditional English view is the first. But the modern English jurisprudence puts that view in doubt, and rightly so (see *Jones*, at para. 11, per Lord Bingham). As we discussed above, a rule of customary international law may need to be adapted to fit the differing circumstances of common law instead of public international law.

(c) *The Procedure for Recognizing Customary International Law*

177 Much of Canadian civil procedure depends on the distinction between law and facts. Facts are pled, but law is not; facts are determined through evidence, but law is not; facts cannot be settled on a motion to strike or summary judgment, but law can; factual findings by a trier of fact are deferred to by appellate courts; legal conclusions are not. Perhaps most importantly, judges cannot determine matters of fact without evidence led by the parties (except where judicial notice applies), but can decide questions of law. Judges doing their own research on law is not only accepted, but expected. Judges doing their own research on facts is impermissible.

178 The majority suggests that the content of customary international law should be treated as law by Canadian courts, not fact, but, incongruously, also recognizes that the authorities on which it relies for this proposition nonetheless maintain that *evidence* of state practice is necessary to prove a new norm of customary international law (para. 96, citing G. van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 62-69). With respect, we see the approach of treating norms of international law as law and new norms of international law as fact as creating an unwieldy hybridization of law and fact. As we have discussed above, procedure in Canadian law is largely built upon the distinction between law and fact, and such a hybrid therefore promises to cause confusion. The absence of clear methodology will foster conclusionary reasoning, in other words decision making by intuition. And, what standard of review would be applied to such decisions? Confusion in means gives rise to uncertainty in ends.

179 The process is perhaps most conveniently understood as comprising three steps. The first requires the court to find the facts of state practice and *opinio juris*. In easy cases, the first step can be dispensed with without a trial due to the power of judicial notice. When there is or can be no dispute about the existence of a norm of customary international law it is appropriate for the courts to take judicial notice (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 61). In this case, we agree with the majority that the existence of some of the norms of international law that have been pled -- for example, that crimes against humanity are prohibited -- meets the threshold for taking judicial notice (Majority Reasons, at para. 99). Where, however, the existence of a norm of customary international law is contested -- as it is on the question of whether corporations can be held liable at international law -- judges should rely on the pleadings (on an application to strike or for summary judgment) or the evidence that is adduced before them.

180 It is in these contested, hard cases where this step is particularly important. Courts will be called on to evaluate both whether there exists a custom generally among states that is applied uniformly, and whether the practicing states respect the custom out of the belief that doing so is necessary in order to fulfil their obligations under customary international law. These are, fundamentally, empirical exercises: they do not ask what state practice should be or whether states should comply with the norm out of a sense of customary international legal obligation, but whether states in fact do so. As van Ert has acknowledged, "[s]tate practice ... is a matter of fact" (*Using International Law in Canadian Courts*, at p. 67) and that when a claimant asserts "a new rule of customary international law", proof in evidence may be required ("The Reception of International Law in Canada", at p. 6, fn. 60).

181 As the majority has correctly described (at para. 79), the judicial decisions of national courts can be "evidence" of general practice or *opinio juris*. These national courts include Canadian courts, the courts of other common law systems, and the courts of every other national legal system. To determine whether a rule of customary international law exists, Canadian courts must be prepared to understand and evaluate judicial decisions from the world over. As this Court explained, "[t]o establish custom, an extensive survey of the practices of nations is required" (*R. v. Finta*, [1994] 1 S.C.R. 701, at p. 773). Canadian judges need to be able to understand decisions rendered in a foreign legal system, in which they are not trained, and in languages which they do not know. Making expert evidence available for judges to understand foreign language texts is simply sensible (van Ert, *Using International Law in Canadian Courts*, at p. 57). Put another way, the foundations of customary international law rest, in part, on foreign law. In Canada, foreign law is treated as fact, not law (J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, at p. 7-1). When a Canadian court applies Canadian conflict of laws rules and determines that the law of a foreign state is to be applied in a Canadian court proceeding, the Canadian judge does not then embark on their own analysis of the foreign law. Rather, the Canadian judge relies on the parties to adduce evidence of the content of the foreign law.

182 It is only once the facts of state practice and *opinio juris* are found that the court can proceed to a second step, which is to identify which, if any, norms of customary international law must be recognized to best explain these facts. This question arises since state practice and *opinio juris* may be consistent with more than one possible norm. This is a question of law.

183 The final step is to apply the norms, as recognized, to the facts of the case at bar. This is a question of mixed fact and law.

184 We should note that, although we disagree with the majority on this procedural point, and although this point is important, it is ultimately not the nub of our disagreement. The more the questions in dispute are questions of fact, the more difficult it is for a court to properly strike the pleadings. It is therefore more difficult for us to strike these claims on *our* understanding of the jurisprudential character of international law, than it is on *the majority's* understanding. Nonetheless, as we will explain, we would do just that.

B. *The Claim, on the Majority's Theory, Contravenes These Limits Placed Upon International Law Within Canadian Law*

185 In the following section, we explain why the majority's theory of the case cannot succeed. We begin here by summarizing its approach, as we understand it:

a)There are prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, and degrading treatment (paras. 100-3).

b)These prohibitions have the status of *jus cogens*, except possibly for that against the use of forced labour (paras. 100-3).

c)Individuals and states both must obey some customary international law prohibitions, and it is a question for the trial judge whether they must obey these specific prohibitions (paras. 105, 110-11 and 113).

d)Corporations must also obey certain such prohibitions (paras. 112-113).

e)Individuals are beneficiaries of these prohibitions (paras. 106-11).

f)It would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability" (para. 112, citing H. H. Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at p. 266).

g)The doctrine of adoption makes any action prohibited at international law also prohibited at domestic law, unless there is legislative action to the contrary (paras. 94, 114 and 116).

h)In domestic law, where there is a right there must be a remedy (paras. 120-21).

i)There is no adequate remedy in domestic law, including in existing tort (paras. 122-26).

186 We have no quarrel with steps (a), (b), (c), (e), and (h) of the majority's analysis.

187 In our respectful view, however, the majority's analysis goes astray at steps (d), (f), (g), and (i). The conclusion it draws at step (d) relies upon it being possible for a norm of customary international law to exist when state practice is not general and not uniform. The conclusions it draws at steps (f) and (g) are not supported by the premises on which it relies. And the conclusions the majority draws at step (i) are possible only if one ignores the express *Criminal Code*, R.S.C. 1985, c. C-46, prohibition against courts creating common law offences. We will address these in turn.

(1) As a Matter of Law, Corporations Cannot Be Liable at Customary International Law

188 The majority states that "it is not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law'" (para. 113, citing Koh, at p. 267). The authority the majority cites in support of this proposition is a single law review essay by Professor Harold Koh. It cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world, and we do not know of any. While it does cite a book by Simon Baughen and an article by Andrew Clapham, those authorities do not support its view of the matter (S. Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32; A. Clapham, "On Complicity", in M. Henzelin and R. Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). Baughen's discussion of norms of international criminal law imposing civil liability on aiders and abetters is specific to the provision in the United States Code now commonly known as the *Alien Tort Statute*, 28 U.S.C. s. 1350 (2018), and Clapham's article concerns the recognition of the complicity of corporations in international criminal law and human rights violations, not the recognition of civil liability rules.

189 In our view, that corporations are excluded from direct liability is plain and obvious. Although normally such a contested issue would be left to trial, in the context of a disputed norm of customary international law the existence of an opposing view can itself be dispositive. As this Court said in *Kazemi*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102).

190 In this regard, and against Professor Koh's lone essay, we would pit the United Nations General Assembly's *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007, which states that "preliminary research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law" (para. 34). This is confirmed by the evaluation of Judge Crawford, in the book that the majority cites at para. 97 of its reasons (*Brownlie's Principles of Public International Law*):

> At present, no international processes exist that require private persons or businesses to protect human rights. Decisions of international tribunals focus on states' responsibility for preventing human rights abuses by those within their jurisdiction. Nor is corporate liability for human rights violations yet recognized under customary international law. [Emphasis added; footnotes omitted.]
>
> (Crawford, at p. 630)

191 The authorities thus favour the proposition that corporate liability for human rights violations has *not* been recognized under customary international law; the most that one could credibly say is that the proposition that such liability has been recognized is equivocal. To repeat *Kazemi*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102). Absent such a binding norm, the workers' cause of action is clearly doomed to fail.

(2) The Doctrine of Adoption Does Not Transform a Prohibitive Rule Into a Liability Rule

192 With respect, we find the majority's analysis in respect of steps (f) and (g) difficult to follow.

193 At paragraph 101, the majority writes that "[t]he prohibition against slavery too is seen as a peremptory norm". We are uncertain how it deduces the potential existence of a liability rule from this uncontroversial statement of a prohibition. Perhaps it sees a liability rule as inherent in a "prohibition", or perhaps it sees the doctrine of adoption as producing a liability rule in response to a prohibition, or perhaps both.8 We do not know.

194 Faced with such uncertainty, we will consider all the plausible reasoning paths that could take the majority from the existence of a prohibition to the existence of a liability rule. We see three such paths that correspond to distinct interpretations of its reasons:

(1) Prohibitions of customary international law *require* the Canadian state to provide domestic liability rules between individuals and corporations. With regard to slavery, the prohibition would require Canada to provide a legal rule pursuant to which enslaved persons could hold a corporation responsible for their enslavement liable. The doctrine of adoption requires our courts to create such rules if they do not already exist. Paragraph 119 of the majority's reasons supports this interpretation.

(2) A prohibition in customary international law itself contains a liability rule between individuals and corporations. With regard to slavery, the prohibition upon slavery would include a subordinate rule that 'a corporation who is responsible for enslavement is liable to enslaved persons'. The doctrine of adoption requires domestic courts to enforce these rules. Paragraphs 127 and 128 of the majority reasons support this interpretation.

(3) General (that is, non-criminal) customary international law requires states to enact laws prohibiting certain actions. International criminal law also prohibits corporations from taking these actions. With regard to slavery, the prohibition upon slavery would mean that, respectively, 'Canada must prohibit and prevent slavery by third parties' and 'it is an international crime for a corporation to enslave someone'. The doctrine of adoption transforms these requirements and prohibitions into tort liability rules. Paragraphs 117 and 122 of the majority reasons support this interpretation.

195 If either of the first two interpretations correctly represents the majority's reasons, then we would respectfully suggest that its reasons depend on customary international law norms that do not exist. If the third interpretation correctly represents the majority's reasons, we would respectfully suggest that its reasons depend on affording to the doctrine of adoption a role it cannot have.

196 If, as in the first interpretation above, the majority's reasons depend on customary international law *requiring* states to provide a civil remedy for breaches of prohibitions, then we say -- first of all -- that this theory is not what the workers have pleaded. The workers did not plead the necessary facts of state practice and *opinio juris*: they did not plead that there exists a general practice among states of providing a civil remedy for breaches of prohibitions, and that states perform that practice out of compliance with customary international law. Nor can the court take judicial notice of such practices, because they are not sufficiently well-established.

197 Further, and more fundamentally, states are typically free to meet their international obligations according to their own domestic institutional arrangements and preferences. Customary international law may well require all states to prohibit slavery, but it does not typically govern the form of that prohibition. A civil liability rule is but one possibility. A prohibition could also be effected through, for example, the criminal law or through administrative penalties. How legislatures accomplish such a goal is typically a matter for them to consider and decide. As the Second Circuit Court of Appeals observed in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2nd Cir. 2007), the "law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations" (at p. 269, citing *Kadic v. Karadziae*, 70 F.3d 232 (2nd Cir. 1995), at p. 246). While it is conceivable that international law could develop to give such a result, it has not done so (*Kazemi*, at para. 153). Asserting that it has done so or that it should do so does not make it so.

198 If, as in the second interpretation above, the majority's reasons depend on an existing a rule of customary international law that renders a corporation directly civilly liable to an individual, then we observe, once again, that this theory is not pleaded.

199 The support for this conclusion in the majority's reasons (at para. 112) consists of the aforementioned academic essay by Professor Koh. Professor Koh's essay states it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability". If the majority is relying on this essay as evidence of the existence of such a rule, then we would say simply that a single essay does not constitute state practice or *opinio juris*.

200 Even taken on its own terms as authority for any proposition, the Koh essay does not indicate that customary international law *has* so evolved; rather, it simply speculates that it *could* so evolve. The mere possibility that customary international law *could* change is not sufficient, on a motion to strike, to save a claim from being doomed to fail. Otherwise, all kinds of suppositious claims would succeed on the basis that the legislature *could* create a new statutory cause of action to support them. Of course, on a motion to strike, it is impossible to strike a novel common law claim for novelty alone. The relevant distinction here is that courts have some discretion to change the common law. Courts do not have that discretion in respect of statutory law or customary international law. Courts can recognize a change to customary international law, but they cannot change it directly themselves.

201 We observe also that Professor Koh, in his other work, is clear that his academic project is normative in nature: he does not seek merely to *describe* the existing state of international law, but *to change* international law through his scholarship (see H. H. Koh, *International Law vs. Donald Trump: A Reply*, March 5, 2018 (online)). State practice is not a normative concept, but a descriptive one. It therefore cannot be established based on how a single U.S. academic thinks international law should work, but rather must be based on how states in fact behave. State practice is the difference between civil liability and criminal liability at customary international law. That criminal liability arises from customary international law has been accepted by the states of the international community since Nuremberg. It is precisely this acceptance that creates customary international law.

202 Outside the sphere of criminal law, there is no corresponding acceptance-of-liability rules regarding individuals. This widely accepted view is neatly summarized by Professor Roger O'Keefe, who writes, "[t]he phenomenon of individual criminal responsibility under international law sets this subset of international crimes apart from the general body of public international law, the breach of whose rules gives rise only to the delictual responsibility of any state in breach" (*International Criminal Law* (2015), at pp. 47-48 (footnote omitted)). Indeed, as the majority of this Court observed in *Kazemi* (at para. 104), criminal proceedings and civil proceedings are "seen as fundamentally different by a majority of actors in the international community".

203 Authority from this country also supports the view that customary international law prohibitions do not create civil liability rules. In *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675, the Court of Appeal for Ontario considered and rejected the argument that the customary international law prohibition against torture "constitutes a right to be free from torture and where there is a right there must be a remedy", and therefore a civil remedy must exist (para. 92). As *Bouzari* correctly held, "[a]s a matter of principle, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition" (at para. 93) and "as a matter of practice, states do not accord a civil remedy for torture committed abroad by foreign states" (para. 94). The issue may be simply stated: a domestic court cannot effect a change to the law by "seeing a widespread state practice that does not exist today" (para. 95).

204 It may be that neither of our first two interpretations of its reasons is correct, and that the majority shares our view that there is no rule of customary international law that requires states to create civil liability rules or that purports to impose civil liability directly. If that is so, then, as in the third interpretation above, the doctrine of adoption must play in the majority's reasons the role of converting a general prohibition upon states and criminal prohibitions upon individuals into a civil liability rule. In our view, this would afford the doctrine of adoption a role it cannot play.

205 It is not enough to simply say that the doctrine of adoption incorporates prohibitive and mandatory rules into the common law. Outside the realm of criminal law, customary international law imposes prohibitions and mandates on states, not private actors. As Judge Crawford puts it, "human rights ... arise against the state, which so far has a virtual monopoly of responsibility" (p. 111). States are the only duty-holders under general customary international law.

206 Nor is it enough to say that the doctrine of adoption must respond to a state's duties under customary international law. We do not dispute that a state's duties may include one to prohibit and another to prevent violations of those aforementioned rights. Nor do we dispute that such a mandatory norm can trigger the doctrine of adoption. Our dispute is limited to *how* the doctrine of adoption leads Canadian law to change in response to recognition of a norm of customary international law. In our view, the three-step process we defined above for determining whether to amend private common law rules in response to the recognition of a mandatory norm of customary international law ought to govern.

207 At the first step, we would identify the mandatory norm at issue here as "Canada must prohibit and prevent slavery by third parties", *mutatis mutandis* for each of the activities alleged to be in violation of international law. We agree that the pleadings may allege that this norm may exist, and further, it is not plain and obvious to us that it does not. We would not therefore strike out the claim on that basis. This brings us to considering the second and third steps of the process for adopting a mandatory norm: determining how the norm would be best given effect, and determining whether any legislation prevents the court from changing the common law to give the norm that effect.

208 At the second step, we say that such a mandatory rule is appropriately given effect through, and only through, the criminal law. Indeed, the majority's reasons appear animated by concerns that are the subject of the criminal law. We will discuss this aspect of its reasons in greater detail in the next section and will not repeat the point here.

209 At the third step, we note that Parliament has, in s. 9 of the *Criminal Code*, clearly prohibited courts from creating criminal laws via the common law. In *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 3, this Court explicitly rejected the idea that it could "turn back the clock and re-enter ... a period when the courts rather than Parliament could change the elements of criminal offences". At this step, we conclude that, on this interpretation of the majority's theory of the case, the pleadings are doomed to fail on two bases: first, that violations of the mandatory norms at issue here are properly remedied through the criminal law, for which there is not a private law cause of action; and secondly, that Parliament has prohibited the courts from creating new crimes.

210 The majority's approach is no more tenable if we take a step back and consider it more conceptually. Essentially, on this interpretation, the majority's approach amounts to saying that the doctrine of adoption has what jurists in Europe would call "horizontal effect". Articles of the treaties that constitute the European Union give individuals rights both against the state ("vertical effect") and against other private parties ("horizontal effect") (P. Craig, "Britain in the European Union", in J. Jowell, D. Oliver and C. O'Cinneide, eds., *The Changing Constitution* (8th ed. 2015), 104, at p. 127). In Canada, this Court rejected the idea that the *Charter* has horizontal effect (see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 597; see also G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999), 62 *Mod. L. Rev.* 824, at p. 824). It would be astonishing were customary international law to have horizontal effect where the *Charter* does not. One wonders if the majority's view of the adoption of customary international law would amount to a new Bill of Horizontal Rights; conceptually, these are very deep waters.

211 The majority's approach also amounts to recognizing a private law cause of action for simple breach of customary international public law. This would be similarly astonishing, since there is no private law cause of action for simple breach of statutory Canadian public law (see *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 9). As Judge Crawford has explained, a rule of customary international law will not be adopted if it is itself "contradicted by some antecedent principle of the common law" (p. 66, citing *West Rand Central Gold Mining Company v. Rex*, [1905] 2 K.B. 391, at p. 408, per Lord Alverstone C.J.; *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.), at p. 168, per Lord Atkin).

212 Further yet, the mere existence of international criminal liability rules does not make necessary the creation of domestic torts. As we have already noted, in support of its view that domestic courts can hold corporations civilly liable for breaches of international law, the majority (at para. 112) relies upon an essay by Professor Koh. But this essay concerns the domestic courts of the United States, not Canada. And the law being applied by U.S. courts differs in a highly significant respect. As Professor Koh writes, "Congress passed two statutes -- the Alien Tort Statute and the Torture Victim Protection Act (TVPA) -- precisely to provide civil remedies for international law violations" ("Separating Myth from Reality about Corporate Responsibility Litigation", at pp. 266-67 (emphasis added)). The former, the hoary and historically unique *Alien Tort Statute*, requires American courts to treat international law as creating civil liabilities (*Khulumani*, at p. 270, fn. 5). The *Alien Tort Statute* has no analogue outside the United States (A. Ramasastry and R. C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law -- A Survey of Sixteen Countries* (2006), at p. 24; J. Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies -- A report prepared for the Office of the UN High Commissioner for Human Rights*, February 2014 (online), at p. 45). The existence of these statutes has influenced the peculiar American equivalent to the doctrine of adoption. Essentially, the majority's approach would amount to Americanizing the Canadian doctrine of adoption without accounting for the unique statutory context from which the American doctrine arose. It goes without saying that Canadian courts cannot adopt a U.S. statute when Parliament and the legislatures have not.

213 In short, in order to reach the conclusion it does about the necessity of a tort liability rule, the majority must significantly change the doctrine of adoption. As we will explain below (see section III, subheading C), this is not a change that this Court is empowered to make.

(3) A Tort Remedy Is Not Necessary

214 At what we identified as step (h) of its reasons, the majority suggests that where there is a right, there must be a remedy. We agree. It adds, in what we termed step (i) of its reasons, that this truism signifies there is no bar to Canadian courts granting a civil remedy for violations of customary international law norms. Here is another point of disagreement. In our view, it is possible, even at this early stage of proceedings, to exclude a remedy *for money damages* for violations of customary international law norms. The right to a remedy does not necessarily mean a right to a *particular form, or kind of* remedy. Parliament could prefer another remedy, such as judicial review, or a criminal sanction. As this Court said in *Kazemi*, "[r]emedies are by no means automatic or unlimited; there is no societal consensus that an effective remedy is always guaranteed to compensate for every rights violation" (para. 159).

215 The majority rejects the possibility that existing domestic torts could suffice. In its view, "it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts" (para. 123). It tells us it is difficult to refute the concept that "torture is something more than battery" and that "slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment" (para. 126, citing R.F., at para. 4). There is, it says (at para. 125), important "symbolism", in the labelling of an action as "torture" or "battery". It adopts the view that the "remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern" (para. 125, citing G. Virgo, "Characterisation, Choice of Law, and Human Rights", in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at para. 335). The majority also explains that these proposed causes of action are "inherently different from" and have "a more public nature than" traditional torts, since these tortious actions "shoc[k] the conscience" (para. 124, citing M. C. Bassiouni, "International Crimes: *Jus Cogens and Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63, at p. 69). It concludes by explaining that an appropriate remedy must emphasize "the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches" (para. 129).

216 With respect, these considerations are not relevant to deciding the scope of tort law. A difference merely of damages or the extent of harm will not suffice to ground a new tort. For example, in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, this Court explained that a separate tort of sexual battery was unnecessary because the harms addressed by sexual battery were fully encompassed by battery. The sexual aspect of the claim went to the amount of damages, which did not require the recognition of a separate tort (para. 27). Similarly, the Court of Appeal for Ontario recently held that "an increased societal recognition" of the wrongfulness of conduct did not necessitate the creation of a new tort (*Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494, at paras. 50-53, leave to appeal refused, [2019] S.C.C.A. No. 174, S.C.C. Bull., September 20, 2019, at p. 7). The point is this: since all torture is battery (or intentional infliction of emotional distress), albeit a particularly severe form thereof, it does not need to be recognized as a new tort. Our law, as is, furnishes an appropriate cause of action.

217 The majority provides plausible reasons for recognizing four new common law *crimes*, were that something courts could do. However, in our respectful view, they are inapposite for determining whether a new common law *tort* should be recognized.

218 The suitability of criminal law, relative to tort law, in addressing this conduct, is readily apparent. Parliament reached precisely this conclusion when it chose to criminalize crimes against humanity (see *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24). Parliament chose not to provide for a liability rule in tort. As we have already mentioned, to find a new tort based on mere degree of harm would contradict *Scalera*. A more profound degree of harm, may, however, be an appropriate reason for crafting a different criminal remedy. "[S]ymbolism", too, is an issue well-addressed by criminal remedies and poorly addressed by tort. The labelling of a crime matters (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636); the labelling of a tort, not so much. Tort is not an area of law in which the primary value of bringing a case is often, or even usually, symbolic. Finally, the tort system has its own, built-in way to adapt to breaches of rights that are more grave or that need to be deterred: by awarding increased damages.

219 The majority also suggests recognizing new nominate torts so that this Court can "ad[d] its voice to others in the international community collectively condemning [these crimes]" and so "furthe[r] the development of an international rule of law" (para. 130, citing H. H. Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675).

220 In making this suggestion, the majority undervalues the tools Canadian courts already have that can be used to condemn crimes against humanity and degrading treatment. First, even were this action formally for the tort of battery, a court can express its condemnation of the conduct through its reasons. Nothing would prevent the trial judge in this case from writing in his or her reasons that Nevsun committed, or was complicit in, forced labour, slavery and other human rights abuses, even if his or her ultimate legal conclusion is that Nevsun committed assault, battery, or other wrongs. Causes of action sometimes go by different names. For example, what this Court referred to as the "unlawful means" tort in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, is commonly referred to as "'unlawful interference with economic relations', 'interference with a trade or business by unlawful means', 'intentional interference with economic relations', or simply 'causing loss by unlawful means'" (para. 2). Similarly, what this Court referred to as the "tort of civil fraud" in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21, and *Mauldin*, at para. 87, is also commonly referred to as the "tort of deceit" (see *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249, at para. 77).

221 A trial court could also express its condemnation through its damage award. Punitive damages, for example, have been recognized by this Court as "straddl[ing] the frontier between civil law (compensation) and criminal law (punishment)", have as a goal the *denunciation* of misconduct (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 36 and 44). The majority tells us that an award of punitive damages "may be inadequate" to remedy the violation of these international norms (para. 126). It says that a "different and stronger" response may be required (para. 129). But the "different and stronger" response that the majority concludes must be given appears to be a tort with a new name but the same remedy. Again, the better conclusion is that a remedy in criminal law is appropriate, while a remedy in tort law (established by the courts, rather than the legislature) is not.

222 We note also that the majority's approach in this regard would put Canada out of step with other states. As Dr. Zerk explains, although "most jurisdictions provide for the possibility of private claims for compensation for wrongful behaviour", "these kinds of claims are not in most cases aimed at gross human rights abuses specifically" (p. 43). Instead, torts such as "assault", "battery", "false imprisonment", and "negligence" are used (pp. 43-44). Indeed, corporate liability for violations of customary international law generally depends on "ordinary common law torts or civil law delicts" (Ramasastry and Thompson, at p. 22). Such ordinary private law actions provide mechanisms to address the "harm arising out of a grave breach" of international criminal law (p. 24). This is a critical point here, where the workers advance such ordinary private law claims in addition to their claim founded on customary international law. Even were this part of Nevsun's motion to strike to be granted, the workers could pursue in Canada the same relief they could obtain in most other states.

223 And, as we will discuss below in section IV, subheading D, our existing private international law jurisprudence also provides a vehicle by which courts can declare that the law of another state is so morally repugnant that the courts of this country will decline to apply it.

C. *Changing the Limits of International Law Is Not the Job of Courts*

224 Above, we have described how the majority's reasons either depend on customary international law norms that do not exist or depend on affording to the doctrine of adoption a role it does not have. This requires us to consider whether this Court can change the doctrine of adoption so that it provides a civil liability rule for breaches of prohibitions at customary international law. In our view, it cannot, regardless of whether it is framed as recognizing a cause of action for breach of customary international law or as giving horizontal effect to that law.

225 It is of course open to Parliament and the legislatures to make such a change. Absent statutory intervention, however, the ability of courts to shape the law is, as a matter of common-law methodology, constrained. Courts develop the law *incrementally*. This is a manifestation of the unwritten constitutional principle of legislative supremacy, which goes to the core of just governance and to the respective roles of the legislature, the executive and the judiciary (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at pp. 436-38; *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 666-67; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, at para. 43; B. McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006), 4 *N.Z.J.P.I.L.* 147). It also reflects the comparative want of expertise of the courts, relative to the legislature. The legislature has the institutional competence and the democratic legitimacy to enact major legal reform. By contrast, the courts are confined by the record to considering the circumstances of the particular parties before them, and so cannot anticipate all the consequences of a change.

226 The importance, both practical and normative, of confining courts to making only incremental changes to the common law was stated by this Court in *Watkins*, at pp. 760-61:

> This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
>
> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally,

> and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.
>
> Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution. [Emphasis added.]

227 In the same vein, Justice Robert J. Sharpe, writing extra-judicially, has reflected on the limits of the judicial role when faced with polycentric issues:

> The first question is whether the proposed change is of a nature that falls within the capacity of the courts to decide. Judges, as I have argued, should be conscious of the inherent limits of adjudication and the fact that their view of a legal issue will necessarily be limited by the dynamics of the adversarial litigation process. That process is well-suited to deal with the issues posed by bipolar disputes and considerably less capable of dealing with polycentric issues that raise questions and pose problems that transcend the interests of the parties. Judges should hesitate to move the law in new directions when the implications of doing so are not readily captured or understood by looking at the issue through the lens of the facts of the case they are deciding. The legislative process is better suited to consider and weigh competing policy choices that are external to legal rights and duties. Elected representatives have the capacity to reflect the views of the population at large. Government departments have the resources to study and evaluate policy options. The legislative process allows all interested parties to make their views known and encourages consideration and accommodation of competing viewpoints.
>
> The second question relates to the magnitude of the change. Common law judges constantly refer to incremental or interstitial change and characterize the development of the common law as a gradual process of evolution. Former Senior Law Lord Tom Bingham put it this way: it is very much in the common law tradition "to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices." If the proposed change fits that description, there is a strong tradition to support judicial law-making. It is quite another thing, however, "to seek to recast the law in a radically innovative or adventurous way," as that makes the law "uncertain and unpredictable" and is unfair to the losing party who relied on the law as it existed before the change. Developments of the latter magnitude may best be left to the legislature. [Footnote omitted.]
>
> (*Good Judgment: Making Judicial Decisions* (2018), at p. 93)

Accordingly, for a change to be incremental, it cannot have complex and uncertain ramifications. This Court has repeatedly declined to change the common law in those very circumstances (*Watkins*, at p. 761; *London Drugs Ltd.*, at pp. 436-38; *Salituro*, at pp. 677-78; *Fraser River Pile & Dredge Ltd.*, at para. 44).

228 There is much accumulated wisdom in this jurisprudence. To alter the courts' treatment of customary international law would "se[t] the law on an unknown course whose ramifications cannot be accurately gauged" (*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93). As this Court explained in *Kazemi*, at para. 108:

> The common law should not be used by the courts to determine complex policy issues in the absence of a strong legal foundation or obvious and applicable precedents that demonstrate that a new consensus is emerging. To do otherwise would be to abandon all certainty that the common law might hold. Particularly in cases of international law, it is appropriate for Canadian courts only to follow the "bulk of the authority" and not change the law drastically based on an emerging idea that is in its conceptual infancy.

The majority views such a change as "necessary" (at para. 118), but provides no reason to believe the change will have anything other than complex and uncertain ramifications. Such a fundamental reform to the common law must be left to the legislature, even though doing so by judge-made law might seem intuitively desirable (*Salituro*, at p. 670).

229 If Parliament wishes to create an action for a breach of customary international law, that is a decision for Parliament itself to take. It is not one for this Court to take on Parliament's behalf. As stated by Professor O'Keefe:

> ... the recognition by the courts of a cause of action in tort for the violation of a rule of customary international law would be no less than the judicial creation of a new tort, something which has not truly happened since the coining of the unified tort of negligence in *Donoghue v Stephenson* in 1932.9 The reason for this is essentially constitutional: given its wide-reaching implications, economic and sometimes political, the creation of a novel head of tort is now generally recognised as better left to Parliament, on account of the latter's democratic legitimacy and superior capacity to engage beforehand in the necessary research and consultation. [Footnote omitted.]
>
> (R. O'Keefe, "The Doctrine of Incorporation Revisited", in J. Crawford and V. Lowe, eds., *The British Year Book of International Law 2008* (2009), 7, at p. 76.)

230 When the English courts determined to give horizontal effect to an international instrument (the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221), they did so pursuant to the direction of *a statute* that made it unlawful for a public authority -- which by the terms of the statute included the courts -- to act "in a way which is incompatible with a Convention right" (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 6(1) and (3)). Similarly, the horizontal effect of the Treaties of the European Union in the United Kingdom depends on a statutory instruction in the *European Communities Act 1972* (U.K.), 1972, c. 68 (*R. (Miller) v. Secretary of State*, [2017] UKSC 5, [2018] A.C. 61, at paras. 62-68). While we agree with the majority's reasoning (at para. 94) that legislative endorsement is not required for there to be *vertical* effect in the common law (that is, an effect against the executive) of a mandatory or prohibitive norm of customary international law, there is no such tradition of *horizontal* effect in the common law (that is, an effect on the relations between private parties) without legislative action. Further, and to the extent such an effect is even possible, it should be governed by the considerations we set out at paras. 174-75 concerning the effect of mandatory and prohibitive norms in private common law.

231 It is thus for Parliament to decide whether to change the doctrine of adoption to provide courts the power to convert prohibitive rules of international law into free-standing torts. Parliament has not done so. While it has created a statutory cause of action for victims of terrorism, it has not chosen to do so for every violation of customary international law (see s. 4 of the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2).

IV. On the Second Theory, the Claims Are Also Bound to Fail

232 We have thus far confined our comments to the theory of the case given by the majority. As part of reading the pleadings generously, however, we must also consider the theory given by the chambers judge and the Court of Appeal. Under this theory, the amended pleadings sought to have the court recognize four new nominate torts *inspired* by international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.

233 On this theory of the case, international law plays a limited role. It will be of merely persuasive authority in recognizing the tort to begin with. It will also play less ongoing significance. Although proving the content of customary international law may be valuable for showing the urgency of recognizing a new tort, once a new tort is recognized, the new tort will have a comfortable home within the common law. If slavery is recognized as a tort, a future litigant will have no need to prove that an edge-case of slavery is a violation of customary international law; they can instead simply invoke the domestic tort. It is far easier for Canadian judges to know the contours of a domestic tort than it is for them to know the contours of customary international law. The transmutation of customary international law into individual domestic torts has another advantage, too. On an edge-case, where it is unclear whether states are obliged to prohibit the conduct under customary international law, Canadian judges will not be faced with a partly empirical question (as they would on the majority's theory of the case), but a normative question.

234 The question that remains is: when should Canadian common law courts recognize these new nominate torts?

235 We explain below, first, the test that Canadian courts have developed for recognizing -- or more precisely, for refusing to recognize -- a new nominate tort. We then apply that test to the four torts the workers allege.

A. *The Test for Recognizing a New Nominate Tort*

236 In *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 120, Wilson J. (dissenting, but not on this point) described the history of disputed theories for recognizing new torts:

> It has been described in Solomon, Feldthusen and Mills, *Cases and Materials on the Law of Torts* (2nd ed. 1986), as follows (at p. 6):
>
> Initially, the search for a theoretical basis for tort law centred on the issue of whether there was a general principle of tortious liability. Sir John Salmond argued that tort law was merely a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability [see Salmond, *The Law of Torts* (6th ed., 1924) at pp. 9-10]. Essentially the law of torts was a finite set of independent rules, and the courts were not free to recognize new heads of liability. In contrast, writers such as Pollock contended that the law of torts was based upon the single unifying principle that all harms were tortious unless they could be justified [see Pollock, *The Law of Torts* (13th ed., 1929) at p. 21]. The courts were thus free to recognize new torts. Glanville Williams suggested a compromise between the two viewpoints. He argued that tort law historically exhibited no comprehensive theory, but that the existing categories of liability were sufficiently flexible to enable tort law to grow and adapt. [Emphasis added.]

Justice Wilson agreed with, and adopted, Glanville Williams's pragmatic approach (p. 120, citing G. L. Williams, "The Foundation of Tortious Liability" (1939), 7 *Cambridge L.J.* 1).

237 Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies (see, for example, *Scalera*); (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another (*Saskatchewan Wheat Pool*, at pp. 224-25); and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paras. 76-77). Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration.

238 The first rule, that of necessity, acknowledges at least three alternative remedies: another tort, an independent statutory scheme, and judicial review. If any of these alternatives address the wrong targeted by the proposed nominate tort, then the court will decline to recognize it.

239 As we described above, a difference merely of damages or the extent of harm will not suffice to ground a new tort (*Scalera*). The proposed torts of "harassment" and "obstruction" also failed at the necessity stage. As the Saskatchewan Court of Appeal recently observed in *McLean v. McLean*, 2019 SKCA 15, at paras. 103-5 (CanLII), the proposed tort of harassment was entirely encompassed by the tort of intentional infliction of mental suffering and so need not be recognized as a distinct tort (see also *Merrifield*, at para. 42). Similarly, the proposed tort of obstruction -- the plaintiffs had alleged the defendants had obstructed them from clearing trees -- was encompassed by the existing torts of nuisance and trespass (*6165347 Manitoba Inc. v. Jenna Vandal*, 2019 MBQB 69, at paras. 91 and 100 (CanLII)).

240 A statutory remedy can also suffice to show that a new nominate tort is unnecessary. For example, in *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195, this Court held that the *Ontario Human Rights Code*, R.S.O. 1970, c. 318 ("*Code*") foreclosed the development of a common law tort based on the same policies embodied in the *Code*. Similarly, in *Frame*, at p. 111, the Court declined to create a common law tort concerning alienation of affection in the family context because the legislature had occupied the field through the *Children's Law Reform Act*, R.S.O. 1980, c. 68.

241 The second rule, that the tort must reflect a wrong visited by one person upon another, is also well-established and is reflected in the courts' resistance to creating strict or absolute liability regimes (see, for example, *Saskatchewan Wheat Pool*, at p. 224). It is also the converse of the idea so memorably expressed by Sharpe J.A. in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, at para. 69: there, the "facts ... cr[ied] out for a remedy". When the facts do not make such a cry, the courts will not recognize a tort.

242 Finally, the change wrought to the legal system must not be indeterminate or substantial. This rule reflects the courts' respect for legislative supremacy and the courts' mandate to ensure that the law remains stable, predictable and accessible (T. Bingham, *The Rule of Law* (2010), at p. 37). Hence, the Ontario Superior Court's rejection of a proposed tort of "derivative abuse of process" that would provide compensation for someone allegedly injured by another person's litigation. Such a tort, the court noted, would create indeterminate liability (*Harris v. GlaxoSmithKline Inc*., 2010 ONSC 2326, 101 O.R. (3d) 665, aff'd on other grounds, 2010 ONCA 872, 106 O.R. (3d) 661, leave to appeal refused, [2011] S.C.C.A. No. 85, [2011] 2 S.C.R. vii). Similarly, in *Wallace*, this Court rejected the proposed tort of "bad faith discharge" (at para. 78) because it would create a "radical shift in the law" (at para. 77) and contradict "established principles of employment law" (para. 76). A shift will be less radical when it is presaged by some combination of *obiter*, academic commentary, and persuasive foreign judicial activity, none of which are present here.

243 *Jones v. Tsige* provides a rare and instructive example of where a proposed new nominate tort was found by a court to have passed this test. The breach of privacy was indeed seen by the court as a wrong caused by one person to another, and as a wrong for which there existed no other remedy in tort law or in statute. The Court of Appeal for Ontario found support to recognize a cause of action for intrusion upon seclusion in the common law and *Charter* jurisprudence (at para. 66), and looked to other jurisdictions which had recognized a similar cause of action arising from a right to privacy, either by statute or by the common law (paras. 55-64). The court defined the elements of the cause of action (at paras. 70-72) and identified factors to guide an assessment of damages (paras. 87-90). Having undertaken this careful analysis, the court concluded that it had the competence as an institution to make this incremental change to the common law -- it being "within the capacity of the common law to evolve to respond to the problem" (para. 68).

B. *Two of the Proposed Nominate Torts Fail This Test*

244 In our view, the proposed torts of cruel, inhuman or degrading treatment, and "crimes against humanity" both fail this test.

245 The proposed tort of cruel, inhuman or degrading treatment fails the necessity test, since any conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress. To the extent that this tort describes a greater degree of harm than that typically litigated in the conventional torts, this goes only to damages. As this Court found in *Scalera*, no distinct tort is necessary.

246 The proposed tort of "crimes against humanity" also fails, but for a different reason: it is too multifarious a category to be the proper subject of a nominate tort. Many crimes against humanity would be already addressed under extant torts. If there are individual crimes against humanity that would not already be recognized as tortious conduct in Canada, the workers should specify them, rather than rely on a catch-all phrase that includes wrongs already covered. Adopting such a tort wholesale would not be the kind of incremental change to the common law that a Canadian court ought to make.

C. *Two of the Proposed Nominate Torts May Pass This Test*

247 In our view, it is possible the proposed torts of slavery and use of forced labour would pass the test for recognizing a new nominate tort. Recognizing each of these torts -- subject to further development throughout the proceedings -- may prove to be necessary, in that each may capture conduct not independently captured in torts such as battery, intentional infliction of emotional distress, negligence, or forcible confinement. For example, it is possible that the facts, if fully developed in the course of trial, might show that one person kept another person enslaved without need for any force or violence, simply by convincing that other person that they are rightfully property. Use of forced labour also, by its terms, may include liability that pierces the corporate veil or extends through agency relationships. And, to the extent there are non-tort alternative remedies under the criminal law, they would not restore the victim as tort law would.

248 It is also uncontroversial that each of these torts -- again, subject to further development -- reflects wrongs being done by one person to another.

249 Finally, the admission of these torts would not cause unforeseeable or unknowable harm to Canadian law. Both slavery and use of forced labour are widely understood in this country to be illegal and, indeed, morally reprehensible, and liability for such conduct would herald no great shift in expectations.

250 Nonetheless, for the reasons that follow, we would hold that the attempt to create such nominate torts is doomed to fail.

D. *Slavery and Use of Forced Labour Should Not Be Recognized for the First Time in the Circumstances of This Case*

251 In our view, proposed torts should not be recognized for the first time in a proceeding based on conduct that occurred in a foreign territory, where the workers in this case had no connection to British Columbia at the time of the alleged torts, and where the British Columbian defendant has only an attenuated connection to the tort.

252 In general, tortious conduct abroad will not be governed by Canadian law, even where the wrong is litigated before Canadian courts. It is the law of the place of the tort that will, normally, govern (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1050). The only exception is when such law is so repugnant to the fundamental morality of the Canadian legal system as to lead the court not to apply it (p. 1054).

253 One of two possibilities may arise when the proceedings in this case continue. It may be that the court finds Eritrean law not so offensive, and proceeds to apply it. In that case, judicial restraint would prevent the courts from recognizing a novel tort in Canadian law, because its application would be moot. Alternatively, if Eritrean law is found to be repugnant, the British Columbia courts would be in the unfortunate position of setting out a position for the first time on these proposed new torts based on conduct that occurred in a foreign state.

254 There are problems, both practical and institutional, with developing Canadian law based on conduct that occurred in a foreign state.

255 The practical problem is that the law that is appropriate for regulating a foreign state may not also be law that is appropriate for regulating Canada. It is trite to say that hard cases make bad law. When a case comes through the public policy exception to conflicts of law, it will, almost by definition, be a hard case.

256 The institutional problem is well expressed by La Forest J. in *Tolofson*, at p. 1052:

> It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did.

If that is true of legislatures, it is ever the more true for courts. Courts simply must recognize the limits of their institutional competence and the distinct roles of the judiciary vis-à-vis Parliament and the executive (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 46-47). The judiciary is confined to making incremental changes to the common law, and can only respond to the evidence and argument before it. In contrast, the executive has the resources to study complex matters of state, conduct research, and consult with affected groups and the public. Parliament can do so, too, as well as hearing expert testimony through its committees. While the remedy that a court may order is limited to the question before the court, the executive can craft broad legal and institutional responses to these issues. The executive can create delegated regulatory authority, and implement policy and procedures. Further, whereas courts do not have the jurisdiction or resources to monitor the impact of its decisions, the executive can develop specialized units with a mandate to monitor, make recommendations, implement and, where necessary, adjust a course of action. The domain of foreign relations is, in our view, perhaps the most obvious example of where the executive is competent to act, but where courts lack the institutional competence to do so.

257 Lester B. Pearson, in a speech before the Empire Club of Canada and the Canadian Club of Toronto in 1951, spoke about developing foreign policy in Canada ("Canadian Foreign Policy in a Two Power World", *The Empire Club of Canada: Addresses 1950-1951* (1951), 346). Mr. Pearson emphasized the delicacy of foreign relations, which calls for balancing political, economic and geographical considerations and consultation with other nations -- a role that courts are not institutionally suited to undertake:

> The formulation of foreign policy has special difficulties for a country like Canada, which has enough responsibility and power in the world to prevent its isolation from the consequences of international decisions, but not enough to ensure that its voice will be effective in making those decisions.
>
> Today, furthermore, foreign policy must be made in a world in arms, and in conflict ... .
>
> ...
>
> We all agree, however, that we must play our proper part, no less and no more, in the collective security action of the free world, without which we cannot hope to get through the dangerous days ahead. But how do we decide what that proper part is, having regard to our own political, economic and geographical situation? It is certainly not one which can be determined by fixing a mathematical proportion of what some other country is doing. As long as we live in a world of sovereign states, Canada's part has to be determined by ourselves, but this should be done only after consultation with and, if possible, in agreement with our friends and allies. We must be the judge of our international obligations and we must decide how they can best be carried out for Canada ... . [pp. 349 and 352]

258 Mr. Pearson's speech was given in the Cold War context, and considered Canada's foreign relations policy vis-à-vis two major world powers. Clearly, the landscape of international relations and Canada's role on the world stage have changed dramatically since 1951. Today, as the political and economic relationships between nations become increasingly complex, Mr. Pearson's message is even more compelling: foreign relations is a delicate matter, which the executive -- and not the courts -- is equipped to undertake.

259 Setting out a novel tort in the exceptional circumstance of a foreign state's law being held by the court to be so repugnant to Canadian morality would be an intrusion into the executive's dominion over foreign relations. The courts' role within this country is, primarily, to adjudicate on disputes within Canada, and between Canadian residents. This is the purpose for which the courts have been vested their powers by s. 96 of the *Constitution Act, 1867*. Our courts' legitimacy depends on our place within the constitutional architecture of this country; Canadian courts have no legitimacy to write laws to govern matters in Eritrea, or to govern people in Eritrea. Developing Canadian law in order to respond to events in Eritrea is not the proper role of the court: that is a task that ought to be left to the executive, through the conduct of foreign relations, and to the legislatures and Parliament.

260 In making these observations, we do not question the public policy exception to applying the law indicated by a choice of law exercise. The proper use of that exception, however, is to apply existing Canadian law, which is either the product of legislative enactment or the common law, to situations where applying the foreign law would be repugnant to the consciences of Canadians. That exception should not be used as a back door for the courts to create new law governing the behaviour of the citizens of other states in their home state.

V. Conclusion

261 This appeal engages fundamental questions of procedure and substance. The majority's approach to the procedural question at the heart of a motion to strike will encourage parties to draft pleadings in a vague and underspecified manner. It offers this lesson: the more nebulous the pleadings and legal theory used to protect them, the more likely they are to survive a motion to strike. This approach will suck much of the utility from the motion to strike. Doomed actions will occupy the superior courtrooms of this country, persisting until the argument collapses at summary judgment or trial. In a moment where courts are struggling to handle the existing caseload, increasing the load is likely not to facilitate access to justice, but to frustrate it.

262 In substance, this appeal is about, as much as anything else, maintaining respect for the appropriate role of each order of the Canadian state. The creation of a cause of action for breach of customary international law would require the courts to encroach on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs).

263 It is not up to the Court to ignore the foundations of customary international law, which prohibits certain state conduct, in order to create a cause of action against private parties. Rather, it would be up to Parliament to create a statutory cause of action. And, where an issue has consequences for foreign relations, the executive, not courts, is institutionally competent to decide questions of policy. Fundamentally, it is this understanding and respect for the institutional competence of each order of the state that underlies the proper functioning of the domestic and international order.

264 A final word. The implications of the majority's reasons should be comprehended. On the majority's approach to determining what norms of customary international law may exist, generalist judges will be called upon to determine the practices of foreign states and the bases for those practices without hearing evidence from either party. They are to make these determinations aided only by lawyers, who themselves will rarely be experts in this field. The judiciary is institutionally ill-suited to make such determinations.

265 The result, we fear, will be instability. In international law, on the majority's approach, Canadian courts will, perhaps on the word of a single law professor, be empowered to declare what the states of the world have through their practices agreed upon. And this uncertainty will redound upon the law of this country. The line of reasoning set out in this judgment departs from foundational principles of judicial law-making in tort law, and there is no reason to believe that Canadian courts will in the future be any more restrained with their use of international law. So fundamental a remaking of the laws of this country is not for the courts. This, ultimately, is where we part ways with the majority.

266 For these reasons, we would allow the appeal in part and strike the paragraphs of the workers' claims related to causes of action arising from customary international law norms, with costs to Nevsun in this Court and in the courts below.

The reasons of Moldaver and Côté JJ. were delivered by

S. COTÉ J. (dissenting)

I. Introduction

267 My main point of departure from the analysis of my colleague, Abella J., concerns the existence and applicability of the act of state doctrine, or some other rule of non-justiciability barring the respondents' claims. As for the reasons of Brown and Rowe JJ. concerning the respondents' claims inspired by customary international law, while I agree with their analysis and conclusion, I wish to briefly stress a few points on that issue before addressing the act of the state doctrine.

II. Claims Inspired by Customary International Law

268 On this first issue, I must emphasize that the extension of customary international law to corporations represents a significant departure in this area of the law.

269 The question posed to this Court is not whether corporations are "immune" from liability under customary international law (Abella J.'s reasons, at para. 104), but whether customary international law extends the scope of liability for violation of the norms at issue to corporations: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. 2010), at p. 120, aff'd on other grounds, 569 U.S. 108 (2013). While my colleague recites the rigorous requirements for establishing a norm of customary international law (at paras. 77-78), when it comes to actually analyzing whether international human rights law applies to corporations, she does not engage in the descriptive inquiry into whether there is a sufficiently widespread, representative and consistent state practice. Instead, she relies on normative arguments about why customary international law ought to apply to corporations: see paras. 104-13. A court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences:

> As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.
>
> (*Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, at p. 298, per Lord Hoffman)

My colleague is indeed correct that international law "does move" (at para. 106), but it moves only so far as state practice will allow. The widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations: J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at pp. 102 and 607.

III. Act of State Doctrine

270 Turning to the issue of the act of state doctrine, this is not a conflict of laws case. This Court is not being asked to determine whether the courts of British Columbia have jurisdiction over the parties, whether a court of another jurisdiction is a more appropriate forum to hear the dispute, whether the law of another jurisdiction should be applied or what the content of that foreign law happens to be.

271 Rather, we must decide whether the respondents' claims are amenable to adjudication by courts within Canada's domestic legal order or whether they are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. In my view, the respondents' claims, as pleaded, fall within this latter category. Accordingly, I would allow the appeal and dismiss the respondents' claims in their entirety, as they are not justiciable.

272 In the reasons that follow, I begin by outlining two distinct branches within the act of state doctrine. I conclude that our choice of law jurisprudence does indeed play a similar role to that of certain aspects of the act of state doctrine. However, I also conclude that the act of state doctrine includes a second branch distinct from choice of law which renders some claims non-justiciable. This branch of the doctrine bars the adjudication of civil actions which have their foundation in allegations that a foreign state has violated public international law.

273 Next, I discuss how the doctrine of justiciability and the constitutional separation of powers explain why a Canadian court may not entertain a civil claim between private parties where the outcome depends on a finding that a foreign state violated international law. Finally, I apply the doctrine of justiciability to the respondents' claims, ultimately finding that they are not justiciable, because they require a determination that Eritrea has committed an internationally wrongful act.

A. *Substantive Foundations of the Act of State Doctrine*

274 Whether a national court is competent to adjudicate upon the lawfulness of sovereign acts of a foreign state is a question that has many dimensions. As the United Kingdom Supreme Court explained in *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964, the act of state doctrine can be disaggregated into an array of categories: para. 35, per Lord Mance; paras. 121-22, per Lord Neuberger; paras. 225-38, per Lord Sumption.

275 My colleague holds that the act of state doctrine, and all of its animating principles, have been completely subsumed by the Canadian choice of law and judicial restraint jurisprudence. With respect, I am unable to agree with her approach. There is another distinct, though complementary, dimension of the act of state doctrine in addition to the choice of law dimension. Claims founded upon a foreign state's alleged breach of international law raise a unique issue of justiciability which is not addressed in my colleague's reasons.

276 Whether this dimension is referred to as a branch of the act of state doctrine or as a specific application of the more general doctrine of justiciability, the Canadian jurisprudence leads to the conclusion that some claims are not justiciable, because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations.

277 I pause to note that the distinction between the non-justiciability and choice of law branches does not exhaust the "array of categories" within the act of state doctrine. Rather, I prefer to consider the doctrine along two axes: (1) unlawfulness under the foreign state's domestic law, as opposed to unlawfulness under international law; and (2) the choice of law branch, as opposed to the non-justiciability branch, of the doctrine. These two axes are interrelated. As I explain below, there are choice of law rules that apply to a court's review of alleged unlawfulness under the foreign state's domestic law and under international law. There are also rules of non-justiciability which address unlawfulness under the foreign state's domestic law and unlawfulness under international law. The discussion that follows is not intended to be comprehensive, as my aim is simply to demonstrate that the issue before this Court is whether a domestic court is competent to adjudicate claims based on a foreign state's violations of international law under the non-justiciability branch of the doctrine.

278 I turn now to the underlying rationale for drawing a distinction between the respective branches of the act of state doctrine.

(1) Choice of Law Branch of the Act of State Doctrine

279 The choice of law branch of the act of state doctrine establishes a general rule that a foreign state's domestic law -- or "municipal law" -- will be recognized and normally accepted as valid and effective: *Belhaj*, at paras. 35 and 121-22. In England, the effect of this principle is that English courts will not adjudicate on the lawfulness or validity of sovereign acts performed by a state under its own laws: *Johnstone v. Pedlar*, [1921] 2 A.C. 262, at p. 290 (H.L.). This branch is focused on whether an English court should give effect to a foreign state's municipal law.

280 There are exceptions to this general rule. The act of state doctrine gives way to the "well-established exception in private international law of public policy": C. McLachlan, *Foreign Relations Law* (2014), at para. 12.157. For example, in *Oppenheimer v. Cattermole*, [1976] A.C. 249, the House of Lords refused to apply a Nazi-era law depriving Jews of their citizenship and property: pp. 277-78. Lord Cross reasoned that "it is part of the public policy of this country that our courts should give effect to clearly established rules of international law", and that the Nazi decree was "so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all": p. 278. The House of Lords reiterated this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883, holding that the domestic law of a foreign state could be disregarded if it constitutes a serious violation of international law. Iraq had issued a decree expropriating aircrafts of the Kuwait Airways Corporation which were then in Iraq. The House of Lords held that the Iraqi decree was a clear violation of international law and that the English courts were therefore at liberty to refuse to recognize it on grounds of public policy. This shows how international law informs the public policy exception of the choice of law branch.

281 In Canada, similar principles are reflected in this Court's choice of law jurisprudence. In *Laane and Baltser v. Estonian State Cargo & Passenger s. s. Line*, [1949] S.C.R. 530, this Court declined to give effect to a 1940 decree of the Estonian Soviet Socialist Republic that purported to nationalize all Estonian merchant vessels and also purported to have extraterritorial effect. The appeal was decided on the principle that a domestic court will not give effect to foreign public laws that purport to have extraterritorial effect: see p. 538, per Rinfret C.J.; p. 542, per Kerwin J.; p. 547, per Rand J.; pp. 547-51, per Kellock J. However, Rand J. would also have held that, irrespective of the decree's extraterritorial scope, there is a "general principle that no state will apply a law of another which offends against some fundamental morality or public policy": p. 545. I note that no act of state issue actually arose on the facts of that case, as the domestic law branch of the act of state doctrine applies only to acts carried out in the foreign state's territory: see, e.g., *Belhaj*, at paras. 229 and 234, per Lord Sumption. Therefore, it is unsurprising that "[n]o act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court": Abella J.'s reasons, at para. 46.

282 In another English case, *Buck v. Attorney General*, [1965] 1 All E.R. 882 (C.A.), the plaintiffs sought a declaration that the constitution of Sierra Leone was invalid. Lord Harman held that an English court could not make a declaration that impugned the validity of the constitution of a foreign state: p. 885. Lord Diplock reasoned that the claim had to be dismissed because the issue of the validity of the foreign law did not arise incidentally:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction. [pp. 886-87]

283 While the facts of *Buck* fall within the non-justiciability branch, the effect of Lord Diplock's reasoning is that the act of state doctrine does not prevent a court from examining the validity of a foreign law if the court is obliged to determine the content of the foreign law as a choice of law issue. As Professor McLachlan points out, any other approach could lead to perverse results, because a court applying foreign law must apply the law as it would have been applied in the foreign jurisdiction: McLachlan, at para. 12.139.

284 In this regard, too, this Court reached a similar result in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. The issue in it was whether British Columbia's superior court could rule on the constitutionality of a Quebec statute which prohibited the removal from Quebec of business documents required for judicial processes outside Quebec. This Court approached the question as one of conflict of laws, observing that there was no reason why a court should never be able to rule on the constitutionality of another province's legislation. Ultimately, this Court held that a provincial superior court has jurisdiction to make findings respecting the constitutionality of a statute enacted by the legislature of another province if this issue arises incidentally in litigation before it. The constitutionality of the Quebec statute was not foundational to the claim advanced in the British Columbia courts. Rather, it arose in the discovery process in the context of the parties' obligation to disclose relevant documents, some of which were in Quebec. Therefore, the constitutionality of the statute could properly be considered in the choice of law analysis. Of course, because the facts of that case gave rise to an issue involving the British Columbia courts and Quebec legislation, it is, again, unsurprising that this Court "made no reference to act of state": Abella J.'s reasons, at para. 48.

285 Nonetheless, based on this comparative review of the case law, it appears that this Court's choice of law jurisprudence leads to the same result as the choice of law branch of the English Act of State doctrine: see McLachlan, at paras. 12.24 and 12.126-12.167. To this extent, I agree with Abella J. that that jurisprudence plays a similar role to that of the choice of law branch of the act of state doctrine in the context of alleged unlawfulness under foreign domestic and international law: paras. 44-57. However, this is not true as regards the non-justiciability branch as applied to alleged violations of international law.

(2) Non-justiciability Branch of the Act of State Doctrine

286 The non-justiciability branch of the doctrine is concerned with judicial abstention from adjudicating upon the lawfulness of actions of foreign states: see *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), at p. 931; McLachlan, at paras. 12.168 and 12.177-12.178. As I explain below, a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law.

287 *Blad v. Bamfield* (1674), 3 Swans 604, 36 E.R. 992, may be the earliest case regarding this branch of the act of state doctrine. A Danish man, Blad, had seized property of English subjects (including Bamfield) in Iceland on the authority of letters patent granted by the King of Denmark. Blad was sued in England for this allegedly unlawful act. He sought an injunction to restrain the proceeding. In the High Court of Chancery, Lord Nottingham entered a stay of the proceeding against Blad because the English subjects' defence against the injunction was premised on a finding that the Danish letters patent were inconsistent with articles of peace between England and Denmark. Lord Nottingham reasoned that a misinterpretation of the articles of peace "may be the unhappy occasion of a war" (p. 606), and that it would be "monstrous and absurd" (p. 607) to have a domestic court decide the question of the legality of the Danish letters patent, the meaning of the articles of peace or the question of whether the English had a right to trade in Iceland.

288 Another early case on the act of state doctrine is *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C.1, 9 E.R. 993. Revolutionaries in the German duchy of Brunswick overthrew the reigning Duke, Charles, in 1830. The King of Hanover deposed Charles in favour of Charles' brother, William, and placed Charles' assets under the guardianship of the Duke of Cambridge. Charles brought an action in which he sought an accounting for the property of which he had been deprived. In the House of Lords, Lord Chancellor Cottenham reasoned that the action was not concerned with determining private rights as between individuals but, rather, concerned an allegation that the King of Hanover had acted contrary to the "laws and duties and rights and powers of a Sovereign exercising sovereign authority": p. 1000. This led the Lord Chancellor to conclude that the English courts cannot "entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad": p. 1000.

289 The leading case on the non-justiciability branch is *Buttes Gas*. The Occidental Petroleum Corporation and Buttes Gas and Oil Co. held competing concessions to exploit disputed oil reserves near an island in the Arabian Gulf. Occidental claimed its right to exploit the reserves under a concession granted by the emirate of Umm al Qaiwain. Buttes Gas claimed its right pursuant to one granted by the emirate of Sharjah. Both emirates, as well as Iran, claimed to be entitled to the island and to its oil reserves. After the United Kingdom intervened, the dispute was settled by agreement. Occidental's concession was subsequently terminated. Occidental alleged that Buttes Gas and Sharjah had fraudulently conspired to cheat and defraud Occidental, or to cause the United Kingdom and Iran to act unlawfully to the injury of Occidental: p. 920. Buttes Gas argued that an English court should not entertain such claims, as they concerned acts of foreign states.

290 In the House of Lords, Lord Wilberforce held that Occidental's claim was not justiciable. He identified a branch of the act of state doctrine which he said was concerned with the applicability of foreign domestic legislation: p. 931. He suggested that this branch was essentially a choice of law rule concerned with the choice of the proper law to apply to a dispute: p. 931. However, he drew one important distinction:

> It is one thing to assert that effect will not be given to a foreign municipal law or executive act if it is contrary to public policy, or to international law (cf. *In re Helbert Wagg & Co. Ltd's Claim* [1956] Ch. 323) and quite another to claim that the courts may examine the validity, under international law or some doctrine of public policy, of an act or acts operating in the area of transactions between states. [p. 931]

291 Lord Wilberforce went on to hold, following *Blad*, *Duke of Brunswick* and other authorities, that private law claims which turn on a finding that a foreign state has acted in a manner contrary to public international law are not justiciable by an English court:

> It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. [p. 938]

292 In the two passages reproduced above, Lord Wilberforce touched on an important point: a distinction must be drawn between the types of problems addressed in justiciability cases and the types of problems addressed in choice of law cases. Private international law is a response to the problem of how to distribute legal authority among competing municipal jurisdictions: R. Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013), 31 Windsor Y.B. Access Just. 197, at p. 199. However, the problem posed by claims based on violations of public international law is that the international plane constitutes an additional legal system with its own claim to jurisdiction over certain legal questions: McLachlan, at para. 12.22. Thus, conflict of laws rules alone are not capable of addressing the concerns raised by Lord Wilberforce in *Buttes Gas*, because they do not mediate between domestic legal systems and the international legal system. In order to address the problems raised by Lord Wilberforce regarding the legitimacy of a domestic court's consideration of questions of international law, this Court must inquire into whether such questions are justiciable under Canada's domestic constitutional arrangements.

293 Before doing so, I want to express my agreement with Newbury J.A. that the early English cases which underpin the act of state doctrine were received into the law of British Columbia in 1858 by what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: 2017 BCCA 401, 4 B.C.L.R. (6th) 91, at para. 123. However, for conceptual clarity, the principles animating early cases such as *Blad* and *Duke of Brunswick* should be reflected through the lens of the modern doctrine of justiciability recognized by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750. It is to that doctrine which I now turn.

B. *Justiciability of International Law Questions in Canada*

294 Justiciability is rooted in a commitment to the constitutional separation of powers: L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 289. The separation of powers under the Constitution prescribes different roles for the executive, legislative and judicial orders: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70. In exercising its jurisdiction, a court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 29-30. It is "fundamental" that each order not "overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other": *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389, per McLachlin J. The doctrine of justiciability reflects these institutional limitations.

295 This Court recognized the existence of a general doctrine of non-justiciability in *Highwood Congregation*, stating that the main question to be asked in applying the doctrine of justiciability is whether the issue is one that is appropriate for a court to decide: para. 32. The answer to that question depends on whether the court asking the question has the institutional capacity to adjudicate the matter and whether its doing so is legitimate: para. 34.

296 A court has the institutional capacity to consider international law questions, and its doing so is legitimate, if they also implicate questions with respect to constitutional rights (*Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125), the legality of an administrative decision (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3) or the interface between international law and Canadian public institutions (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 23). If, however, a court allows a private claim which impugns the lawfulness of a foreign state's conduct under international law, it will be overstepping the limits of its proper institutional role. In my view, although the court has the institutional capacity to consider such a claim, its doing so would not be legitimate.

297 The executive is responsible for conducting international relations: *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 39. In *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, this Court observed that creating a universal civil jurisdiction allowing torture claims against foreign officials to be pursued in Canada "would have a potentially considerable impact on Canada's international relations", and that such decisions are not to be made by the courts: para. 107. Similar concerns arise in the case of litigation between private parties founded upon allegations that a foreign state has violated public international law. Such disputes "are not the proper subject matter of judicial resolution" (Sossin, at p. 251), because questions of international law relating to internationally wrongful acts of foreign states are not juridical claims amenable to adjudication on "judicial or manageable standards" (*Buttes Gas*, at p. 938, per Lord Wilberforce). Such questions are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

298 In *Khadr* (2010), this Court justified its interference with the exercise by the executive of an aspect of its power over international relations on the basis that the judiciary possesses "a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action": para. 38. However, the same cannot be said of a private claim for compensation which is dependent upon a determination that a foreign state has breached its international obligations. This is not a case in which a court would be abdicating its constitutional judicial review function if it were to decline to adjudicate the claim.

299 *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D. New York), is an example of how private litigation can interfere with the responsibility of the executive for the conduct of international relations. In *Presbyterian*, a foreign state had sent a diplomatic note to the United States Department of State in response to litigation initiated in the U.S. by Sudanese residents against a company incorporated and domiciled in the foreign state that had operations in Sudan. The allegations were based on violations of international law by Sudan. Although the company's motion to dismiss the claim was not successful, the incident was significant enough to spur the foreign state to send the diplomatic note in which it insisted that its foreign policy was being undermined by the litigation. I would point out in particular that the motion failed because the action as pleaded did "not require a judgment that [the foreign state's foreign policy] was or caused a violation of the law of nations", which suggests that if the reverse were true, the claim would have been barred: para. 5. Thus, even in the case of disputes between private parties, when courts "engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy": *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (1981), at pp. 1358-60 (C.A., 9th Circuit).

300 As a practical matter, Canadian courts have good reason to refrain from passing judgment on alleged internationally wrongful acts of foreign states. If Canadian courts claimed the power to pass judgment on violations of public international law by states, that could well have unforeseeable and grave impacts on the conduct of Canada's international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada's reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts.

301 Further, as this doctrine consists in a rule of non-justiciability, it is not amenable to the application of a public policy exception. It arises from the constitutional separation of powers and the limits of the legitimacy of acts of the judiciary. The public importance and fundamental nature of the values at stake cannot render justiciable that which is otherwise not within the judiciary's bailiwick.

302 Abella J. relies on the *Secession Reference* as authority for the proposition that the adjudication of questions of international law is permitted for the purpose of determining the private law rights or obligations of individuals within our legal system: para. 49. With respect, this is an overstatement of the scope of the reasoning in the *Secession Reference*, in which this Court held that it could consider the question whether international law gives the

National Assembly, the legislature or the Government of Quebec the right to effect the secession of Quebec from Canada unilaterally: paras. 21-23. In the Court's view, the question was not a "pure" question of international law, because its purpose was to determine the legal rights of a public institution which exists as part of the domestic Canadian legal order: para. 23. This Court's holding was confined to delineating the scope of Canada's obligation to respect the right to self-determination of the people of Quebec. No issue regarding private law claims or internationally wrongful acts of a foreign state arose in the *Secession Reference*.

303 In its public law decisions, this Court has had recourse to international law to determine issues relating to other public authorities, such as whether municipalities can levy rates on foreign legations (*Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208) and whether the federal or provincial governments possess proprietary rights in Canada's territorial sea and continental shelf (*Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86). It has never held that a Canadian court is free, in adjudicating a private law claim, to decide whether a foreign state -- which does not exist as a part of the domestic Canadian legal order -- has violated public international law.

304 Abella J. also relies on decisions in the extradition and deportation contexts, in which courts consider the human rights records of foreign states as part of their decision-making process: paras. 50-55. However, when Canadian courts examine the human rights records of foreign states in extradition and deportation cases, they do so to ensure that Canada complies with its own international, statutory and constitutional obligations: see *Suresh*. The same cannot be said of a civil claim for compensation. To equate the respondents' civil claim for a private law remedy to claims in the public law extradition and deportation contexts is to disregard the judiciary's statutory and constitutional mandates to consider human rights issues in foreign states in extradition and deportation cases. No such mandate exists in the context of private law claims.

305 In conclusion, although a court has the institutional capacity to consider international law questions, it is not legitimate for it to adjudicate claims between private parties which are founded upon an allegation that a foreign state violated international law. The adjudication of such claims impermissibly interferes with the conduct by the executive of Canada's international relations. That interference is not justified without a mandate from the legislature or a constitutional imperative to review the legality of executive or legislative action in Canada. In the absence of such a mandate or imperative, claims based on a foreign state's internationally wrongful acts are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

IV. The Respondents' Claims Require a Determination That Eritrea Violated Public International Law

306 In this context, justiciability turns on whether the outcome of the claims is dependent upon the allegation that the foreign state acted unlawfully. If this issue is central to the litigation, the claims are not justiciable: e.g., *Buck*, at pp. 886-87; *Buttes Gas*, at pp. 935-38. By contrast, a court may consider the legality of acts of a foreign state under municipal or international law if the issue arises incidentally: e.g., *Hunt*; *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990), at p. 406.

307 In *Buck*, the issue of the validity of the foreign state's constitution was central to the plaintiffs' claim, because the plaintiffs were seeking a declaration that the constitution of Sierra Leone was invalid: p. 886. Lord Diplock stated:

> I do not think that this rule [that a state does not purport to exercise jurisdiction over the internal affairs of another state], which deprives the court of jurisdiction over the subject-matter of this appeal because it involves assertion of jurisdiction over the internal affairs of a foreign sovereign state, can be eluded by the device of making the Attorney-General of England a party instead of the government of Sierra Leone. [p. 887]

308 A case to the opposite effect is *Kirkpatrick*, in which the respondent alleged that the petitioner had obtained a construction contract from the Nigerian Government by bribing Nigerian officials, which was prohibited under

Nigerian law. Scalia J. found that the factual predicate for application of the act of state doctrine did not exist in that case, as nothing in the claim required the court to declare an official act of a foreign state to be invalid: p. 405. Scalia J. reasoned that:

> [a]ct of state issues only arise when a court *must decide* -- that is, when the outcome of the case turns upon -- the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. [Emphasis in original; p. 406.]

309 Similarly, in *Hunt*, La Forest J. concluded that the issue of the constitutionality of the "foreign" statute arose incidentally, because it arose in a proceeding in which the plaintiff sought the disclosure of relevant documents, which was barred by the impugned Quebec statute. In *Buttes Gas*, on the other hand, Occidental pleaded the tort of conspiracy against Buttes Gas, but to succeed, the claim required a determination that Sharjah, Umm al Qaiwain, Iran and the United Kingdom had violated international law. This was not incidental to the claim, and the House of Lords held that it was not justiciable: p. 938.

310 In the case at bar, the issue of the legality of Eritrea's acts under international law is central to the respondents' claims. To paraphrase Lord Diplock in *Buck*, at p. 887, the respondents are simply using the appellant, Nevsun Resources Ltd., as a device to avoid the application of Eritrea's sovereign immunity from civil proceedings in Canada. The respondents' central allegation is that Eritrea's National Service Program is an illegal system of forced labour (A.R., vol. III, at pp. 162-64) that constitutes a crime against humanity (p. 175). The respondents allege that "Nevsun expressly or implicitly condoned the use of forced labour and the system of enforcement through threats and abuse, by the Eritrean military", and that it is directly liable for injuries suffered by the respondents as a result of its "failure to stop the use of forced labour and the enforcement practices at its mine site when it was obvious ... that the plaintiffs were forced to work there against their will": A.R., vol. III, at p. 178.

311 In other words, the respondents allege that Nevsun is liable because it was complicit in the Eritrean authorities' alleged internationally wrongful acts. As was the case in *Buttes Gas*, Nevsun can be liable only if the acts of the actual alleged perpetrators -- Eritrea and its agents -- were unlawful as a matter of public international law. The case at bar is therefore materially different from *Hunt* and *Kirkpatrick*, in which the legality of the acts of a foreign sovereign state, or of an authority in another jurisdiction, had arisen incidentally to the claim.

312 To obtain relief, the respondents would have to establish that the National Service Program is a system of forced labour that constitutes a crime against humanity. This means that determinations that the Eritrean state acted unlawfully would not be incidental to the allegations of liability on Nevsun's part. In my view and with respect, Newbury J.A. erred in finding that the respondents were not asking the court to "inquire into the legality, validity or 'effectiveness' of the acts of laws or conduct of a foreign state": C.A reasons, at para. 172. As she had noted earlier in her reasons -- and I agree with her on this point -- given how the complaint was being pleaded, Nevsun could only be found liable if "Eritrea, its officials or agents were found to have violated fundamental international norms and Nevsun were shown to have been complicit in such conduct": para. 92. The respondents' claims, as pleaded, require a determination that Eritrea has violated international law and must therefore fail.

V. Conclusion

313 It is plain and obvious that the respondents' claims are bound to fail, because private law claims which are founded upon a foreign state's internationally wrongful acts are not justiciable, and the respondents' claims are dependent upon a determination that Eritrea has violated its international obligations. Additionally, for the reasons given by Brown and Rowe JJ., I find that it is plain and obvious that the respondents' causes of action which are inspired by customary international law are bound to fail. Accordingly, I would allow the appeal and dismiss the respondents' claims.

Appeal dismissed with costs, BROWN *and* ROWE JJ. *dissenting in part and* MOLDAVER *and* COTÉ JJ. *dissenting*.

Solicitors:

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondents: Camp Fiorante Matthews Mogerman, Vancouver.

Solicitors for the intervener the International Human Rights Program, University of Toronto Faculty of Law: Waddell Phillips Professional Corporation, Toronto; University of Toronto, Toronto.

Solicitors for the interveners EarthRights International and the Global Justice Clinic at New York University School of Law: Arvay Finlay, Vancouver.

Solicitors for the interveners Amnesty International Canada and the International Commission of Jurists: Champ & Associates, Ottawa; Power Law, Vancouver; University of Ottawa, Ottawa.

Solicitors for the intervener the Mining Association of Canada: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the intervener MiningWatch Canada: Trudel Johnston & Lespérance, Montréal; Andrew E. Cleland, Montréal.

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[1] Eritrean workers' amended notice of civil claim, at paras. 7, 53, 56(a), 60, 63, 66, 70 and 71 (A.R., vol. III, at p. 159).

[2] Nevsun's notice of application: application to strike workers' customary international law claims as disclosing no reasonable claim (A.R., vol. III, at p. 58).

[3] As Anne Warner La Forest writes: "[I]f custom is indeed the law of the land, then the argument in favour of judicial notice, as traditionally understood, is a strong one. It is a near perfect syllogism. If custom is the law of the land, and the law of the land is to be judicially noticed, then custom should be judicially noticed" (p. 381).

[4] See chambers judgment, at paras. 427, 444, 455 and 465-66.

[5] That this creates a paradox of sorts is a well-known problem in the theory of customary international law (see, for example, J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" (2004), 15 *Eur. J. Int'l L.* 523). It is not a paradox we have cause to address in this case.

[6] To be clear, we do not mean to suggest that relief in the nature of *certiorari* and *mandamus* are the only remedies available in such a situation: for example, equitable remedies such as injunctive or declaratory relief may also be available.

[7] We say "private" common law in contradistinction to "public" common law. Public common law is the law that governs the activities of the Crown, and is of course the law related to the executive branch, discussed previously. "Private" common law is law that governs relations between non-state entities.

[8] There is, of course, a further possibility, but it is not one that the majority advances. It may be neither the prohibition at customary international law nor the doctrine of adoption that creates the liability rule. Rather, it would be a prosaic change to the common law that creates the liability rule, inspired by the recognition that an action prohibited at customary international law is wrongful. This was the theory of the case by which the chambers judge upheld the pleadings. We consider and reject this theory in Part IV of our reasons.

[9] This statement was written prior to *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241.

End of Document

R. v. Find, [2001] 1 S.C.R. 863

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

2000: October 13 / 2001: May 24.

File No.: 27495.

[2001] 1 S.C.R. 863 | [2001] 1 R.C.S. 863 | [2001] S.C.J. No. 34 | [2001] A.C.S. no 34 | 2001 SCC 32

Karl Find, appellant; v. Her Majesty The Queen, respondent, and The Attorney General for Alberta and the Criminal Lawyers' Association (Ontario), interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO (110 paras.)

Case Summary

Criminal law — Jurors — Right to challenge for cause — Nature of offence — Whether charges of sexual assault against children raise realistic possibility of juror partiality entitling accused to challenge for cause — Criminal Code, R.S.C. 1985, c. C-46, s. 638(1)(b).

The accused was charged with 21 counts of sexual offences involving complainants ranging between 6 and 12 years of age at the time of the alleged offences. Prior to jury selection, he applied to challenge potential jurors for cause, arguing that the nature of the charges against him gave rise to a realistic possibility that some jurors might be unable to try the case against him impartially and solely on the evidence before them. The trial judge rejected the application. The accused was tried and convicted on 17 of the 21 counts. The majority of the Court of Appeal dismissed the accused's appeal, upholding the trial judge's ruling not to permit the accused to challenge prospective jurors for cause.

Held: The appeal should be dismissed. The nature of the charges against the accused did not give rise to the [page864] right to challenge prospective jurors for cause on the ground of partiality.

Section 638(1)(b) of the Criminal Code permits a party to challenge for cause where a prospective juror is not indifferent between the Crown and accused. Lack of indifference constitutes partiality. Establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. The first branch of the test is concerned with the existence of a material bias, while the second is concerned with the potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The first branch involves two concepts: "bias" and "widespread". "Bias" in the context of challenges for cause refers to an attitude that could lead jurors to decide the case in a prejudicial and unfair manner. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large but in the context of the specific case and may flow from a number of different attitudes. The second concept, "widespread", relates to the prevalence or incidence of the bias in question. The bias must be sufficiently pervasive in the community to raise the possibility that it may be harboured by members of a jury pool. If widespread bias is shown, the second branch of the test requires an accused to show that some jurors may not be able to set aside their bias despite the cleansing effect of the trial judge's instructions and the trial process itself. Ultimately, the decision to allow or deny an application to challenge for cause falls to the discretion of the trial judge. Where a realistic potential for partiality is shown to exist, the right to challenge must follow. If in doubt, the judge should err on the side of permitting challenges. Since jurors are presumed to be impartial, in order to rebut the presumption of impartiality, a party must call evidence or ask the trial judge to take judicial notice of facts, or both. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process. The accused did not call any evidence in support of his application but relied heavily on proof by judicial notice. The threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by [page865] resort to readily accessible sources of indisputable accuracy.

Here, the material presented by the accused falls short of grounding judicial notice of widespread bias in Canadian society against an accused in sexual assault trials. First, while the widespread nature of abuse and its potentially traumatic impact are not disputed, widespread victimization, standing alone, fails to establish widespread bias that might lead jurors to discharge their task in a prejudicial and unfair manner. Second, strong views about a serious offence do not ordinarily indicate bias and nothing in the material supports the contention, nor is it self-evident, that an exception arises in the case of sexual assaults on children. Third, there was also no proof that widespread myths and stereotypes undermine juror impartiality. While stereotypical beliefs might incline some jurors against an accused, it is not notorious or indisputable that they enjoy widespread acceptance in Canadian society. Fourth, although crimes arouse deep and strong emotions, one cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Strong emotions are common to the trial of many serious offences and have never grounded a right to challenge for cause. The proposition that sexual offences are generically different from other crimes in their tendency to arouse strong passions is debatable, and does not, therefore, lend itself to judicial notice. Fifth, the survey of past challenge for cause cases involving sexual offences does not, without more, establish widespread bias arising from sexual assault charges. The number of prospective jurors disqualified, although relied on as support for judicial notice of widespread bias, is equally consistent with the conclusion that the challenge processes disqualified prospective jurors for acknowledging the intense emotions, beliefs, experiences and misgivings anyone might experience when confronted with the prospect of sitting as a juror [page866] on a case involving charges of sexual offences against children. Lastly, the theory of "generic prejudice" against accused persons in sexual assault trials has not been proved, nor could judicial notice be taken of the proposition that such prejudice exists. While judicial notice could be taken of the fact that sexual crimes are almost universally abhorred, this does not establish widespread bias arising from sexual assault trials.

Although the accused failed to satisfy the first branch of the test for partiality, it is prudent to consider the second branch, as the two parts are not watertight compartments. It is open to a trial judge reasonably to infer, in the absence of direct evidence, that some strains of bias by their very nature may prove difficult for jurors to identify and eliminate from their reasoning. The strength of the inference varies with the nature of the bias in issue, and its amenability to judicial cleansing. Fundamental distinctions exist between racial bias and the more general bias relating to the nature of the offence itself. Firstly, racial bias may impact more directly on a jury's decision than bias stemming from the nature of the offence because it is directed against a particular class of accused by virtue of an identifiable immutable characteristic. Secondly, trial safeguards may be less successful in cleansing racial prejudice because of its subtle, systemic and often unconscious operation. Bias directed toward the nature of the offence, however, is more susceptible to cleansing by the rigours of the trial process because it is more likely to be overt and acknowledged. The trial judge is more likely to address these concerns in the course of directions to the jury. Moreover, many of the safeguards the law has developed may be seen as a response to this type of bias. In the absence of evidence that strongly held beliefs or attitudes may affect jury behaviour in an unfair manner, it is difficult to conclude that they could not be cleansed by the trial process. It is speculative to assume that [page867] jurors will act on their beliefs to the detriment of an accused, in violation of their oath or affirmation, the presumption of innocence and the directions of the trial judge. As well, absent evidence to the contrary, there is no reason to believe that stereotypical attitudes about accused persons charged with a crime of a sexual nature are more elusive of the cleansing measures than stereotypical attitudes about complainants. It follows that such myths and stereotypes, even if widespread, provide little support for any inference of a behavioural link between these beliefs and the potential for juror partiality. Finally, absent evidence, it is highly speculative to suggest that the emotions surrounding sexual crimes will lead to prejudicial and unfair juror behaviour. The safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The accused failed to establish that sexual offences give rise to a strain of bias that is uniquely capable of eluding the cleansing effect of trial safeguards.

Cases Cited

Applied: R. v. Williams, [1998] 1 S.C.R. 1128; R. v. Parks (1993), 84 C.C.C. (3d) 353; R. v. Sherratt, [1991] 1 S.C.R. 509; R. v. Betker (1997), 115 C.C.C. (3d) 421; referred to: R. v. K. (A.) (1999), 45 O.R. (3d) 641; R. v. Barrow, [1987] 2 S.C.R. 694; R. v. G. (R.M.), [1996] 3 S.C.R. 362; R. v. O'Connor, [1995] 4 S.C.R. 411; R. v. Carosella, [1997] 1 S.C.R. 80; R. v. Lyons, [1987] 2 S.C.R. 309; R. v. Harrer, [1995] 3 S.C.R. 562; M. (A.) v. Ryan, [1997] 1 S.C.R. 157; R. v. Leipert, [1997] 1 S.C.R. 281; R. v. Hubbert (1975), 29 C.C.C. (2d) 279; R. v. L. (R.) (1996), 3 C.R. (5th) 70; R. v. Mattingly (1994), 28 C.R. (4th) 262; R. v. Potts (1982), 66 C.C.C. (2d) 219; R. v. Alli (1996), 110 C.C.C. (3d) 283; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Lavallée, [1990] 1 S.C.R. 852; R. v. Hillis, [1996] O.J. No. 2739 (QL); R. v. Osolin, [1993] 4 S.C.R. 595; R. v. Ewanchuk, [page868] [1999] 1 S.C.R. 330; R. v. W. (R.), [1992] 2 S.C.R. 122; R. v. D.D., [2000] 2 S.C.R. 275, 2000 SCC 43.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 11(d). Criminal Code, R.S.C. 1985, c. C-46, ss. 626 to 644, 629(1), 632 [am. 1992, c. 41, s. 2], 634, 638(1)(b), (2), 640(2), 649, 658(1).

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APPEAL from a judgment of the Ontario Court of Appeal (1999), 126 O.A.C. 261, [1999] O.J. No. 3295 (QL), dismissing the accused's appeal from his conviction on 17 counts relating to sexual offences. Appeal dismissed.

[page869]

David M. Tanovich and Umberto Sapone, for the appellant. Jamie Klukach and Jennifer Woollcombe, for the respondent. David M. Paciocco, for the intervener, the Criminal Lawyers' Association (Ontario). Written submission by Jack Watson, Q.C., for the intervener, the Attorney General for Alberta.

Solicitors for the appellant: Pinkofsky Lockyer, Toronto; Sapone & Cautillo, Toronto. Solicitor for the respondent: The Ministry of the Attorney General, Toronto. Solicitors for the intervener, the Criminal Lawyers' Association (Ontario): Edelson & Associates, Ottawa. Solicitor for the intervener, the Attorney General for Alberta: The Attorney General for Alberta, Edmonton.

The judgment of the Court was delivered by

McLACHLIN C.J.

I - Introduction

1 Trial by jury is a cornerstone of Canadian criminal law. It offers the citizen the right to be tried by an impartial panel of peers and imposes on those peers the task of judging fairly and impartially. Since our country's earliest days, Canadian jurors have met this challenge. Every year in scores of cases, jurors, instructed that they must be impartial between the prosecution and the accused, render fair and carefully deliberated verdicts. Yet some cases may give rise to real fears that, despite the safeguards of the trial process and the directions of the trial judge, some jurors may not be able to set aside personal views and function impartially.

2 The criminal law has developed procedures to address this possibility. One of the most important is the right of the accused to challenge a potential juror "for cause" where legitimate concerns arise. This Court recently held that widespread prejudice against the accused's racial group may permit an accused to challenge for cause: R. v. Williams, [1998] 1 S.C.R. 1128. In this appeal we are asked to find that charges of sexual assault of children similarly evoke widespread prejudice in the community [page870] and also entitle the accused to challenge prospective jurors for cause.

3 At stake are two important values. The first is the right to a fair trial by an impartial jury under s. 11(d) of the Canadian Charter of Rights and Freedoms. The second is the need to maintain an efficient trial process, unencumbered by needless procedural hurdles. Our task is to set out guidelines that ensure a fundamentally fair trial without unnecessarily complicating and lengthening trials and increasing the already heavy burdens placed on jurors.

4 The appellant was charged with sexual assault of children. Before the jury was empanelled, he applied to challenge the potential jurors for cause. The nature of the charges against him, he contended, gave rise to a realistic possibility that some prospective jurors might harbour such prejudice that they would be unable to act impartially and try the case solely on the evidence before them. The trial judge rejected this request, as did the majority of the Ontario Court of Appeal. Before this Court, the appellant reasserts his claim that the denial of the right to challenge for cause violated s. 638(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46, and deprived him of his Charter right to a fair trial.

5 I conclude that the appellant has not established the right to challenge for cause. No basis has been shown to support the conclusion that charges of sexual assault against children raise a realistic possibility of juror partiality entitling the accused to challenge for cause. Accordingly, the appeal must be dismissed.

II - History of the Case

6 The appellant was tried on 21 counts of sexual assault involving three complainants, who ranged [page871] between the ages of 6 and 12 at the time of the alleged offences. Prior to jury selection, defence counsel applied to challenge potential jurors for cause. No evidence was led in support of this application; rather, defence counsel contended a realistic potential for juror partiality arose from the ages of the alleged victims, the high number of alleged assaults, and the alleged use of violence. Defence counsel proposed that the following questions be put to potential jurors:

> Do you have strong feelings about the issue of rape and violence on young children?
>
> If so, what are those feelings based on?
>
> Would those strong feelings concerning the rape and violence on young children prevent you from giving Mr. Find a fair trial based solely on the evidence given during the trial of this case?

The trial judge, in a brief oral ruling, dismissed the application on the basis that it simply "doesn't fall anywhere near the dicta of the Court of Appeal in Regina v. Parks" (in R. v. Parks (1993), 84 C.C.C. (3d) 353, the Ontario Court of Appeal held that the accused was entitled to challenge potential jurors for cause on the basis of racial prejudice).

7 Later, during the process of empanelling the jury, a potential juror spontaneously offered that he had two children, stating "I just don't think I could separate myself from my feelings towards them and separate the case". This prospective juror was peremptorily challenged, and defence counsel renewed the request to challenge for cause, to no avail. The appellant was tried and convicted on 17 of the 21 counts.

8 The appellant appealed on the ground, inter alia, that the trial judge erred in not allowing challenges for cause. The spontaneous admission of the potential juror during the selection process was the only evidence relied upon before the Ontario Court of Appeal. The majority, per McMurtry C.J.O., held [page872] that this admission did not demonstrate a realistic potential for partiality and offered no evidentiary basis for allowing challenges for cause: (1999), 126 O.A.C. 261, at para. 8. Since no other evidence was led, the appellant could succeed only if the court could take judicial notice of a widespread bias in the community in relation to sexual offences of this kind. The majority held that judicial notice could not be taken of that fact, for the reasons articulated in R. v. K. (A.) (1999), 45 O.R. (3d) 641, a judgment released concurrently. Moldaver J.A. dissented on the challenge for cause issue, also relying on his reasons from K. (A.). Since both opinions import the substance of their reasons from the companion case of K. (A.), it is necessary to consider this case in some detail.

9 K. (A.) involved two brothers charged with the sexual assault of children aged 4 to 12 years at the time of the alleged assaults. The majority of the Court of Appeal, per Charron J.A., upheld the trial judge's decision to deny challenges for cause, while allowing the appeal on other grounds. Charron J.A. emphasized the distinction between racial prejudice and prejudice against persons charged with sexual assault, arguing that the first goes to a want of indifference towards the accused while the second relates to a want of indifference towards the nature of the crime. The connection between racial prejudice and a particular accused is direct and logical, whereas "strong attitudes about a particular crime, even when accompanied by intense feelings of hostility and resentment towards those who commit the crime, will rarely, if ever, translate into partiality in respect of the accused" (para. 41). She rejected the argument that this Court's decision in Williams, supra, expanded the right to challenge for cause. While Williams recognized the possibility of bias arising from the nature of an offence, it did not eliminate the need to show a realistic potential for partiality, which remains [page873] the governing test for challenges for cause. This test was not met in the case before the court.

10 Charron J.A. found little support for the accused's application in statistics indicating widespread sexual abuse in Canadian society. These statistics, she observed, only demonstrate the prevalence of abuse; they do not indicate a resultant bias, let alone the nature of that bias or its impact on jury deliberation. To her mind, they did not support the inference that there exists a realistic risk of juror partiality. As to the appellant's contention that widespread attitudes about sexual offences may cause jurors to act contrary to their oath, Charron J.A. concluded that the material before the court did not describe the alleged attitudes, or indicate how they would affect juror behaviour. She noted that the work of Professor Neil Vidmar, often advanced in support of the concept of generic prejudice, is the subject of heated debate and suffers from a number of flaws, most notably a lack of attention to the impact of juror attitudes on deliberation behaviour.

11 Charron J.A. also found that the presence of "strong feelings, opinions and beliefs" is not so notorious as to be the subject of judicial notice - in fact, it was unclear exactly what beliefs and opinions were being targeted for judicial notice. Beliefs and opinions regarding allegations of sexual abuse are all over the map: some believe children never lie about abuse, others believe that children are especially susceptible to the influence of adults, and that their testimony should not be relied [page874] upon; some believe the trial system to be stacked in favour of the accused, others the complainant. Even if these opinions and beliefs are accepted as widespread, they are likely to be diffused in deliberation. The existence of feelings, opinions and beliefs about the crime of sexual assault does not translate into partiality - jurors are neither presumed, nor desired, to function as blank slates.

12 Finally, Charron J.A. remained unconvinced by evidence that a high proportion of prospective jurors were successfully challenged for cause in cases where challenges were allowed. She found it "impossible to draw any meaningful inference from the answers provided by the jurors when confronted with general questions such as those found ... in this case and in other cases relied upon" (K. (A.), supra, at para. 51). Many of the responses demonstrated nothing more than that the candidate would have difficulty hearing the case. No meaningful direction had been provided by the trial judge on the nature of jury duty or the meaning of impartiality, and no distinction drawn between partiality and the beliefs, emotions and opinions that influence all decision making.

13 Moldaver J.A., dissenting on this issue, was satisfied that a "realistic potential" of juror partiality arises from the nature of sexual assault charges, grounding a right in the accused to challenge prospective jurors for cause. Considering the evidence in its entirety, and taking judicial notice of what he found to be notorious facts, he made a number of preliminary findings: (1) sexual abuse impacts a large percentage of the population, supporting a reasonable inference that any jury panel may contain victims, perpetrators and people closely associated with them; (2) the effects of sexual abuse, or wrongful allegations, are potentially devastating and lifelong; (3) sexual assault tends to be committed [page875] along gender lines; (4) women and children have been subjected to systemic discrimination, including in the justice system - recent changes have gone too far for some, but not far enough for others; (5) where challenges for cause have been permitted, literally hundreds of potential jurors have been found partial; and (6) unlike many crimes, a wide variety of stereotypes and beliefs surround the crime of sexual abuse.

14 Moldaver J.A. concluded that these factors, in combination, raised a realistic concern about juror partiality. At the very least, they left him in doubt, which should be resolved in favour of the accused: Williams, supra, at para. 22. While asserting that challenges for cause based on the nature of the offence are exceptional, he concluded that "unlike other crimes, by its nature, the crime of sexual abuse can give rise to intense and deep-seated biases that may be immune to judicial cleansing and highly prejudicial to an accused" (K. (A.), supra, at para. 189).

15 Two arguments held particular sway with Moldaver J.A. First, he accepted that the high incidence of juror disqualification where challenges for cause were allowed disclosed the existence of a widespread bias against persons charged with sexual assault. Second, he adopted Professor David Paciocco's theory that the prevalence of sexual assault and the politicization of this offence have created two groups of people, "dogmatists" and "victims", both of which contain people who may be unable to set aside their political convictions or experiences with abuse to render an impartial decision.

[page876]

III - Relevant Statutory and Constitutional Provisions

16 Criminal Code, R.S.C. 1985, c. C-46

638. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

...

(b) a juror is not indifferent between the Queen and the accused;

...

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right

...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

IV - Issue

17 Did the nature of the charges against the accused give rise to the right to challenge jurors for cause on the ground of partiality?

V - Analysis

A. Overview of the Jury Selection Process

18 To provide context and guidance to the determination of this issue, it is necessary to consider the process of jury selection and the place of challenges for cause in that process.

19 The jury selection process falls into two stages. The first is the "pre-trial" process, whereby a panel (or "array") of prospective jurors is organized and made available at court sittings as a pool from which trial juries are selected. The second stage is the "in-court" process, involving the selection of a trial jury from this previously prepared panel. Provincial [page877] and federal jurisdictions divide neatly between these two stages: the first stage is governed by provincial legislation, while the second stage falls within the exclusive domain of federal law (see C. Granger, The Criminal Jury Trial in Canada (2nd ed. 1996), at pp. 83-84; R. v. Barrow, [1987] 2 S.C.R. 694, at pp. 712-13).

20 Both stages embody procedures designed to ensure jury impartiality. The "pre-trial" stage advances this objective by randomly assembling a jury pool of appropriate candidates from the greater community. This is assured by provincial legislation addressing qualifications for jury duty; compilation of the jury list; the summoning of panel members; selection of jurors from the jury list; and conditions for being excused from jury duty. These procedures furnish, so far as possible, a representative jury pool: R. v. Sherratt, [1991] 1 S.C.R. 509, at pp. 525-26; P. Schulman and E. R. Myers, "Jury Selection", in Studies on the Jury (1979), a report to the Law Reform Commission of Canada at p. 408.

21 The "in-court" process is governed by ss. 626 to 644 of the Criminal Code. Its procedures directly address juror impartiality. The selection of the jury from the assembled pool of potential jurors occurs in an open courtroom, with the accused present. The jury panel is brought into the courtroom and the trial judge makes a few opening remarks to the panel. Provided the validity of the jury panel itself is not challenged (pursuant to the grounds listed in s. 629(1)), the Registrar reads the indictment, the accused enters a plea, and the empanelling of the jury immediately begins: see Sherratt, supra, at pp. 519-22.

22 Members of the jury pool may be excluded from the jury in two ways during the empanelling process. First, the trial judge enjoys a limited preliminary power to excuse prospective jurors. This is referred to as "judicial pre-screening" of the jury array. At common law, the trial judge was empowered [page878] to ask general questions of the panel to uncover manifest bias or personal hardship, and to excuse a prospective juror on either ground. Today in Canada, the judge typically raises these issues in his remarks to the panel, at which point those in the pool who may have difficulties are invited to identify themselves. If satisfied that a member of the jury pool should not serve either for reasons of manifest bias or hardship, the trial judge may excuse that person from jury service.

23 Judicial pre-screening at common law developed as a summary procedure for expediting jury selection where the prospective juror's partiality was uncontroversial, such as where he or she had an interest in the proceedings or was a relative of a witness or the accused: Barrow, supra, at p. 709. The consent of both parties to the judicial pre-screening was presumed, provided the reason for discharge was "manifest" or obvious. Otherwise, the challenge for cause procedure applied: Sherratt, supra, at p. 534. In 1992, s. 632 of the Criminal Code was enacted to address judicial pre-screening of the jury panel. This provision allows the judge, at any time before the trial commences, to excuse a prospective juror for personal interest, relationship with the judge, counsel, accused or prospective witnesses, or personal hardship or other reasonable cause.

24 The second way members of the jury may be excluded during the empanelling process is upon a challenge of the prospective juror by the Crown or the accused. Both parties are entitled to challenge potential members of the jury as these prospective jurors are called to "the book". Two types of challenge are available to both the Crown and the accused: (1) a limited number of peremptory challenges without providing reasons pursuant to s. 634; and (2) an unlimited number of challenges for cause, with leave of the judge, on one of the grounds enumerated under s. 638(1) of the Criminal Code.

[page879]

25 One ground for challenge for cause is that a prospective juror is "not indifferent between the Queen and the accused": Criminal Code, s. 638(1)(b). If the judge is satisfied that a realistic potential for juror partiality exists, he or she may permit the requested challenges for cause. If challenged for cause, the impartiality of the candidate is tried by two triers of fact, usually two previously sworn jurors: Criminal Code, s. 640(2). Absent elimination, the juror is sworn and takes his or her place in the jury box. After the full complement of 12 jurors is empanelled, the accused is placed in their charge, and the trial commences.

26 The Canadian system of selecting jurors may be contrasted with procedures prevalent in the United States. In both countries the aim is to select a jury that will decide the case impartially. The Canadian system, however, starts from the presumption that jurors are capable of setting aside their views and prejudices and acting impartially between the prosecution and the accused upon proper instruction by the trial judge on their duties. This presumption is displaced only where potential bias is either clear and obvious (addressed by judicial pre-screening), or where the accused or prosecution shows reason to suspect that members of the jury array may possess biases that cannot be set aside (addressed by the challenge for cause process). The American system, by contrast, treats all members of the jury pool as presumptively suspect, and hence includes a preliminary voir dire process, whereby prospective jurors are frequently subjected to extensive questioning, often of a highly personal nature, to guide the respective parties in exercising their peremptory challenges and challenges for cause.

27 The respective benefits and costs of the different approaches may be debated. With respect to benefits, it is unclear that the American system produces better juries than the Canadian system. As Cory J. observed in R. v. G. (R.M.), [1996] 3 S.C.R. 362, at para. 13, we possess "a centuries-old tradition of juries reaching fair and courageous [page880] verdicts". With respect to costs, jury selection under the American system takes longer and intrudes more markedly into the privacy of prospective jurors. It has also been suggested that the extensive questioning permitted by this process, while aimed at providing an impartial jury, is open to abuse by counsel seeking to secure a favourable jury, or to indoctrinate jurors to their views of the case (see Schulman and Myers, supra, at p. 429).

28 The ultimate requirement of a system of jury selection is that it results in a fair trial. A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective. As I stated in R. v. O'Connor, [1995] 4 S.C.R. 411, at para. 193, "[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process... . What the law demands is not perfect justice, but fundamentally fair justice". See also R. v. Carosella, [1997] 1 S.C.R. 80, at para. 72; R. v. Lyons, [1987] 2 S.C.R. 309, at p. 362; R. v. Harrer, [1995] 3 S.C.R. 562, at para. 14. At the same time, occasional injustice cannot be accepted as the price of efficiency: M. (A.) v. Ryan, [1997] 1 S.C.R. 157, at para. 32; R. v. Leipert, [1997] 1 S.C.R. 281.

29 These are the considerations that must guide us in assessing whether the appellant in this case has established the right to challenge for cause. Challenges for cause that will serve no purpose but to increase delays and intrude on prospective jurors' privacy are to be avoided. As the Ontario Court of Appeal cautioned in R. v. Hubbert (1975), 29 C.C.C. (2d) 279, at p. 291: "[t]rials should not be unnecessarily prolonged by speculative and sometimes suspect challenges for cause". However, if there exists reason to believe that the jury pool may be so tainted by incorrigible prejudices that [page881] the trial may not be fair, then challenges for cause must be allowed.

B. The Test: When Should Challenges for Cause Be Granted Under Section 638(1)(b)?

1. The Test for Partiality

30 Section 638(1)(b) of the Code permits a party to challenge for cause on the ground that "a juror is not indifferent between the Queen and the accused". Lack of indifference may be translated as "partiality". Both terms describe a predisposed state of mind inclining a juror prejudicially and unfairly toward a certain party or conclusion: see Williams, supra, at para. 9.

31 In order to challenge for cause under s. 638(1)(b), one must show a "realistic potential" that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused: Sherratt, supra; Williams, supra, at para. 14.

32 As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioural components of partiality: Parks, supra, at pp. 364-65; R. v. Betker (1997), 115 C.C.C. (3d) 421 (Ont. C.A.), at pp. 435-36.

33 These two components of the test involve distinct inquiries. The first is concerned with the existence of a material bias, and the second with the [page882] potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The two components of this test serve to ensure that all aspects of the issue are examined. They are not watertight compartments, but rather guidelines for determining whether, on the record before the court, a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them.

34 The test for partiality involves two key concepts: "bias" and "widespread". It is important to understand how each term is used.

35 The New Oxford Dictionary of English (1998), at p. 169, defines "bias" as "prejudice in favour of or against one thing, person, or group compared with another, especially in a way considered to be unfair". "Bias", in the context of challenges for cause, refers to an attitude that could lead jurors to discharge their function in the case at hand in a prejudicial and unfair manner.

36 It is evident from the definition of bias that not every emotional or stereotypical attitude constitutes bias. Prejudice capable of unfairly affecting the outcome of the case is required. Bias is not determined at large, but in the context of the specific case. What must be shown is a bias that could, as a matter of logic and experience, incline a juror to a certain party or conclusion in a manner that is unfair. This is determined without regard to the cleansing effect of trial safeguards and the direction of the trial judge, which become relevant only at the second stage consideration of the behavioural effect of the bias.

[page883]

37 Courts have recognized that "bias" may flow from a number of different attitudes, including: a personal interest in the matter to be tried (Hubbert, supra, at p. 295; Criminal Code, s. 632); prejudice arising from prior exposure to the case, as in the case of pre-trial publicity (Sherratt, supra, at p. 536); and prejudice against members of the accused's social or racial group (Williams, supra, at para. 14).

38 In addition, some have suggested that bias may result from the nature and circumstances of the offence with which the accused is charged: R. v. L. (R.) (1996), 3 C.R. (5th) 70 (Ont. Ct. (Gen. Div.)); R. v. Mattingly (1994), 28 C.R. (4th) 262 (Ont. Ct. (Gen. Div.)); N. Vidmar, "Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials" (1997), 21 Law & Hum. Behav. 5. In Williams, supra, at para. 10, this Court referred to Vidmar's suggestion that bias might, in some cases, flow from the nature of the offence. However, the Court has not, prior to this case, directly considered this kind of bias.

39 The second concept, "widespread", relates to the prevalence or incidence of the bias in question. Generally speaking, the alleged bias must be established as sufficiently pervasive in the community to raise the possibility that it may be harboured by one or more members of a representative jury pool (although, in exceptional circumstances, a less prevalent bias may suffice, provided it raises a realistic potential of juror partiality: Williams, supra, at para.

43). If only a few individuals in the community hold the alleged bias, the chances of this bias tainting the jury process are negligible. For this reason, a court must generally be satisfied that the alleged bias is widespread in the community before a right to challenge for cause may flow.

40 If widespread bias is shown, a second question arises: may some jurors be unable to set aside their bias despite the cleansing effect of the judge's instructions and the trial process? This is the [page884] behavioural component of the test. The law accepts that jurors may enter the trial with biases. But the law presumes that jurors' views and biases will be cleansed by the trial process. It therefore does not permit a party to challenge their right to sit on the jury because of the existence of widespread bias alone.

41 Trial procedure has evolved over the centuries to counter biases. The jurors swear to discharge their functions impartially. The opening addresses of the judge and the lawyers impress upon jurors the gravity of their task, and enjoin them to be objective. The rules of process and evidence underline the fact that the verdict depends not on this or that person's views, but on the evidence and the law. At the end of the day, the jurors are objectively instructed on the facts and the law by the judge, and sent out to deliberate in accordance with those instructions. They are asked not to decide on the basis of their personal, individual views of the evidence and law, but to listen to each other's views and evaluate their own inclinations in light of those views and the trial judge's instructions. Finally, they are told that they must not convict unless they are satisfied of the accused's guilt beyond a reasonable doubt and that they must be unanimous.

42 It is difficult to conceive stronger antidotes than these to emotion, preconception and prejudice. It is against the backdrop of these safeguards that the law presumes that the trial process will cleanse the biases jurors may bring with them, and allows challenges for cause only where a realistic potential exists that some jurors may not be able to function impartially, despite the rigours of the trial process.

43 It follows from what has been said that "impartiality" is not the same as neutrality. Impartiality does not require that the juror's mind be a blank [page885] slate. Nor does it require jurors to jettison all opinions, beliefs, knowledge and other accumulations of life experience as they step into the jury box. Jurors are human beings, whose life experiences inform their deliberations. Diversity is essential to the jury's functions as collective decision-maker and representative conscience of the community: Sherratt, supra, at pp. 523-24. As Doherty J.A. observed in Parks, supra, at p. 364, "[a] diversity of views and outlooks is part of the genius of the jury system and makes jury verdicts a reflection of the shared values of the community".

44 To treat bias as permitting challenges for cause, in the absence of a link with partial juror behaviour, would exact a heavy price. It would erode the threshold for entitlement defined in Sherratt and Williams, and jeopardize the representativeness of the jury, excluding from jury service people who could bring valuable experience and insight to the process. Canadian law holds that "finding out what kind of juror the person called is likely to be - his personality, beliefs, prejudices, likes or dislikes" is not the purpose of challenges for cause: Hubbert, supra, at p. 289. The aim is not favourable jurors, but impartial jurors.

45 Ultimately, the decision to allow or deny an application to challenge for cause falls to the discretion of the trial judge. However, judicial discretion should not be confused with judicial whim. Where a realistic potential for partiality exists, the right to challenge must flow: Williams, supra, at para. 14. If in doubt, the judge should err on the side of permitting challenges. Since the right of the accused to a fair trial is at stake, "[i]t is better to risk allowing what are in fact unnecessary challenges, [page886] than to risk prohibiting challenges which are necessary": Williams, supra, at para. 22.

2. Proof: How a Realistic Potential for Partiality May Be Established

46 A party may displace the presumption of juror impartiality by calling evidence, by asking the judge to take judicial notice of facts, or both. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process.

47 The first branch of the inquiry - establishing relevant widespread bias- requires evidence, judicial notice or trial events demonstrating a pervasive bias in the community. The second stage of the inquiry - establishing a behavioural link between widespread attitudes and juror conduct - may be a matter of proof, judicial notice, or simply reasonable inference as to how bias might influence the decision-making process: Williams, supra, at para. 23.

48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: R. v. Potts (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); [page887] J. Sopinka, S. N. Lederman and A. W. Bryant, The Law of Evidence in Canada (2nd ed. 1999), at p. 1055.

49 The scientific and statistical nature of much of the information relied upon by the appellant further complicates this case. Expert evidence is by definition neither notorious nor capable of immediate and accurate demonstration. This is why it must be proved through an expert whose qualifications are accepted by the court and who is available for cross-examination. As Doherty J.A. stated in R. v. Alli (1996), 110 C.C.C. (3d) 283 (Ont. C.A.), at p. 285: "[a]ppellate analysis of untested social science data should not be regarded as the accepted means by which the scope of challenges for cause based on generic prejudice will be settled".

C. Were the Grounds for Challenge for Cause Present in this Case?

50 To challenge prospective jurors for cause, the appellant must displace the presumption of juror impartiality by showing a realistic potential for partiality. To do this, the appellant must demonstrate the existence of a widespread bias arising from the nature of the charges against him (the "attitudinal" component), that raises a realistic potential for partial juror behaviour despite the safeguards of the trial process (the "behavioural" component). I will discuss each of these requirements in turn as they apply to this case.

1. Widespread Bias

51 In this case, the appellant alleges that the nature and the circumstances of the offence with which he is charged give rise to a bias that could unfairly incline jurors against him or toward his conviction. [page888] He further alleges that this bias is widespread in the community. In support of this submission, the appellant relies on the following propositions from Moldaver J.A.'s dissent in K. (A.), supra, at para. 166. The parties generally agree on these facts, but dispute the conclusions to be drawn from them:

- Studies and surveys conducted in Canada over the past two decades reveal that a large percentage of the population, both male and female, have been the victims of sexual abuse. From this, it is reasonable to infer that any given jury panel may contain victims of sexual abuse, perpetrators and people closely associated with them.
- The harmful effects of sexual abuse can prove devastating not only to those who have been victimized, but those closely related to them. Tragically, many victims remain traumatized and psychologically scarred for life. By the same token, for those few individuals who have been wrongfully accused of sexual abuse, the effects can also be devastating.
- Sexual assault tends to be committed along gender lines. As a rule, it is women and children who are victimized by men.
- Women and children have been subjected to systemic discrimination reflected in both individual and institutional conduct, including the criminal justice system. As a result of widespread media coverage and the earnest and effective efforts of lobby groups in the past decade, significant and

long overdue changes have come about in the criminal justice system. For some, the changes have not gone far enough; for others, too far.

- Where challenges for cause have been permitted in cases involving allegations of sexual abuse, literally hundreds of prospective jurors have been found to be partial by the triers of fact. In those cases where trial judges have refused to permit the challenge, choosing instead to vet the panel at large for bias, the numbers are equally substantial.

[page889]

- Unlike many crimes, there are a wide variety of stereotypical attitudes and beliefs surrounding the crime of sexual abuse.

52 While the parties agree on these basic facts, they disagree on whether they demonstrate widespread bias. The appellant called no evidence, expert or otherwise, on the incidence or likely effect of prejudice stemming from the nature of the offences with which he is charged. Instead, he asks the Court to take judicial notice of a widespread bias arising from allegations of the sexual assault of children. The Crown, by contrast, argues that the facts on which it agrees do not translate into bias, much less widespread bias.

53 The appellant relies on the following: (a) the incidence of victimization and its effect on members of the jury pool; (b) the strong views held by many about sexual assault and the treatment of this crime by the criminal justice system; (c) myths and stereotypes arising from widespread and deeply entrenched attitudes about sexual assault; (d) the incidence of intense emotional reactions to sexual assault, such as a strong aversion to the crime or undue empathy for its victims; (e) the experience of Ontario trial courts, where hundreds of potential jurors in such cases have been successfully challenged as partial; and (f) social science research indicating a "generic prejudice" against the accused in sexual assault cases. He argues that these factors permit the Court to take judicial notice of widespread bias arising from charges of sexual assault of children.

54 It is worth reminding ourselves that at this stage we are concerned solely with the nature and prevalence of the alleged biases (i.e., the "attitudinal" component), and not their amenability to cleansing [page890] by the trial process, which is the focus of the "behavioural" component.

(a) Incidence of Victimization

55 The appellant argues that the prevalence and potentially devastating impact of sexual assault permit the Court to conclude that any given jury pool is likely to contain victims or those close to them who may harbour a prejudicial bias as a consequence of their experiences.

56 The Crown acknowledges both the widespread nature of abuse and its potentially traumatic impact. Neither of these facts is in issue. Nor is it unreasonable to conclude from these facts that victims of sexual assault, or those close to them, may turn up in a jury panel. What is disputed is whether this widespread victimization permits the Court to conclude, without proof, that the victims and those who share their experience are biased, in the sense that they may harbour prejudice against the accused or in favour of the Crown when trying sexual assault charges.

57 The only social science research before us on the issue of victim empathy is a study by R. L. Wiener, A. T. Feldman Wiener and T. Grisso, "Empathy and Biased Assimilation of Testimonies in Cases of Alleged Rape" (1989), 13 Law & Hum. Behav. 343. The appellant cites this study for the proposition that those participants acquainted in some way with a rape victim demonstrated a greater tendency, under the circumstances of the study, to find a defendant guilty. However, as the Crown notes, this study offers no evidence that victim status in itself impacts jury verdicts. In fact, the study found no correlation between degree of empathy for rape victims and tendency to convict, nor did it find higher degrees of victim empathy amongst those persons acquainted with rape victims. Further, the study was limited to a small sample of participants. It made no attempt to simulate an actual jury trial, and did not involve a deliberation [page891] process or an actual verdict. In the absence of expert testimony, tested under cross-examination, as to the conclusions properly supported by this study, I can only conclude that it provides little assistance in establishing the existence of widespread bias arising from the incidence of sexual assault in Canadian society.

58 Moldaver J.A. concluded that the prevalence of sexual assault in Canadian society and its traumatic and potentially lifelong effects, provided a realistic basis to believe that victims of this crime may harbor intense and deep-seated biases. In arriving at this conclusion, he expressly relied on an unpublished article by Professor David Paciocco, "Challenges for Cause in Jury Selection after Regina v. Parks: Practicalities and Limitations", Canadian Bar Association - Ontario, February 11, 1995, which he quoted at para. 176 for the proposition that "[o]ne cannot help but believe that these deep scars would, for some, prevent them from adjudicating sexual offence violations impartially".

59 This is, however, merely the statement of an assumption, offered without a supporting foundation of evidence or research. Courts must approach sweeping and untested "common sense" assumptions about the behaviour of abuse victims with caution: see R. v. Seaboyer, [1991] 2 S.C.R. 577 (per L'Heureux-Dubé J., dissenting in part); R. v. Lavallee, [1990] 1 S.C.R. 852, at pp. 870-72 (per Wilson J.). Certainly these assumptions are not established beyond reasonable dispute, or documented with indisputable accuracy, so as to permit the Court to take judicial notice of them.

60 I conclude that while widespread victimization may be a factor to be considered, standing alone it [page892] fails to establish widespread bias that might lead jurors to discharge their task in a prejudicial and unfair manner.

(b) Strongly Held Views Relating to Sexual Offences

61 The appellant submits that the politicized and gender-based nature of sexual offences gives rise to firmly held beliefs, opinions and attitudes that establish widespread bias in cases of sexual assault.

62 This argument found favour with Moldaver J.A. in K. (A.). Moldaver J.A. judicially noticed the tendency of sexual assault to be committed along gender lines. He also took judicial notice of the systemic discrimination women and children have faced in the criminal justice system, and the fact that recent reforms have gone too far for some and not far enough for others. From this foundation of facts, he inferred that the gender-based and politicized nature of sexual offences leads to a realistic possibility that some members of the jury pool, as a result of their political beliefs, will harbour deep-seated and virulent biases that might prove resistant to judicial cleansing. Quoting from the work of Professor Paciocco, Moldaver J.A. emphasized that strong political convictions and impartiality are not necessarily incongruous, but that for some "feminists" "commitment gives way to zealotry and dogma". The conviction that the justice system and its rules are incapable of protecting women and children, it is argued, may lead some potential jurors to disregard trial directions and rules safeguarding the presumption of innocence. Little regard for judicial direction can be expected from "those who see the prosecution of [page893] sexual offenders as a battlefront in a gender based war" (para. 177).

63 The appellant supports this reasoning, adding that the polarized, politically charged nature of sexual offences results in two prevalent social attitudes: first, that the criminal justice system is incapable of dealing with an "epidemic" of abuse because of its male bias or the excessive protections it affords the accused; and second, that conviction rates in sexual offence cases are unacceptably low. These beliefs, he alleges, may jeopardize the accused's right to a fair trial. For example, jurors harbouring excessive political zeal may ignore trial directions and legal rules perceived as obstructing the "truth" of what occurred, or may simply "cast their lot" with the victim. All this, the appellant submits, amounts to widespread bias in the community incompatible with juror impartiality.

64 The appellant does not deny that jurors trying any serious offence may hold strong views about the relevant law. Nor does he suggest such views raise concerns about bias in the trial of most offences. Few rules of criminal law attract universal support, and many engender heated debate. The treatment of virtually all serious crimes attracts sharply divided opinion, fervent criticism, and advocacy for reform. General disagreement or criticism of the relevant law, however, does not mean a prospective juror is inclined to take the law into his or her own hands at the expense of an individual accused.

65 The appellant's submission reduces to this: while strong views on the law do not ordinarily indicate bias, an exception arises in the case of [page894] sexual assaults on children. The difficulty, however, is that there is nothing in the material that supports this contention, nor is it self-evident. There is no indication that jurors are more willing to cross the line from opinion to prejudice in relation to sexual assault than for any other serious crime. It is therefore far from clear that strongly held views about sexual assault translate into bias, in the required sense of a tendency to act in an unfair and prejudicial manner.

66 Moreover, assuming that the strong views people may hold about sexual assault raise the possibility of bias, how widespread such views are in Canadian society remains a matter of conjecture. The material before the Court offers no measure of the prevalence in Canadian society of the specific attitudes identified by the appellant as corrosive of juror impartiality. Some people may indeed believe that the justice system is faltering in the face of an epidemic of abuse and that perpetrators of this crime too often escape conviction; yet, it is far from clear that these beliefs are prevalent in our society, let alone that they translate into bias on a widespread scale.

(c) Myths and Stereotypes About Sexual Offences

67 The appellant suggests that the strong views that surround the crime of sexual assault may contribute to widespread myths and stereotypes that undermine juror impartiality. In any given jury pool, he argues, some people may reason from the prevalence of abuse to the conclusion that the accused is likely guilty; some may assume children never lie about abuse; and some may reason that the accused is more likely to be guilty because he is a man.

[page895]

68 Again, however, the proof falls short. Although these stereotypical beliefs clearly amount to bias that might incline some people against the accused or toward conviction, it is neither notorious nor indisputable that they enjoy widespread acceptance in Canadian society. Myths and stereotypes do indeed pervade public perceptions of sexual assault. Some favour the accused, others the Crown. In the absence of evidence, however, it is difficult to conclude that these stereotypes translate into widespread bias.

(d) Emotional Nature of Sexual Assault Trials

69 The appellant asks the Court to take judicial notice of the emotional nature of sexual assault trials and to conclude that fear, empathy for the victim, and abhorrence of the crime establish widespread bias in the community. His concern is that jurors, faced with allegations of sexual assaults of children, may act on emotion rather than reason. This is particularly the case, he suggests, for past victims of abuse, for whom the moral repugnancy of the crime may be amplified. He emphasizes that the presumption of innocence in criminal trials demands the acquittal of the "probably" guilty. An intense aversion to sexual crimes, he argues, may incline some jurors to err on the side of conviction in such circumstances. Undue empathy for the victim, he adds, may also prompt a juror to "validate" the complaint with a guilty verdict, rather than determine guilt or innocence according to the law.

70 Crimes commonly arouse deep and strong emotions. They represent a fundamental breach of the perpetrator's compact with society. Crimes make victims, and jurors cannot help but sympathize [page896] with them. Yet these indisputable facts do not necessarily establish bias, in the sense of an attitude that could unfairly prejudice jurors against the accused or toward conviction. Many crimes routinely tried by jurors are abhorrent. Brutal murders, ruthless frauds and violent attacks are standard fare for jurors. Abhorred as they are, these crimes seldom provoke suggestions of bias incompatible with a fair verdict.

71 One cannot automatically equate strong emotions with an unfair and prejudicial bias against the accused. Jurors are not expected to be indifferent toward crimes. Nor are they expected to remain neutral toward those shown to have committed such offences. If this were the case, prospective jurors would be routinely and successfully challenged for cause as a preliminary stage in the trial of all serious criminal offences. Instead, we accept that jurors often abhor the crime alleged to have been committed - indeed there would be cause for alarm if representatives of a community did not deplore heinous criminal acts. It would be equally alarming if jurors did not feel empathy or compassion for persons shown to be victims of such acts. These facts alone do not establish bias. There is simply no indication that these attitudes, commendable in themselves, unfairly prejudice jurors against the accused or toward conviction. They are common to the trial of many serious offences and have never grounded a right to challenge for cause.

72 Recognizing this fact, the appellant and the intervener Criminal Lawyers' Association ("CLA") contend that allegations of sexual offences against children incite emotional reactions of an intensity above and beyond those invoked by other criminal acts. Such offences, they contend, stand alone in their capacity to inflame jurors and cloud reason. Moldaver J.A., dissenting in K. (A.), distinguished sexual offences from most [page897] other despicable criminal acts, on the basis that "sexual assault trials tend to be emotionally charged, particularly in cases of child abuse, where the mere allegation can trigger feelings of hostility, resentment and disgust in the minds of jurors" (para. 188).

73 The proposition that sexual offences are generically different from other crimes in their ability to arouse strong passion is not beyond reasonable debate or capable of immediate and accurate demonstration. As such, it does not lend itself to judicial notice. Nor was evidence led on this issue. Some may well react to allegations of a sexual crime with emotions of the intensity described by the appellant. Yet how prevalent such emotions are in Canadian society remains a matter of conjecture. The Court simply cannot reach conclusions on these controversial matters in an evidentiary vacuum. As a result, the appellant has not established the existence of an identifiable bias arising from the emotionally charged nature of sexual crimes, or the prevalence of this bias should it in fact exist.

(e) The History of Challenges for Cause in Ontario

74 The appellant refers this Court to the experience of Ontario trial courts where judges have allowed defence counsel to challenge prospective jurors for cause in cases involving allegations of sexual assault: see Vidmar, supra, at p. 5; D. M. Tanovich, D. M. Paciocco, S. Skurka, Jury Selection in Criminal Trials: Skills, Science, and the Law (1997), at pp. 239-42. These sources, cataloguing 34 cases, indicate that hundreds of potential jurors have been successfully challenged for cause as not indifferent between the Crown and the accused. It is estimated that 36 percent of the prospective jurors challenged were disqualified.

[page898]

75 The appellant argues that the fact that hundreds of prospective jurors have been found to be partial is in itself sufficient evidence of widespread bias arising from sexual assault trials. This is proof, he asserts, that the social realities surrounding sexual assault trials give rise to prejudicial beliefs, attitudes and emotions on a widespread scale in Canadian communities.

76 The Crown disagrees. It argues first, that the survey lacks validity because of methodological defects, and second, that even if the results are accepted, the successful challenges do not demonstrate a widespread bias, but instead may be attributed to other causes.

77 The first argument against the survey is that its methodology is unsound. The Crown raises a number of concerns: the survey is entirely anecdotal, not comprehensive or random; not all of the questions asked of prospective jurors are indicated; there is no way in which to assess the directions, if any, provided by the trial judge, especially in relation to the distinction between strong opinions or emotions and partiality; and no comparative statistics are provided contrasting these results with the experience in other criminal law contexts. The intervener CLA concedes that the survey falls short of scientific validity, but contends that it nevertheless documents a phenomena of considerable significance. Hundreds of prospective jurors disqualified on the grounds of bias by impartial triers of fact must, it is argued, displace the presumption of juror impartiality. Nonetheless, the lack of methodological rigour and the absence of expert evidence undermine the suggestion that the Ontario experience establishes widespread bias.

78 The second argument against the survey is that the questions asked were so general, and the information elicited so scarce, that no meaningful inference [page899] can be drawn from the responses given by challenged jurors or from the number of potential jurors disqualified. Charron J.A., for the majority in K. (A.), observed that prospective jurors in that case received no meaningful instruction on the nature of jury duty or the meaning and importance of impartiality. Further, they often indicated confusion at the questions posed to them or asked that the questions be repeated. In the end, numerous prospective jurors were disqualified for offering little more than that they would find it difficult to hear a case of this nature, or that they held strong emotions about the sexual abuse of children.

79 The challenge for cause process rests to a considerable extent on self-assessment of impartiality by the challenged juror, and the response to questions on challenge often will be little more than an affirmation or denial of one's own ability to act impartially in the circumstances of the case. In the absence of guidance, prospective jurors may conflate disqualifying bias with a legitimate apprehension about sitting through a case involving allegations of sexual abuse of children, or the strong views or emotions they may hold on this subject.

80 Where potential jurors are challenged for racial bias, the risk of social disapprobation and stigma supports the veracity of admissions of potential partiality. No similar indicia of reliability attach to the frank and open admission of concern about one's ability to approach and decide a case of alleged child sexual abuse judiciously. While a prospective juror's admission of racial prejudice may suggest partiality, the same cannot be said of an admission of abhorrence or other emotional attitude toward the sexual abuse of children. We do not know whether the potential jurors who professed concerns about serving on juries for sexual assault charges were doing so because they were biased, or for other reasons. We do not know [page900] whether they were told that strong emotions and beliefs would not in themselves impair their duty of impartiality, or whether they were informed of the protections built into the trial process.

81 In fact, the number of prospective jurors disqualified, although relied on as support for judicial notice of widespread bias, is equally consistent with the conclusion that the challenge processes, despite the best intentions of the participants, disqualified prospective jurors for acknowledging the intense emotions, beliefs, experiences and misgivings anyone might experience when confronted with the prospect of sitting as a juror on a case involving charges of sexual assault of children. As discussed, the mere presence of strong emotions and opinions cannot be equated automatically with bias against the accused or toward conviction.

82 It follows that the survey of past challenge for cause cases involving charges of sexual assault does not without more establish widespread bias arising from these charges.

(f) Social Science Evidence of "Generic Prejudice"

83 The appellant argues that social science research, particularly that of Vidmar, supports the contention that social realities, such as the prevalence of sexual abuse and its politically charged nature, translate into a widespread bias in Canadian society.

84 In Williams, supra, the Court referred to Vidmar's research in concluding that the partiality targeted by s. 638(1)(b) was not limited to biases [page901] arising from a direct interest in the proceeding or pre-trial exposure to the case, but could arise from any of a variety of sources, including the "nature of the crime itself" (para. 10). However, recognition that the nature of an offence may give rise to "generic prejudice" does not obviate the need for proof. Labels do not govern the availability of challenges for cause. Regardless of how a case is classified, the ultimate issue is whether a realistic possibility exists that some potential jurors may try the case on the basis of prejudicial attitudes and beliefs, rather than the evidence offered at trial. The appellant relies on the work of Vidmar for the proposition that such a possibility does in fact arise from allegations of sexual assault.

85 Vidmar is known for the theory of a "generic prejudice" against accused persons in sexual assault trials and for the conclusion that the attitudes and beliefs of jurors are frequently reflected in the verdicts of juries on such trials.

However, the conclusions of Vidmar do not assist in finding widespread bias. His theory that a "generic prejudice" exists against those charged with sexual assault, although in the nature of expert evidence, has not been proved. Nor can the Court take judicial notice of this contested proposition. With regard to the behaviour of potential jurors, the Court has no foundation in this case to draw an inference of partial juror conduct, as discussed in more detail below, under the behavioural stage of the partiality test.

86 Vidmar himself acknowledges the limitations of his research. He concedes that the notion of "generic prejudice" lacks scientific validity, and that none of the studies he relies on actually asked the questions typically asked of Canadian jurors, including whether they can impartially adjudicate guilt or innocence in a sexual assault trial: Vidmar, supra. Moreover, the authorities Vidmar relies on are almost exclusively "confined to examination of [page902] public attitudes towards certain criminal acts, especially child sexual abuse. Not surprisingly, it appears the public is quite disapproving of persons who have sexually abused children, and of such conduct itself": R. v. Hillis, [1996] O.J. No. 2739 (Gen. Div.) (QL), at para. 7. While judicial notice may be taken of the uncontested fact that sexual crimes are almost universally abhorred, this does not establish widespread bias arising from sexual assault trials.

87 The attempt of Vidmar and others to conduct scientific research on jury behaviour is commendable. Unfortunately, research into the effect of juror attitudes on deliberations and verdicts is constrained by the almost absolute prohibition in s. 649 of the Criminal Code against the disclosure by jury members of information relating to the jury's proceedings. More comprehensive and scientific assessment of this and other aspects of the criminal law and criminal process would be welcome. Should Parliament reconsider this prohibition, it may be that more helpful research into the Canadian experience would emerge. But for now, social science evidence appears to cast little light on the extent of any "generic prejudice" relating to charges of sexual assault, or its relationship to jury verdicts.

(g) Conclusions on the Existence of a Relevant, Widespread Bias

88 Do the factors cited by the appellant, taken together, establish widespread bias arising from charges relating to sexual abuse of children? In my view, they do not. The material presented by the appellant, considered in its totality, falls short of grounding judicial notice of widespread bias in Canadian society against the accused in such trials. At best, it establishes that the crime of sexual [page903] assault, like many serious crimes, frequently elicits strong attitudes and emotions.

89 However, the two branches of the test for partiality are not watertight compartments. Given the challenge of proving facts as elusive as the nature and scope of prejudicial attitudes, and the need to err on the side of caution, I prefer not to resolve this case entirely at the first, attitudinal stage. Out of an abundance of caution, I will proceed to consider the potential impact, if any, of the alleged biases on juror behaviour.

2. Is it Reasonable to Infer that Some Jurors May Be Incapable of Setting Aside Their Biases Despite Trial Safeguards?

90 The fact that members of the jury pool may harbour prejudicial attitudes, opinions or feelings is not, in itself, sufficient to support an entitlement to challenge for cause. There must also exist a realistic possibility that some jurors may be unable or unwilling to set aside these prejudices to render a decision in strict accordance with the law. This is referred to as the behavioural aspect of the test for partiality.

91 The applicant need not always adduce direct evidence establishing this link between the bias in issue and detrimental effects on the trial process. Even in the absence of such evidence, a trial judge may reasonably infer that some strains of bias by their very nature may prove difficult for jurors to identify and eliminate from their reasoning.

92 This inference, however, is not automatic. Its strength varies with the nature of the bias in issue, and its amenability to judicial cleansing. In Williams, the Court inferred a behavioural link between the pervasive racial prejudice established [page904] on the evidence and the possibility that some jurors, consciously or not, would decide the case based on prejudice and stereotype. Such a result, however, is not inevitable for every form of bias, prejudice or preconception. In some circumstances, the appropriate inference is that the "predispositions can be safely regarded as curable by judicial direction": Williams, supra, at para. 24.

93 Fundamental distinctions exist between the racial prejudice at issue in Williams and a more general bias relating to the nature of the offence itself. These differences relate both to the nature of these respective biases, and to their susceptibility (or resistance) to cleansing by the trial process. It may be useful to examine these differences before embarking on a more extensive consideration of the potential effects on the trial process, if any, of the biases alleged in the present case.

94 The first difference is that race may impact more directly on the jury's decision than bias stemming from the nature of the offence. As Moldaver J.A. stated in Betker, supra, at p. 441, "[r]acial prejudice is a form of bias directed against a particular class of accused by virtue of an identifiable immutable characteristic. There is a direct and logical connection between the prejudice asserted and the particular accused". By contrast, the aversion, fear, abhorrence, and beliefs alleged to surround sexual assault offences may lack this cogent and irresistible connection to the accused. Unlike racial prejudice, they do not point a finger at a particular accused.

95 Second, trial safeguards may be less successful in cleansing racial prejudice than other types of bias, as recognized in Williams. As Doherty J.A. observed in Parks, supra, at p. 371: "[i]n deciding whether the post-jury selection safeguards against partiality provide a reliable antidote to racial bias, the nature of that bias must be emphasized". The nature of racial prejudice - in particular its subtle, systemic and often unconscious operation - compelled [page905] the inference in Williams that some people might be incapable of effacing, or even identifying, its influence on their reasoning. In reaching this conclusion, the Court emphasized the "invasive and elusive" operation of racial prejudice and its foundation "on preconceptions and unchallenged assumptions that unconsciously shape the daily behaviour of individuals" (paras. 21-22).

96 The biases alleged in this case, by contrast, may be more susceptible to cleansing by the rigours of the trial process. They are more likely to be overt and acknowledged than is racial prejudice, and hence more easily removed. Jurors are more likely to recognize and counteract them. The trial judge is more likely to address these concerns in the course of directions to the jury, as are counsel in their addresses. Offence-based bias has concerned the trial process throughout its long evolution, and many of the safeguards the law has developed may be seen as a response to it.

97 Against this background, I turn to the question of whether the biases alleged to arise from the nature of sexual assault, if established, might lead jurors to decide the case in an unfair and prejudicial way, despite the cleansing effect of the trial process.

98 First, the appellant contends that some jurors, whether victims, friends of victims, or simply people holding strong views about sexual assault, may not be able to set aside strong beliefs about this crime - for example, that the justice system is biased against complainants, that there exists an epidemic of abuse that must be halted, or that conviction rates are too low - and decide the case solely on its merits. Some jurors, he says, may disregard rules of law that are perceived as obstructing the "truth" of what occurred. Others may simply "cast their lot" with groups that have [page906] been victimized. These possibilities, he contends, support a reasonable inference that strong opinions may translate into a realistic potential for partial juror conduct.

99 This argument cannot succeed. As discussed, strongly held political views do not necessarily suggest that jurors will act unfairly in an actual trial. Indeed, passionate advocacy for law reform may be an expression of the highest respect for the rule of law, not a sign that one is willing to subvert its operation at the expense of the accused. As Moldaver J.A. eloquently observed in Betker, supra, at p. 447, "the test for partiality is not whether one seeks to change the law but whether one is capable of upholding the law...".

100 In the absence of evidence that such beliefs and attitudes may affect jury behaviour in an unfair manner, it is difficult to conclude that they will not be cleansed by the trial process. Only speculation supports the proposition that jurors will act on general opinions and beliefs to the detriment of an individual accused, in disregard of their oath or affirmation, the presumption of innocence, and the directions of the trial judge.

101 The appellant also contends that myths and stereotypes attached to the crime of sexual assault may unfairly inform the deliberation of some jurors. However, strong, sometimes biased, assumptions about sexual behaviour are not new to sexual assault trials. Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases - the belief that women of "unchaste" character are more likely to have consented or are less worthy of belief; that passivity or even resistance may in fact constitute consent; and that some women invite sexual assault by reason of their [page907] dress or behaviour, to name only a few. Based on overwhelming evidence from relevant social science literature, this Court has been willing to accept the prevailing existence of such myths and stereotypes: see, for example, Seaboyer, supra; R. v. Osolin, [1993] 4 S.C.R. 595, at pp. 669-71; R. v. Ewanchuk, [1999] 1 S.C.R. 330, at paras. 94-97.

102 Child complainants may similarly be subject to stereotypical assumptions, such as the belief that stories of abuse are probably fabricated if not reported immediately, or that the testimony of children is inherently unreliable: R. v. W. (R.), [1992] 2 S.C.R. 122; R. v. D.D., [2000] 2 S.C.R. 275, 2000 SCC 43; N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W. S. Tarnopolsky, J. Whitman and M. Ouellette, eds., Discrimination in the Law and the Administration of Justice (1993), 231.

103 These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

104 Yet the prevalence of such attitudes has never been held to justify challenges for cause as of right by Crown prosecutors. Instead, we have traditionally trusted the trial process to ensure that such attitudes will not prevent jurors from acting impartially. We have relied on the rules of evidence, statutory protections, and guidance from the judge and counsel to clarify potential misconceptions and [page908] promote a reasoned verdict based solely on the merits of the case.

105 Absent evidence to the contrary, there is no reason to believe that stereotypical attitudes about accused persons are more elusive of these cleansing measures than stereotypical attitudes about complainants. It follows that the myths and stereotypes alleged by the appellant, even if widespread, provide little support for any inference of a behavioural link between these beliefs and the potential for juror partiality.

106 Finally, the appellant argues that the strong emotions evoked by allegations of sexual assault, especially in cases involving child complainants, may distort the reasoning of some jurors. He emphasizes that a strongly held aversion to the offence may incline some jurors to err on the side of conviction. Others may be swayed by "undue empathy" for the alleged victim, perceiving the case as a rejection or validation of the complainant's claim, rather than a determination of the accused's guilt or innocence according to law.

107 Again, absent evidence, it is highly speculative to suggest that the emotions surrounding sexual crimes will lead to prejudicial and unfair juror behaviour. As discussed, the safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest - all [page909] collaborate to keep the jury on the path to an impartial verdict despite offence-based prejudice. The appellant has not established that the offences with which he is charged give rise to a strain of bias that is uniquely capable of eluding the cleansing effect of these trial safeguards.

108 It follows that even if widespread bias were established, we cannot safely infer, on the record before the Court, that it would lead to unfair, prejudicial and partial juror behaviour. This is not to suggest that an accused can never be prejudiced by the mere fact of the nature and circumstances of the charges he or she faces; rather, the inference between social attitudes and jury behaviour is simply far less obvious and compelling in this context, and more may be required to satisfy a court that this inference may be reasonably drawn. The nature of offence-based bias, as discussed, suggests that the circumstances in which it is found to be both widespread in the community and resistant to the safeguards of trial may prove exceptional. Nonetheless, I would not foreclose the possibility that such circumstances may arise. If widespread bias arising from sexual assault were established in a future case, it would be for the court in that case to determine whether this bias gives rise to a realistic potential for partial juror conduct in the community from which the jury pool is drawn. I would only caution that in deciding whether to draw an inference of adverse effect on jury behaviour the court should take into account the nature of the bias and its susceptibility to cleansing by the trial process.

[page910]

VI - Conclusion

109 The case for widespread bias arising from the nature of charges of sexual assault on children is tenuous. Moreover, even if the appellant had demonstrated widespread bias, its link to actual juror behaviour is speculative, leaving the presumption that it would be cleansed by the trial process firmly in place. Many criminal trials engage strongly held views and stir up powerful emotions - indeed, even revulsion and abhorrence. Such is the nature of the trial process. Absent proof, we cannot simply assume that strong beliefs and emotions translate into a realistic potential for partiality, grounding a right to challenge for cause. I agree with the majority of the Court of Appeal that the appellant has not established that the trial judge erred in refusing to permit him to challenge prospective jurors for cause.

110 I would dismiss the appeal and affirm the conviction.

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R. v. Imperial Tobacco Canada Ltd., [2011] 3 S.C.R. 45

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: February 24, 2011;

Judgment: July 29, 2011.

File Nos.: 33559, 33563.

[2011] 3 S.C.R. 45 | [2011] 3 R.C.S. 45 | [2011] S.C.J. No. 42 | [2011] A.C.S. no 42 | 2011 SCC 42

Her Majesty The Queen in Right of Canada, Appellant/Respondent on cross-appeal; v. Imperial Tobacco Canada Limited, Respondent/Appellant on cross-appeal, and Attorney General of Ontario and Attorney General of British Columbia, Interveners. And Attorney General of Canada, Appellant/Respondent on cross-appeal; v. Her Majesty The Queen in Right of British Columbia, Respondent, and Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc., Respondents/Appellants on cross-appeal, and Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick, Interveners. [page46]

(151 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Civil procedure — Third-party claims — Motion to strike — Tobacco manufacturers being sued by provincial government to recover health care costs of tobacco-related illnesses, and by consumers of "light" or "mild" cigarettes for damages and punitive damages — Tobacco companies issuing third-party notices to federal government claiming contribution and indemnity — Whether plain and obvious that third-party claims disclose no reasonable cause of action.

Catchwords:

Torts — Negligent misrepresentation — Failure to warn — Negligent design — Duty of care — Proximity — Tobacco manufacturers being sued by provincial government and consumers and issuing third-party notices to federal government claiming contribution and indemnity — Federal government claiming representations constituted government policy immune from judicial review — Whether facts as pleaded establish prima facie duty of care — If so, whether conflicting policy considerations negate such duty.

Catchwords:

Torts — Provincial statutory scheme establishing rights of action against tobacco manufacturers and suppliers — Whether federal government liable as a "manufacturer" under the Tobacco Damages and

Health Care Costs Recovery Act, S.B.C. 2000, c. 30, or a "supplier" under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2, and the Trade Practice Act, R.S.B.C. 1996, c. 457.

Summary:

The appeal concerns two cases before the courts in British Columbia. In the *Costs Recovery* case, the [page47] Government of British Columbia is seeking to recover, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act* ("*CRA*"), the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of tobacco companies, including Imperial. British Columbia alleges that by 1950, the tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product. In the *Knight* case, a class action was brought against Imperial alone on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost of the cigarettes and punitive damages. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes.

In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design and failure to warn, as well as at equity. They also allege that Canada would itself be liable as a "manufacturer" under the *CRA* or a "supplier" under the *Business Practices and Consumer Protection Act* and the *Trade Practice Act*, and that they are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*. Canada brought motions to strike the third-party notices, arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claim. The court unanimously struck the remainder of the tobacco companies' claims.

[page48]

Held: The appeals should be allowed and the claims should be struck out. The tobacco companies' cross-appeals should be dismissed.

On a motion to strike, a claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action. The approach must be generous, and err on the side of permitting a novel but arguable claim to proceed to trial. However, the judge cannot consider what evidence adduced in the future might or might not show. Here, it is plain and obvious that none of the tobacco companies' claims against Canada have a reasonable chance of success.

Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case

In the *Costs Recovery* case, the private law claims against Canada for contribution and indemnity based on alleged breaches of a duty of care to smokers must be struck. A third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff, in this case, British Columbia. Here, even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia.

The Claims for Negligent Misrepresentation

There are two relationships at issue in these claims: one between Canada and consumers and one between Canada and tobacco companies. In the *Knight* case, Imperial alleges that Canada negligently represented the health attributes of low-tar cigarettes to consumers. In both the *Knight* case and the *Costs Recovery* case, the tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies.

The facts as pleaded do not bring Canada's relationship with consumers and the tobacco companies within a settled category of negligent misrepresentation. Accordingly, to determine whether the alleged causes of action have a reasonable prospect of success, the general requirements for liability in tort must be met. At [page49] the first stage, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. In a claim of negligent misrepresentation, both of these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties. A special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case. If proximity is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized.

Here, on the facts as pleaded, Canada did not owe a *prima facie* duty of care to consumers. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes. However, the relevant statutes establish only general duties to the public, and no private law duties to consumers. In light of the lack of proximity, this claim in the *Knight* case should be struck at the first stage of the analysis.

As for the tobacco companies, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of establishing a special relationship of proximity giving rise to a *prima facie* duty of care. The allegations are that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials, going far beyond the sort of statements made by Canada to the public at large. Furthermore, Canada's regulatory powers over the manufacturers coupled with its specific advice and its commercial involvement could be seen as supporting a conclusion that Canada ought reasonably to have foreseen that the tobacco companies would rely on the representations and that such reliance would be reasonable in the pleaded circumstance.

[page50]

Canada's alleged negligent misrepresentations do not give rise to tort liability, however, because of conflicting policy considerations. The alleged representations constitute protected expressions of government policy. Core government policy decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. The representations in this case were part and parcel of a government policy, adopted at the highest level in the Canadian government and developed out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease, to encourage people who continued to smoke to switch to low-tar cigarettes.

The claims for negligent misrepresentation should also fail because they would expose Canada to indeterminate liability. Recognizing a duty of care for representations to the tobacco companies would effectively amount to a duty to consumers. While the quantum of damages owed by Canada to the companies in both cases would depend on the number of smokers and the number of cigarettes sold, Canada had no control over the number of people who smoked light cigarettes.

The Claims for Failure to Warn

The tobacco companies make two allegations for failure to warn: (1) that Canada directed the tobacco companies not to provide warnings on cigarette packages about the health hazards of cigarettes and (2) that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco it designed and licensed. These two claims should be struck. The crux of the first claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn. The same is true of the second claim. While the tort of failure to warn requires evidence of a positive duty towards the plaintiff, nothing in the third-party notices suggests that Canada was under such a positive duty here. A plea of negligence, without more, will not suffice to raise a duty to warn. In any event, [page51] such a claim would fail for the policy reasons applicable to the negligent misrepresentation claim.

The Claims for Negligent Design

The tobacco companies have brought two types of negligent design claims against Canada. They submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. In the *Knight* case, Imperial submits that Canada breached its duty of care to consumers of light and mild cigarettes. The two negligent design claims establish a *prima facie* duty of care. With respect to Canada's design of low-tar tobacco strains, the proximity alleged with the tobacco companies is not based on a statutory duty, but on commercial interactions between Canada and the tobacco companies. In the *Knight* case also, it is at least arguable that Canada was acting in a commercial capacity towards the consumers of light and mild cigarettes when it designed its strains of tobacco. However, the decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy and based on social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. These claims should accordingly be struck.

Liability as a "Manufacturer" and a "Supplier"

The tobacco companies' contribution claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* should be struck. It is plain and obvious that the federal government does not qualify as a manufacturer of tobacco under that Act. When the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, [page52] and the broader context of the relationship between the province and the federal government. Holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco-related wrongs from taxpayers to the tobacco industry. Similarly, the tobacco companies cannot rely on the recently adopted *Health Care Costs Recovery Act* in an action for contribution under the *CRA*. Finally, Canada could not be liable for contribution under the *Negligence Act* or at common law since it is not directly liable to British Columbia.

Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *Trade Practice Act* and the *Business Practices and Consumer Protection Act* which replaced it should also be struck. Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in those statutes. Those phrases must be understood as limited to activities undertaken for a commercial purpose. Here, it is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier and is not liable under those statutes.

Claims for Equitable Indemnity and Procedural Considerations

The tobacco companies' claims of equitable indemnity should be struck. Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

Finally, the claims for declaratory relief should be struck. The tobacco companies' ability to mount defences would not be severely prejudiced if Canada was no longer a third party in the litigation.

[page53]

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[page54]

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Hall, Saunders, Lowry, Tysoe and Smith JJ.A.), 2009 BCCA 541, 99 B.C.L.R. (4) 93, 313 D.L.R. (4) 695, [2010] 2 W.W.R. 9, 280 B.C.A.C. 160, 474 W.A.C. 160, [2009] B.C.J. No. 2445 (QL), 2009 CarswellBC 3300, reversing in part a decision of Satanove J. striking out third-party notices, 2007 BCSC 964, 76 B.C.L.R. (4) 100, [2008] 4 W.W.R. 156, [2007] B.C.J. No. 1461 (QL), 2007 CarswellBC 1806 (*sub nom. Knight v. Imperial Tobacco Canada Ltd.*). Appeal allowed and cross-appeal dismissed.

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Hall, Saunders, Lowry, Tysoe and Smith JJ.A.), 2009 BCCA 540, 98 B.C.L.R. (4) 201, 313 D.L.R. (4) 651, [2010] 2 W.W.R. 385, 280 B.C.A.C. 100, 474 W.A.C. 100, [2009] B.C.J. No. 2444 (QL), 2009 CarswellBC 3307, reversing in part a decision of Wedge J. striking out third-party notices, [page55] 2008 BCSC 419, 82 B.C.L.R. (4) 362, 292 D.L.R. (4) 353, [2008] 12 W.W.R. 241, [2008] B.C.J. No. 609 (QL), 2008 CarswellBC 687 (*sub nom. British Columbia v. Imperial Tobacco Canada Ltd.*). Appeal allowed and cross-appeal dismissed.

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The judgment of the Court was delivered by

McLACHLIN C.J.

TABLE OF CONTENTS

		Paragraph
I.	Introduction	1
II.	Underlying Claims and Judicial History	6
A.	*The Knight Case*	6

B. *The Costs Recovery Case* 11

III. Issues Before the Court 15

IV. Analysis 17

A. *The Test for Striking Out Claims* 17

B. *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case* 27

C. *The Claims for Negligent Misrepresentation* 32

(1) Stage One: Proximity and Foreseeability 40

(2) Stage Two: Conflicting Policy Considerations 61

(a) *Government Policy Decisions* 63

(i) Conduct at Issue 67

(ii) Relevance of Evidence 68

(iii) What Constitutes a Policy Decision Immune From Judicial Review? 72

(iv) Conclusion on the Policy Argument 92

(b) *Indeterminate Liability* 97

(c) *Summary on Stage-Two Policy Arguments* 102

D. *Failure to Warn* 103

(1) Labelling Claim 104

(2) Failure to Warn Imperial About Health Hazards 106

E. *Negligent Design* 110

(1) *Prima Facie* Duty of Care 112

(2) Stage-Two Policy Considerations 116

F. *The Direct Claims Under the Costs Recovery Acts* 117

(1) Could Canada Qualify as a Manufacturer Under the *Tobacco Damages and Health Care Costs Recovery Act*? 121

(a) *Text of the Statute* 122

(b) *Legislative Intention* 127

(c) *Broader Context* 129

(d) *Summary* 132

(2) Could Canada Be Found Liable Under the *Health Care Costs Recovery Act*? 133

(3) Could Canada Be Liable for Contribution Under the *Negligence Act* if It Is Not Directly Liable to British Columbia? 135

(4) Could Canada Be Liable for Common Law Contribution? 138

G. *Liability Under the Trade Practice Act and the Business Practices and Consumer Protection Act* 140

H. *The Claim for Equitable Indemnity* 146

I. *Procedural Considerations* 149

V. Conclusion 151

I. Introduction

1 Imperial Tobacco Canada Ltd. ("Imperial") is a defendant in two cases before the courts in British Columbia, *British Columbia v. Imperial Tobacco Canada Ltd.*, Docket: S010421, and *Knight v. Imperial Tobacco Canada Ltd.*, Docket: L031300. In the first case, the Government of British Columbia is seeking to recover the cost of paying for the medical treatment of individuals suffering from tobacco-related illnesses from a group of 14 tobacco companies, including Imperial ("*Costs Recovery* case"). The second case is a class action brought against Imperial alone by Mr. Knight on behalf of class members who purchased "light" or "mild" cigarettes, seeking a refund of the cost [page59] of the cigarettes and punitive damages ("*Knight* case").

2 In both cases, the tobacco companies issued third-party notices to the Government of Canada, alleging that if the tobacco companies are held liable to the plaintiffs, they are entitled to compensation from Canada for negligent misrepresentation, negligent design, and failure to warn, as well as at equity. They also allege that Canada would itself be liable under the statutory schemes at issue in the two cases. In the *Costs Recovery* case, it is alleged that Canada would be liable under the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 ("*CRA*"), as a "manufacturer". In the *Knight* case, it is alleged that Canada would be liable as a "supplier" under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"), and its predecessor, the *Trade Practice Act*, R.S.B.C. 1996, c. 457 ("*TPA*").

3 In both cases, Canada brought motions to strike the third party notices under r. 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5), arguing that it was plain and obvious that the third-party claims failed to disclose a reasonable cause of action. In both cases, the chambers judges agreed with Canada, and struck all of the third-party notices. The British Columbia Court of Appeal allowed the tobacco companies' appeals in part. A majority of 3-2 held that the negligent misrepresentation claims arising from Canada's alleged duty of care to the tobacco companies in both the *Costs Recovery* case and the *Knight* case should proceed to trial. A majority in the *Knight* case further held that the negligent misrepresentation claim based on Canada's alleged duty of care to consumers should proceed, as should the negligent design claims in the *Knight* case. The court unanimously [page60] struck the remainder of the tobacco companies' claims.

4 The Government of Canada appeals the finding that the claims for negligent misrepresentation and the claim for negligent design should be allowed to go to trial. The tobacco companies cross-appeal the striking of the other claims.

5 For the reasons that follow, I conclude that all the claims of Imperial and the other tobacco companies brought against the Government of Canada are bound to fail, and should be struck. I would allow the appeals of the Government of Canada in both cases and dismiss the cross-appeals.

II. Underlying Claims and Judicial History

A. *The Knight Case*

6 In the *Knight* case, consumers in British Columbia have brought a class action against Imperial under the *BPCPA* and its predecessor, the *TPA*. The class consists of consumers of light or mild cigarettes. It alleges that Imperial engaged in deceptive practices when it promoted low-tar cigarettes as less hazardous to the health of consumers. The class alleges that the levels of tar and nicotine listed on Imperial's packages for light and mild cigarettes did not reflect the actual deliveries of toxic emissions to smokers, and alleges that the smoke produced by light cigarettes was just as harmful as that produced by regular cigarettes. The class seeks reimbursement of the cost of the cigarettes purchased, and punitive damages.

[page61]

7 Imperial issued a third-party notice against Canada. It alleges that Health Canada advised tobacco companies and the public that low-tar cigarettes were less hazardous than regular cigarettes. Imperial alleges that while Health Canada was initially opposed to the use of health warnings on cigarette packaging, it changed its policy in 1967. It instructed smokers to switch to low-tar cigarettes if they were unwilling to quit smoking altogether, and it asked tobacco companies to voluntarily list the tar and nicotine levels on their advertisements to encourage consumers to purchase low-tar brands. Contrary to expectations, it now appears that low-tar cigarettes are potentially more harmful to smokers.

8 Imperial also alleges that Agriculture Canada researched, developed, manufactured, and licensed several strains of low-tar tobacco, and collected royalties from the companies, including Imperial, that used these strains. By 1982, Imperial pleads, the tobacco strains developed by Agriculture Canada were "almost the only tobacco varieties available to Canadian tobacco manufacturers" (*Knight* case, amended third-party notice of Imperial, at para. 97).

9 Imperial makes five allegations against Canada:

(1) Canada is itself liable under the *BPCPA* and the *TPA* as a "supplier" of tobacco products that engaged in deceptive practices, and Imperial is entitled to contribution and indemnity from Canada pursuant to the provisions of the *Negligence Act*, R.S.B.C. 1996, c. 333.

(2) Canada breached private law duties to consumers by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn them against the hazards of low-tar cigarettes, and by failing to design its tobacco [page62] strain with due care. Consequently, Imperial alleges that it is entitled to contribution and indemnity from Canada under the *Negligence Act*.

(3) Canada breached its private law duties to Imperial by negligently misrepresenting the health attributes of low-tar cigarettes, by failing to warn Imperial about the hazards of low-tar cigarettes, and by failing to design its tobacco strain with due care. Imperial alleges that it is entitled to damages against Canada to the extent of any liability Imperial may have to the class members.

(4) In the alternative, Canada is obliged to indemnify Imperial under the doctrine of equitable indemnity.

(5) If Canada is not liable to Imperial under any of the above claims, Imperial is entitled to declaratory relief against Canada so that it will remain a party to the action and be subject to discovery procedures under the *Supreme Court Rules*.

10 Canada brought an application to strike the third-party claims. It was successful before Satanove J. in the Supreme Court of British Columbia (2007 BCSC 964, 76 B.C.L.R. (4th) 100). The chambers judge struck all of the claims against Canada. Imperial was partially successful in the Court of Appeal (2009 BCCA 541, 99 B.C.L.R. (4th) 93). The Court of Appeal unanimously struck the statutory claim, the claim of negligent design between Canada and Imperial, and the equitable indemnity claim. However, the majority, *per* Tysoe J.A., held that the two negligent misrepresentation claims and the negligent design claim between Canada and consumers should be allowed to proceed. The majority reasons did not address the [page63] failure to warn claim. Hall J.A., dissenting, would have struck all the third-party claims.

B. *The Costs Recovery Case*

11 The Government of British Columbia has brought a claim under the *CRA* to recover the expense of treating tobacco-related illnesses caused by "tobacco related wrong[s]". Under the *CRA*, manufacturers of tobacco products are liable to the province directly. The claim was brought against 14 tobacco companies. British Columbia alleges that by 1950, these tobacco companies knew or ought to have known that cigarettes were harmful to one's health, and that they failed to properly warn the public about the risks associated with smoking their product.

12 Various defendants in the *Costs Recovery* case, including Imperial, brought third-party notices against Canada for its alleged role in the tobacco industry. I refer to them collectively as the "tobacco companies". The allegations in this claim are strikingly similar to those in the *Knight* case. The tobacco companies plead that Health Canada advised them and the public that low-tar cigarettes were less hazardous and instructed smokers that they should quit smoking or purchase low-tar cigarettes. The tobacco companies allege that Canada was initially opposed to the use of warning labels on cigarette packaging, but ultimately instructed the industry that warning labels should be used and what they should say. The tobacco companies also plead that Agriculture Canada researched, developed, manufactured and licensed the strains of low-tar tobacco which they used for their cigarettes in exchange for royalties.

[page64]

13 The tobacco companies brought the following claims against Canada:

(1) Canada is itself liable under the *CRA* as a "manufacturer" of tobacco products, and the tobacco companies are entitled to contribution and indemnity from Canada pursuant to the *Negligence Act*.

(2) Canada breached private law duties to consumers for failure to warn, negligent design, and negligent misrepresentation, and the tobacco companies are entitled to contribution and indemnity from Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(3) Canada breached its private law duties owed to the tobacco companies for failure to warn and negligent design, and negligently misrepresented the attributes of low-tar cigarettes. The tobacco companies allege that they are entitled to damages against Canada to the extent of any liability they may have to British Columbia under the *CRA*.

(4) In the alternative, Canada is obliged to indemnify the tobacco companies under the doctrine of equitable indemnity.

(5) If Canada is not liable to the tobacco companies under any of the above claims, they are entitled to declaratory relief.

14 Canada was successful before the chambers judge, Wedge J., who struck all of the claims (2008 BCSC 419, 82 B.C.L.R. (4th) 362). In the Court of Appeal, the majority, *per* Tysoe J.A., allowed the negligent misrepresentation claim between Canada and the tobacco companies to proceed (2009 BCCA 540, 98 B.C.L.R. (4th) 201). Hall J.A., [page65] dissenting, would have struck all the third-party claims.

III. Issues Before the Court

15 There is significant overlap between the issues on appeal in the *Costs Recovery* case and the *Knight* case, particularly in relation to the common law claims. Both cases discuss whether Canada could be liable at common law in negligent misrepresentation, negligent design and failure to warn, and in equitable indemnity. To reduce duplication, I treat the issues common to both cases together.

16 There are also issues and arguments that are distinct in the two cases. Uniquely in the *Costs Recovery* case, Canada argues that all the contribution claims based on the *Negligence Act* and Canada's alleged duties of care to smokers should be struck because even if these alleged duties were breached, Canada would not be liable to the sole plaintiff British Columbia. The statutory claims are also distinct in the two cases. The issues may therefore be stated as follows:

1. What is the test for striking out claims for failure to disclose a reasonable cause of action?
2. Should the claims for contribution and indemnity based on the *Negligence Act* and alleged breaches of duties of care to smokers be struck in the *Costs Recovery* case?
3. Should the tobacco companies' negligent misrepresentation claims be struck out?

[page66]

4. Should the tobacco companies' claims of failure to warn be struck out?
5. Should the tobacco companies' claims of negligent design be struck out?
6. Should the tobacco companies' claim in the *Costs Recovery* case that Canada could qualify as a "manufacturer" under the *CRA* be struck out?
7. Should Imperial's claim in the *Knight* case that Canada could qualify as a "supplier" under the *TPA* and the *BPCPA* be struck out?
8. Should the tobacco companies' claims of equitable indemnity be struck out?
9. If Canada is not liable to the tobacco companies under any of the third-party claims, are the tobacco companies nonetheless entitled to declaratory relief against Canada so that it will remain a party to both actions and be subject to discovery procedures under the *Supreme Court Rules*?

IV. Analysis

A. *The Test for Striking Out Claims*

17 The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of [page67] success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

18 Although all agree on the test, the arguments before us revealed different conceptions about how it should be applied. It may therefore be useful to review the purpose of the test and its application.

19 The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

20 This promotes two goods - efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be - on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

21 Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised [page68] on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson.* Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

22 A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[page69]

23 Before us, Imperial and the other tobacco companies argued that the motion to strike should take into account, not only the facts pleaded, but the possibility that as the case progressed, the evidence would reveal more about Canada's conduct and role in promoting the use of low-tar cigarettes. This fundamentally misunderstands what a motion to strike is about. It is not about evidence, but the pleadings. The facts pleaded are taken as true. Whether the evidence substantiates the pleaded facts, now or at some future date, is irrelevant to the motion to strike. The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

24 This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities - as they sometimes do - the remedy is to amend the pleadings to plead new facts at that time.

25 Related to the issue of whether the motion should be refused because of the possibility of unknown evidence appearing at a future date is the issue of speculation. The judge on a motion to strike asks if the claim has any reasonable prospect of success. In the world of abstract speculation, there is a mathematical chance that any number of things might happen. That is not what the test on a motion to strike seeks to determine. Rather, it operates on the assumption that the claim will proceed through the court system in the usual way - in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedent. The question is whether, considered in *the context of the [page70] law and the litigation process*, the claim has no reasonable chance of succeeding.

26 With this framework in mind, I proceed to consider the tobacco companies' claims.

B. *Canada's Alleged Duties of Care to Smokers in the Costs Recovery Case*

27 In the *Costs Recovery* case, Canada argues that all the claims for contribution based on its alleged duties of care to smokers must be struck. Under the *Negligence Act*, Canada submits, contribution may only be awarded if the third party would be liable to the plaintiff directly. It argues that even if Canada breached duties to smokers, such breaches cannot ground the tobacco companies' claims for contribution if they are found liable to British Columbia, the sole plaintiff in the *Costs Recovery* case. This argument was successful in the Court of Appeal.

28 The tobacco companies argue that direct liability to the plaintiff is not a requirement for being held liable in contribution. They argue that contribution in the *Negligence Act* turns on fault, not liability. The object of the *Negligence Act* is to allow defendants to recover from other parties that were also at fault for the damage that resulted to the plaintiff, and barring a claim against Canada would defeat this purpose, they argue.

29 I agree with Canada and the Court of Appeal that a third party may only be liable for contribution under the *Negligence Act* if it is directly liable to the plaintiff. In *Giffels Associates Ltd. v. Eastern Construction Co.*, [1978] 2 S.C.R. 1346, dealing [page71] with a statutory provision similar to that in British Columbia, Laskin C.J. stated:

> ... I am of the view that it is a precondition of the right to resort to contribution that there be liability to the plaintiff. I am unable to appreciate how a claim for contribution can be made under s. 2(1) by one person against another in respect of loss resulting to a third person unless each of the former two came under a liability to the third person to answer for his loss. [Emphasis added; p. 1354.]

30 Accordingly, it is plain and obvious that the private law claims against Canada in the *Costs Recovery* case that arise from an alleged duty of care to consumers must be struck. Even if Canada breached duties to smokers, this would have no effect on whether it was liable to British Columbia, the plaintiff in that case. This holding has no bearing on the consumer claim in the *Knight* case since consumers of light or mild cigarettes are the plaintiffs in the underlying action.

31 The discussion of the private law claims in the remainder of these reasons will refer exclusively to the claims based on Canada's alleged duties of care to the tobacco companies in both cases before the Court, and Canada's alleged duties to consumers in the *Knight* case.

C. *The Claims for Negligent Misrepresentation*

32 There are two types of negligent misrepresentation claims that remain at issue on this appeal. First, in the *Knight* case, Imperial alleges that Canada negligently misrepresented the health attributes of low-tar cigarettes to consumers, and is therefore liable for contribution and indemnity on the basis of the *Negligence Act* if the class members [page72] are successful in this suit. Second, in both cases before the Court, Imperial and the other tobacco companies allege that Canada made negligent misrepresentations to the tobacco companies, and that Canada is liable for any losses that the tobacco companies incur to the plaintiffs in either case.

33 Canada applies to have the claims struck on the ground that they have no reasonable prospect of success.

34 For the purposes of the motion to strike, we must accept as true the facts pleaded. We must therefore accept that Canada represented to consumers and to tobacco companies that light or mild cigarettes were less harmful, and that these representations were not accurate. We must also accept that consumers and the tobacco companies relied on Canada's representations and acted on them to their detriment.

35 The law first recognized a tort action for negligent misrepresentation in *Hedley Byrne.* Prior to this, parties were confined to contractual remedies for misrepresentations. *Hedley Byrne* represented a break with this tradition, allowing a claim for economic loss in tort for misrepresentations made in the absence of a contract between the parties. In the decades that have followed, liability for negligent misrepresentation has been imposed in a variety of situations where the relationship between the parties disclosed sufficient proximity and foreseeability, and policy considerations did not negate liability.

36 Imperial and the other tobacco companies argue that the facts pleaded against Canada bring their claims within the settled parameters of the [page73] tort of negligent misrepresentation, and therefore a *prima facie* duty of care is established. The majority in the Court of Appeal accepted this argument in both decisions below (*Knight* case, at paras. 45 and 66; *Costs Recovery* case, at para. 70).

37 The first question is whether the facts as pleaded bring Canada's relationships with consumers and the tobacco companies within a settled category that gives rise to a duty of care. If they do, a *prima facie* duty of care will be established: see *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 15. However, it is important to note that liability for negligent misrepresentation depends on the nature of the relationship between the plaintiff and defendant, as discussed more fully below. The question is not whether negligent misrepresentation is a recognized tort, but whether there is a reasonable prospect that the relationship alleged in the pleadings will give rise to liability for negligent misrepresentation.

38 In my view, the facts pleaded do not bring either claim within a settled category of negligent misrepresentation. The law of negligent misrepresentation has thus far not recognized liability in the kinds of relationships at issue in these cases. The error of the tobacco companies lies in assuming that the relationships disclosed by the pleadings between Canada and the tobacco companies on the one hand and between Canada and consumers on the other are like other relationships that have been held to give rise to liability for negligent misrepresentation. In fact, they differ in important ways. It is sufficient at this point to note that the tobacco companies have not been able to point to any case where a government has been held liable in negligent misrepresentation for statements made to an industry. To determine whether such a cause of action has a reasonable prospect of success, we must therefore consider whether the general requirements for liability in tort are met, on the test [page74] set out by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, and somewhat reformulated but consistently applied by this Court, most notably in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

39 At the first stage of this test, the question is whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a *prima facie* duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this *prima facie* duty of care should not be recognized: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129.

(1) Stage One: Proximity and Foreseeability

40 On the first branch of the test, the tobacco companies argue that the facts pleaded establish a sufficiently close and direct, or "proximate", relationship between Canada and consumers (in the *Knight* case) and between Canada and tobacco companies (in both cases) to support a duty of care with respect to government statements about light and mild cigarettes. They also argue that Canada could reasonably have foreseen that consumers and the tobacco industry would rely on Canada's statements about the health advantages of light cigarettes, and that such reliance was reasonable. Canada responds that it was acting exclusively in a regulatory capacity when it made statements to the public and to the industry, which does not give rise to sufficient proximity to ground the alleged duty of care. In the *Costs Recovery* case, Canada also alleges that it could not have reasonably foreseen that the B.C. legislature would enact the *CRA* and therefore cannot be liable for the [page75] potential losses of the tobacco companies under that Act.

41 Proximity and foreseeability are two aspects of one inquiry - the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.

42 Proximity and foreseeability are heightened concerns in claims for economic loss, such as negligent misrepresentation: see, generally, *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210. In a claim of negligent misrepresentation, both these requirements for a *prima facie* duty of care are established if there was a "special relationship" between the parties: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24. In *Hercules Managements*, the Court, *per* La Forest J., held that a special relationship will be established where: (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (2) reliance by the plaintiff would be reasonable in the circumstances of the case (*ibid.*). Where such a relationship is established, the defendant may be liable for losses suffered by the plaintiff as a result of a negligent misstatement.

43 A complicating factor is the role that legislation should play when determining if a government actor owed a *prima facie* duty of care. Two situations may be distinguished. The first is the situation where the alleged duty of care is said to arise explicitly or by implication from the statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the claimant and the government, and is not negated by the statute.

44 The argument in the first kind of case is that the statute itself creates a private relationship of proximity giving rise to a *prima facie* duty of care. It may be difficult to find that a statute creates sufficient proximity to give rise to a duty of care. Some statutes may impose duties on state actors with respect to particular claimants. However, more often, statutes are aimed at public goods, like regulating an industry (*Cooper*), or removing children from harmful environments (*Syl Apps*). In such cases, it may be difficult to infer that the legislature intended to create private law tort duties to claimants. This may be even more difficult if the recognition of a private law duty would conflict with the public authority's duty to the public: see, e.g., *Cooper* and *Syl Apps*. As stated in *Syl Apps*, "[w]here an alleged duty of care is found to conflict with an overarching statutory or public duty, this may constitute a compelling policy reason for refusing to find proximity" (at para. 28; see also *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 39).

45 The second situation is where the proximity essential to the private duty of care is alleged to arise from a series of specific interactions between the government and the claimant. The argument in these cases is that the government has, through its conduct, entered into a special relationship with the plaintiff sufficient to establish the necessary proximity for a duty of care. In these cases, the [page77] governing statutes are still relevant to the analysis. For instance, if a finding of proximity would conflict with the state's general public duty established by the statute, the court may hold that no proximity arises: *Syl Apps*; see also *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401. However, the factor that gives rise to a duty of care in these types of cases is the specific interactions between the government actor and the claimant.

46 Finally, it is possible to envision a claim where proximity is based both on interactions between the parties and the government's statutory duties.

47 Since this is a motion to strike, the question before us is simply whether, assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. On one hand, where the sole basis asserted for proximity is the statute, conflicting public duties may rule out any possibility of proximity being established as a matter of statutory interpretation: *Syl Apps.* On the other, where the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

48 As mentioned above, there are two relationships at issue in these claims: the relationship between Canada and consumers (the *Knight* case), and the relationship between Canada and tobacco companies (both cases). The question at this stage is whether there is a *prima facie* [page78] duty of care in either or both these relationships. In my view, on the facts pleaded, Canada did not owe a *prima facie* duty of care to consumers, but did owe a *prima facie* duty to the tobacco companies.

49 The facts pleaded in Imperial's third-party notice in the *Knight* case establish no direct relationship between Canada and the consumers of light cigarettes. The relationship between the two was limited to Canada's statements to the general public that low-tar cigarettes are less hazardous. There were no specific interactions between Canada and the class members. Consequently, a finding of proximity in this relationship must arise from the governing statutes: *Cooper*, at para. 43.

50 The relevant statutes establish only general duties to the public, and no private law duties to consumers. The *Department of Health Act*, S.C. 1996, c. 8, establishes that the duties of the Minister of Health relate to "the promotion and preservation of the health of the people of Canada": s. 4(1). Similarly, the *Department of Agriculture and Agri-Food Act*, R.S.C. 1985, c. A-9, s. 4, the *Tobacco Act*, S.C. 1997, c. 13, s. 4, and the *Tobacco Products Control Act*, R.S.C. 1985, c. 14 (4th Supp.), s. 3 [rep. 1997, c. 13, s. 64], only establish duties to the general public. These general duties to the public do not give rise to a private law duty of care to particular individuals. To borrow the words of Sharpe J.A. of the Ontario Court of Appeal in *Eliopoulos Estate v. Ontario (Minister of Health and Long-Term Care)* (2006), 276 D.L.R. (4th) 411, "I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals": para. 17. At the same time, the governing statutes do not foreclose the possibility of recognizing a duty of care to the tobacco companies. Recognizing a duty of care on the government when it makes representations to the tobacco companies about the health attributes of tobacco strains would not conflict with its general duty to protect the health of the public.

[page79]

51 Turning to the relationship between Canada and the tobacco companies, at issue in both of the cases before the Court, the tobacco companies contend that a duty of care on Canada arose from the transactions between them and Canada over the years. They allege that Canada went beyond its role as regulator of industry players and entered into a relationship of advising and assisting the companies in reducing harm to their consumers. They hope to show that Canada gave erroneous information and advice, knowing that the companies would rely on it, which they did.

52 The question is whether these pleadings bring the tobacco companies within the requirements for a special relationship under the law of negligent misrepresentation as set out in *Hercules Managements*. As noted above, a special relationship will be established where (1) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation, and (2) such reliance would, in the particular circumstances of the case, be reasonable. In the cases at bar, the facts pleaded allege a history of interactions between Canada and the tobacco companies capable of fulfilling these conditions.

53 What is alleged against Canada is that Health Canada assumed duties separate and apart from its governing statute, including research into and design of tobacco and tobacco products and the promotion of tobacco and tobacco products (third-party statement of claim of Imperial in the *Costs Recovery* case, A.R., vol. II, at p. 66). In addition, it is alleged that Agriculture Canada carried out a programme of cooperation with and support for tobacco growers and cigarette manufacturers including advising cigarette manufacturers of the desirable content of nicotine in tobacco to be used in the manufacture of tobacco products. It is alleged that officials, drawing on their knowledge and expertise in smoking and health matters, provided both advice and directions to the manufacturers including advice that the tobacco strains [page80] designed and developed by officials of Agriculture Canada and sold or licensed to the manufacturers for use in their tobacco products would not increase health risks to consumers or otherwise be harmful to them (*ibid.*, at pp. 109-10). Thus, what is alleged is not simply that broad powers of regulation were brought to bear on the tobacco industry, but that Canada assumed the role of adviser to a finite number of manufacturers and that there were commercial relationships entered into between Canada and the companies based in part on the advice given to the companies by government officials.

54 What is alleged with respect to Canada's interactions with the manufacturers goes far beyond the sort of statements made by Canada to the public at large. Canada is alleged to have had specific interactions with the manufacturers in contrast to the absence of such specific interactions between Canada and the class members. Whereas the claims in relation to consumers must be founded on a statutory framework establishing very general duties to the public, the claims alleged in relation to the manufacturers are not alleged to arise primarily from such general regulatory duties and powers but from roles undertaken specifically in relation to the manufacturers by Canada apart from its statutory duties, namely its roles as designer, developer, promoter and licensor of tobacco strains. With respect to the issue of reasonable reliance, Canada's regulatory powers over the manufacturers, coupled with its specific advice and its commercial involvement, could be seen as supporting a conclusion that reliance was reasonable in the pleaded circumstance.

55 The indicia of proximity offered in *Hercules Managements* for a special relationship (direct financial interest; professional skill or knowledge; advice provided in the course of business, deliberately or in response to a specific request) may not be particularly apt in the context of alleged [page81] negligent misrepresentations by government. I note, however, that the representations are alleged to have been made in the course of Health Canada's regulatory and other activities, not in the course of casual interaction. They were made specifically to the manufacturers who were subject to Health Canada's regulatory powers and by officials alleged to have special skill, judgment and knowledge.

56 Before leaving this issue, two final arguments must be considered. First, in the *Costs Recovery* case, Canada submits that there is no *prima facie* duty of care between Canada and the tobacco companies because the potential damages that the tobacco companies may incur under the *CRA* were not foreseeable. It argues that "[i]t was not reasonably foreseeable by Canada that a provincial government might create a wholly new type of civil obligation to reimburse costs incurred by a provincial health care scheme in respect of defined tobacco related wrongs, with unlimited retroactive and prospective reach" (A.F., at para. 36).

57 In my view, Canada's argument was correctly rejected by the majority of the Court of Appeal. It is not necessary that Canada should have foreseen the precise statutory vehicle that would result in the tobacco companies' liability. All that is required is that it could have foreseen that its negligent misrepresentations would result in a harm of some sort to the tobacco companies: *Hercules Managements*, at paras. 25-26 and 42. On the facts pleaded, it cannot be ruled out that the tobacco companies may succeed in proving that Canada foresaw that the tobacco industry would incur this type of penalty for selling a more hazardous product. As held by Tysoe J.A., it is not necessary that Canada foresee that the liability would extend to health care costs specifically, or that provinces would create statutory causes of action to recover these costs. Rather, "[i]t is sufficient that Canada could have reasonably foreseen in a general way that the appellants would [page82] suffer harm if the light and mild cigarettes were more hazardous to the health of smokers than regular cigarettes" (*Costs Recovery* case, at para. 78).

58 Second, Canada argues that the relationship in this case does not meet the requirement of reasonable reliance because Canada was not acting in a commercial capacity, but rather as a regulator of an industry. It was therefore not reasonable for the tobacco companies to have relied on Canada as an advisor, it submits. This view was adopted by Hall J.A. in dissent, holding that "it could never have been the perception of the appellants that Canada was taking responsibility for their interests" (*Costs Recovery* case, at para. 51).

59 In my view, this argument misconceives the reliance necessary for negligent misrepresentation under the test in *Hercules Managements.* When the jurisprudence refers to "reasonable reliance" in the context of negligent misrepresentation, it asks whether it was reasonable for the listener to rely on the speaker's statement as accurate, not whether it was reasonable to believe that the speaker is guaranteeing the accuracy of its statement. It is not plain and obvious that it was unreasonable for the tobacco companies to rely on Canada's statements about the advantages of light or mild cigarettes. In my view, Canada's argument that it was acting as a regulator does not relate to reasonable reliance, although it exposes policy concerns that should be considered at stage two of the *Anns/Cooper* test: *Hercules Managements*, at para. 41.

60 In sum, I conclude that the claims between the tobacco companies and Canada should not be struck out at the first stage of the analysis. The pleadings, assuming them to be true, disclose a *prima facie* duty of care in negligent misrepresentation. However, the facts as pleaded in the *Knight* [page83] case do not show a relationship between Canada and consumers that would give rise to a duty of care. That claim should accordingly be struck at this stage of the analysis.

(2) Stage Two: Conflicting Policy Considerations

61 Canada submits that there can be no duty of care in the cases at bar because of stage-two policy considerations. It relies on four policy concerns: (1) that the alleged misrepresentations were policy decisions of the government; (2) that recognizing a duty of care would give rise to indeterminate liability to an indeterminate class; (3) that recognizing a duty of care would create an unintended insurance scheme; and (4) that allowing Imperial's claim would transfer responsibility for tobacco products to the government from the manufacturer, and the manufacturer "is best positioned to address liability for economic loss" (A.F., at para. 72).

62 For the reasons that follow, I accept Canada's submission that its alleged negligent misrepresentations to the tobacco industry in both cases should not give rise to tort liability because of stage-two policy considerations. First, the alleged statements are protected expressions of government policy. Second, recognizing a duty of care would expose Canada to indeterminate liability.

(a) *Government Policy Decisions*

63 Canada contends that it had a policy of encouraging smokers to consume low-tar cigarettes, [page84] and pursuant to this policy, promoted this variety of cigarette and developed strains of low-tar tobacco. Canada argues that statements made pursuant to this policy cannot ground tort liability. It relies on the statement of Cory J. in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, that "[t]rue policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors" (p. 1240).

64 The tobacco companies, for their part, contend that Canada's actions were not matters of policy, but operational acts implementing policy, and therefore, are subject to tort liability. They submit that Canada's argument fails to account for the "facts" as pleaded in the third-party notices, namely that Canada was acting in an operational capacity, and as a participant in the tobacco industry. The tobacco companies also argue that more evidence is required to determine if the government's actions were operational or pursuant to policy, and that the matter should therefore be permitted to go to trial.

65 In the *Knight* case, the majority in the Court of Appeal, *per* Tysoe J.A., agreed with Imperial's submissions, holding that "evidence is required to determine which of the actions and statements of Canada in this case were policy decisions and which were operational decisions" (para. 52). Hall J.A. dissented; in his view, it was clear that all of Canada's initiatives were matters of government policy:

> [Canada] had a responsibility, as pleaded in the Third Party Notice, to protect the health of the Canadian public including smokers. Any initiatives it took to develop less hazardous strains of tobacco, or to publish the tar and nicotine yields of different cigarette brands were directed to this end. While the development of new [page85] strains of tobacco involved Agriculture Canada, in my view the government engaged in such activities as a regulator of the tobacco industry seeking to protect the health interests of the Canadian public. Policy considerations underlaid all of these various activities undertaken by departments of the federal government. [para. 100]

66 In order to resolve the issue of whether the alleged "policy" nature of Canada's conduct negates the *prima facie* duty of care for negligent misrepresentation established at stage one of the analysis, it is necessary to first consider several preliminary matters.

(i) Conduct at Issue

67 The first preliminary matter is the conduct at issue for purposes of this discussion. The third-party notices describe two distinct types of conduct - one that is related to the allegation of negligent misrepresentation and one that is not. The first type of conduct relates to representations by Canada that low-tar and light cigarettes were less harmful to health than other cigarettes. The second type of conduct relates to Agriculture Canada's role in developing and growing a strain of low-tar tobacco and collecting royalties on the product. In argument, the tobacco companies merged the two types of conduct, emphasizing aspects that cast Canada in the role of a business operator in the tobacco industry. However, in considering negligent misrepresentation, only the first type of conduct - conduct relevant to statements and representations made by Canada - is at issue.

(ii) Relevance of Evidence

68 This brings us to the second and related preliminary matter - the helpfulness of evidence in resolving the question of whether the third-party claims for negligent misrepresentation should be [page86] struck. The majority of the Court of Appeal concluded that evidence was required to establish whether Canada's alleged misrepresentations were made pursuant to a government policy. Likewise, the tobacco companies in this Court argued strenuously that insofar as Canada was developing, growing, and profiting from low-tar tobacco, it should not be regarded as a government regulator or policy maker, but rather a business operator. Evidence was required, they urged, to determine the extent to which this was business activity.

69 There are two problems with this argument. The first is that, as mentioned, it relies mainly on conduct - the development and marketing of a strain of low-tar tobacco - that is not directly related to the allegation of negligent misrepresentation. The only question at this point of the analysis is whether policy considerations weigh against finding that Canada was under a duty of care to the tobacco companies to take reasonable care to accurately represent the qualities of low-tar tobacco. Whether Canada produced strains of low-tar tobacco is not directly relevant to that inquiry. The question is whether, insofar as it made statements on this matter, policy considerations militate against holding it liable for those statements.

70 The second problem with the argument is that, as discussed above, a motion to strike is, by its very nature, not dependent on evidence. The facts pleaded must be assumed to be true. Unless it is plain and obvious that on those facts the action has no reasonable chance of success, the motion to strike must be refused. To put it another way, if there is a reasonable chance that the matter as pleaded may in fact turn out not to be a matter of policy, then the application to strike must be dismissed. Doubts as to what may be proved in the [page87] evidence should be resolved in favour of proceeding to trial. The question for us is therefore whether, assuming the facts pleaded to be true, it is plain and obvious that any duty of care in negligent misrepresentation would be defeated on the ground that the conduct grounding the alleged misrepresentation is a matter of government policy and hence not capable of giving rise to liability in tort.

71 Before we can answer this question, we must consider a third preliminary issue: what constitutes a policy decision immune from review by the courts?

(iii) What Constitutes a Policy Decision Immune From Judicial Review?

72 The question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled. There is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability. There is also general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties. The problem is to devise a workable test to distinguish these situations.

73 The jurisprudence reveals two approaches to the problem, one emphasizing discretion, the other, policy, each with variations. The first approach focuses on the discretionary nature of the impugned conduct. The "discretionary decision" approach was first adopted in *Home Office v. Dorset Yacht Co.*, [1970] 2 W.L.R. 1140 (H.L.). This approach holds that public authorities should be exempt from liability if they are acting within their discretion, unless the challenged decision is irrational.

[page88]

74 The second approach emphasizes the "policy" nature of protected state conduct. Policy decisions are conceived of as a subset of discretionary decisions, typically characterized as raising social, economic and political considerations. These are sometimes called "true" or "core" policy decisions. They are exempt from judicial consideration and cannot give rise to liability in tort, provided they are neither irrational nor taken in bad faith. A variant of this is the policy/operational test, in which "true" policy decisions are distinguished from "operational" decisions, which seek to implement or carry out settled policy. To date, the policy/operational approach is the dominant approach in Canada: *Just*; *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420; *Swinamer v. Nova Scotia (Attorney General)*, [1994] 1 S.C.R. 445; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

75 To complicate matters, the concepts of discretion and policy overlap and are sometimes used interchangeably. Thus Lord Wilberforce in *Anns* defined policy as a synonym for discretion (p. 754).

76 There is wide consensus that the law of negligence must account for the unique role of government agencies: *Just*. On the one hand, it is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes. On the other hand, "the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions": *Just*, at p. 1239. The challenge, [page89] to repeat, is to fashion a just and workable legal test.

77 The main difficulty with the "discretion" approach is that it has the potential to create an overbroad exemption for the conduct of government actors. Many decisions can be characterized as to some extent discretionary. For this reason, this approach has sometimes been refined or replaced by tests that narrow the scope of the discretion that confers immunity.

78 The main difficulty with the policy/operational approach is that courts have found it notoriously difficult to decide whether a particular government decision falls on the policy or operational side of the line. Even low-level state employees may enjoy some discretion related to how much money is in the budget or which of a range of tasks is most important at a particular time. Is the decision of a social worker when to visit a troubled home, or the decision of a snow-plow operator when to sand an icy road, a policy decision or an operational decision? Depending on the circumstances, it may be argued to be either or both. The policy/operational distinction, while capturing an important element of why some government conduct should generally be shielded from liability, does not work very well as a legal test.

79 The elusiveness of a workable test to define policy decisions protected from judicial review is captured by the history of the issue in various courts. I begin with the House of Lords. The House initially adopted the view that all discretionary decisions of government are immune, unless they are irrational: *Dorset Yacht*. It then moved on to a two-stage test that asked first whether the decision was discretionary and, if so, rational; and asked second whether it was a core policy decision, [page90] in which case it was entirely exempt from judicial scrutiny: *X v. Bedfordshire County Council*, [1995] 3 All E.R. 353. Within a year of adopting this two-stage test, the House abandoned it with a ringing declamation of the policy/operational distinction as unworkable in difficult cases, a point said to be evidenced by the Canadian jurisprudence: *Stovin v. Wise*, [1996] A.C. 923 (H.L.), *per* Lord Hoffmann. In its most recent foray into the subject, the House of Lords affirmed that both the policy/operational distinction and the discretionary decision approach are valuable tools for discerning which government decisions attract tort liability, but held that the final test is a "justiciability" test: *Barrett v. Enfield London Borough Council*, [2001] 2 A.C. 550. The ultimate question on this test is whether the court is institutionally capable of deciding on the question, or "whether the court should accept that it has no role to play" (p. 571). Thus at the end of the long judicial voyage the traveller arrives at a test that essentially restates the question. When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts.

80 Australian judges in successive cases have divided between a discretionary/irrationality model and a "true policy" model. In *Sutherland Shire Council v. Heyman* (1985), 157 C.L.R. 424 (H.C.), two of the justices (Gibbs C.J. and Wilson J.) adopted the *Dorset Yacht* rule that all discretionary decisions are immune, provided they are rational (p. 442). They endorsed the policy/operational distinction as a logical test for discerning which decisions should be protected, and adopted Lord Wilberforce's definition of policy as a synonym for discretion. Mason J., by contrast, held that only core policy decisions, which he viewed as a narrower subset of discretionary decisions, were protected (p. 500). Deane J. agreed with Mason J. [page91] for somewhat different reasons. Brennan J. did not comment on which test should be adopted, leaving the test an open question. The Australian High Court again divided in *Pyrenees Shire Council v. Day*, [1998] HCA 3, 192 C.L.R. 330, with three justices holding that a discretionary government action will only attract liability if it is irrational and two justices endorsing different versions of the policy/operational distinction.

81 In the United States, the liability of the federal government is governed by the *Federal Tort Claims Act* of 1946, 28 U.S.C. ("*FTCA*"), which waived sovereign immunity for torts, but created an exemption for discretionary decisions. Section 2680(a) excludes liability in tort for

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Significantly, s. 2680(h) of the *FTCA* exempts the federal government from any claim of misrepresentation, either intentional or negligent: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), at p. 430; *United States v. Neustadt*, 366 U.S. 696 (1961).

82 Without detailing the complex history of the American jurisprudence on the issue, it suffices to say that the cases have narrowed the concept of discretion in the *FTCA* by reference to the concept of policy. Some cases develop this analysis by distinguishing between policy and operational decisions: [page92] e.g., *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court of the United States has since distanced itself from the approach of defining a true policy decision negatively as "not operational", in favour of an approach that asks whether the impugned state conduct was based on public policy considerations. In *United States v. Gaubert*, 499 U.S. 315 (1991), White J. faulted the Court of Appeals for relying on "a nonexistent dichotomy between discretionary functions and operational activities" (p. 326). He held that the "discretionary function exception" of the *FTCA* "protects only governmental actions and decisions based on considerations of public policy" (at p. 323, citing *Berkovitz v. United States*, 486 U.S. 531 (1988), at p. 537 (emphasis added)), such as those involving social, economic and political considerations: see also *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984).

83 In *Gaubert*, only Scalia J. found lingering appeal in defining policy decisions as "not operational", but only in the narrow sense that people at the operational level will seldom make policy decisions. He stated that "there is something to the planning vs. operational dichotomy - though ... not precisely what the Court of Appeals believed" (p. 335). That "something" is that "[o]rdinarily, an employee working at the operational level is not responsible for policy decisions, even though policy considerations may be highly relevant to his actions". For Scalia J., a government decision is a protected policy decision if it "ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations".

[page93]

84 A review of the jurisprudence provokes the following observations. The first is that a test based simply on the exercise of government discretion is generally now viewed as too broad. Discretion can imbue even routine tasks, like driving a government vehicle. To protect all government acts that involve discretion unless they are irrational simply casts the net of immunity too broadly.

85 The second observation is that there is considerable support in all jurisdictions reviewed for the view that "true" or "core" policy decisions should be protected from negligence liability. The current Canadian approach holds that only "true" policy decisions should be so protected, as opposed to operational decisions: *Just*. The difficulty in defining such decisions does not detract from the fact that the cases keep coming back to this central insight. Even the most recent "justiciability" test in the U.K. looks to this concept for support in defining what should be viewed as justiciable.

86 A third observation is that defining a core policy decision negatively as a decision that is not an "operational" decision may not always be helpful as a stand-alone test. It posits a stark dichotomy between two water-tight compartments - policy decisions and operational decisions. In fact, decisions in real life may not fall neatly into one category or the other.

87 Instead of defining protected policy decisions negatively, as "not operational", the majority in *Gaubert* defines them positively as discretionary legislative or administrative decisions and conduct that are grounded in social, economic, and [page94] political considerations. Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. The decision is a considered decision that represents a "policy" in the sense of a general rule or approach, applied to a particular situation. It represents "a course or principle of action adopted or proposed by a government": *New Oxford Dictionary of English* (1998), at p. 1434. When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

88 Policy, used in this sense, is not the same thing as discretion. Discretion is concerned with whether a particular actor had a choice to act in one way or the other. Policy is a narrow subset of discretionary decisions, covering only those decisions that are based on public policy considerations, like economic, social and political considerations. Policy decisions are always discretionary, in the sense that a different policy could have been chosen. But not all discretionary decisions by government are policy decisions.

89 While the main focus on the *Gaubert* approach is on the nature of the decision, the role of the person who makes the decision may be of assistance. Did the decision maker have the responsibility of looking at social, economic or political factors and formulating a "course" or "principle" of action with respect to a particular problem facing the government? Without suggesting that [page95] the question can be resolved simply by reference to the rank of the actor, there is something to Scalia J.'s observation in *Gaubert* that employees working at the operational level are not usually involved in making policy choices.

90 I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

91 Applying this approach to motions to strike, we may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. If it is not plain and obvious, the matter must be allowed to go to trial.

[page96]

(iv) Conclusion on the Policy Argument

92 As discussed, the question is whether the alleged representations of Canada to the tobacco companies that low-tar cigarettes are less harmful to health are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort.

93 The third-party notices plead that Canada made statements to the public (and to the tobacco companies) warning about the hazards of smoking, and asserting that low-tar cigarettes are less harmful than regular cigarettes; that the representations that low-tar cigarettes are less harmful to health were false; and that insofar as consumption caused extra harm to consumers for which the tobacco companies are held liable, Canada is required to indemnify the tobacco companies and/or contribute to their losses.

94 The third-party notices implicitly accept that in making the alleged representations, Health Canada was acting out of concern for the health of Canadians, pursuant to its policy of encouraging smokers to switch to low-tar cigarettes. They assert, in effect, that Health Canada had a policy to warn the public about the hazardous effects of smoking, and to encourage healthier smoking habits among Canadians. The third-party claims rest on the allegation that Health Canada accepted that some smokers would continue to smoke despite the adverse health effects, and decided that these smokers should be encouraged to smoke lower-tar cigarettes.

95 In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a "true" or "core" policy, in the sense of a course or principle of action that the government [page97] adopted. The government's alleged course of action was adopted at the highest level in the Canadian government, and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

96 Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation. However, since the argument about indeterminate liability was fully argued, I will briefly discuss it. In my view, it confirms that no liability in tort should be recognized for Canada's alleged misrepresentations.

(b) *Indeterminate Liability*

97 Canada submits that allowing the defendants' claims in negligent misrepresentation would result in indeterminate liability, and must therefore be rejected. It submits that Canada had no control over the number of cigarettes being sold. It argues that in cases of economic loss, the courts must limit liability to cases where the third party had a means of controlling the extent of liability.

98 The tobacco companies respond that Canada faces extensive, but not indeterminate liability. [page98] They submit that the scope of Canada's liability to tobacco companies is circumscribed by the tort of negligent misrepresentation. Canada would only be liable to the smokers of light cigarettes and to the tobacco companies.

99 I agree with Canada that the prospect of indeterminate liability is fatal to the tobacco companies' claims of negligent misrepresentation. Insofar as the claims are based on representations to consumers, Canada had no control over the number of people who smoked light cigarettes. This situation is analogous to *Cooper*, where this Court held that it would have declined to apply a duty of care to the Registrar of Mortgage Brokers in respect of economic losses suffered by investors because "[t]he Act itself imposes no limit and the Registrar has no means of controlling the number of investors or the amount of money invested in the mortgage brokerage system" (para. 54). While this statement was made in *obiter*, the argument is persuasive.

100 The risk of indeterminate liability is enhanced by the fact that the claims are for pure economic loss. In *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, the Court, *per* Rothstein J., held that "in cases of pure economic loss, to paraphrase Cardozo C.J., care must be taken to find that a duty is recognized only in cases where the class of plaintiffs, the time and the amounts are determinate" (para. 62). If Canada owed a duty of care to consumers of light cigarettes, the potential class of plaintiffs and the amount of liability would be indeterminate.

101 Insofar as the claims are based on representations to the tobacco companies, they are at first blush more circumscribed. However, this distinction breaks down on analysis. Recognizing a duty of care for representations to the tobacco [page99] companies would effectively amount to a duty to consumers, since the quantum of damages owed to the companies in both cases would depend on the number of smokers and the number of cigarettes sold. This is a flow-through claim of negligent misrepresentation, where the tobacco companies are passing along their potential liability to consumers and to the province of British Columbia. In my view, in both cases, these claims should fail because Canada was not in control of the extent of its potential liability.

(c) *Summary on Stage-Two Policy Arguments*

102 In my view, this Court should strike the negligent misrepresentation claims in both cases as a result of stage-two policy concerns about interfering with government policy decisions and the prospect of indeterminate liability.

D. *Failure to Warn*

103 The tobacco companies make two allegations of failure to warn: B.A.T. alleges that Canada directed the tobacco companies not to provide warnings on cigarette packages (the labelling claim) about the health hazards of cigarettes; and Imperial alleges that Canada failed to warn the tobacco companies about the dangers posed by the strains of tobacco designed and licensed by Canada.

(1) Labelling Claim

104 B.A.T. alleges that by instructing the industry to not put warning labels on their cigarettes, Canada is liable in tort for failure to warn. In the *Knight* case, Tysoe J.A. did not address the failure [page100] to warn claims. Hall J.A., writing for the minority, would have struck those claims on stage-two grounds, finding that Canada's decision was a policy decision and that liability would be indeterminate. Hall J.A. also held that liability would conflict with the government's public duties (para. 99). In the *Costs Recovery* case, Tysoe J.A. adopted Hall J.A.'s analysis from the *Knight* case in rejecting the failure to warn claim as between Canada and the tobacco companies (para. 89). B.A.T. challenges these findings.

105 The crux of this failure to warn claim is essentially the same as the negligent misrepresentation claim, and should be rejected for the same policy reasons. The Minister of Health's recommendations on warning labels were integral to the government's policy of encouraging smokers to switch to low-tar cigarettes. As such, they cannot ground a claim in failure to warn.

(2) Failure to Warn Imperial About Health Hazards

106 The Court of Appeal, *per* Tysoe J.A., held that the third-party notices did not sufficiently plead that Canada failed to warn the industry about the health hazards of its strains of tobacco. Imperial argues that this was in error, because the elements of a failure to warn claim are identical to the elements of the negligence claim, which was sufficiently pleaded.

107 Canada points out that the two paragraphs of the third-party notices that discuss failure to warn only mention the claims that relate to labels, and not the claim that Canada failed to [page101] warn Imperial about potential health hazards of the tobacco strains. Canada also argues that to support a claim of failure to warn, the plaintiff must not only show that the defendant acted negligently, but that the defendant was also under a positive duty to act. It submits that nothing in the third-party notices suggests that Canada was under such a positive duty here.

108 I agree with Canada that the tort of failure to warn requires evidence of a positive duty towards the plaintiff. Positive duties in tort law are the exception rather than the rule. In *Childs v. Desormeaux*, the Court held:

> Although there is no doubt that an omission may be negligent, as a general principle, the common law is a jealous guardian of individual autonomy. Duties to take positive action in the face of risk or danger are not free-standing. Generally, the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved. [para. 31]

Moreover, none of the authorities cited by Imperial support the proposition that a plea of negligence, without more, will suffice to raise a duty to warn: *Day v. Central Okanagan (Regional District)*, 2000 BCSC 1134, 79 B.C.L.R. (3d) 36, *per* Drossos J.; see also *Elias v. Headache and Pain Management Clinic*, 2008 CanLII 53133 (Ont. S.C.J.), *per* Macdonald J. (paras. 6 to 9).

109 Even if pleading negligence were viewed as sufficient to raise a claim of duty to warn, which I do not accept, the claim would fail for the stage-two policy reasons applicable to the negligent misrepresentation claim.

E. *Negligent Design*

110 The tobacco companies have brought two types of negligent design claims against Canada [page102] that remain to be considered. First, they submit that Canada breached its duty of care to the tobacco companies when it negligently designed its strains of low-tar tobacco. The Court of Appeal held that the pleadings supported a *prima facie* duty of care in this respect, but held that the duty was negated by the stage-two policy concern of indeterminate liability. Second, Imperial submits that Canada breached its duty of care to the consumers of light and mild cigarettes in the *Knight* case. A majority of the Court of Appeal held that this claim should proceed to trial.

111 In my view, both remaining negligent design claims establish a *prima facie* duty of care, but fail at the second stage of the analysis because they relate to core government policy decisions.

(1) *Prima Facie* Duty of Care

112 I begin with the claim that Canada owed a *prima facie* duty of care to the tobacco companies. Canada submits that there was no *prima facie* duty of care since there is no proximity between Canada and the tobacco companies, relying on the same arguments that it raises in the negligent misrepresentations claims.

113 In my view, the Court of Appeal correctly concluded that Canada owed a *prima facie* duty of care towards the tobacco companies with respect to its design of low-tar tobacco strains. I agree with Tysoe J.A. that the alleged relationship in this case meets the requirements for proximity:

> If sufficient proximity exists in the relationship between a designer of a product and a purchaser of the product, it would seem to me to follow that there is sufficient proximity in the relationship between the designer of a product and a manufacturer who uses the product in goods sold to the public. Also, the designer of the [page103] product ought reasonably to have the manufacturer in contemplation as a person who would be affected by its design in the context of the present case. It would have been reasonably foreseeable to the designer of the product that a manufacturer of goods incorporating the product could be required to refund the purchase price paid by consumers if the design of the product did not accomplish that which it was intended to accomplish. [*Knight* case, para. 67]

114 The allegation is that Canada was acting like a private company conducting business, and conducted itself toward the tobacco companies in a way that established proximity. The proximity alleged is not based on a statutory duty, but on interactions between Canada and the tobacco companies. Canada's argument that a duty of care would result in conflicting private and public duties does not negate proximity arising from conduct, although it may be a relevant stage-two policy consideration.

115 For similar reasons, I conclude that on the facts pleaded, Canada owed a *prima facie* duty of care to the consumers of light and mild cigarettes in the *Knight* case. On the facts pleaded, it is at least arguable that Canada was acting in a commercial capacity when it designed its strains of tobacco. As Tysoe J.A. held in the court below, "a person who designs a product intended for sale to the public owes a *prima facie* duty of care to the purchasers of the product" (para. 48).

(2) Stage-Two Policy Considerations

116 For the reasons given in relation to the negligent misrepresentation claim, I am of the view that stage-two policy considerations negate this *prima facie* duty of care for the claims of negligent design. The decision to develop low-tar strains of tobacco on the belief that the resulting cigarettes would be less harmful to health is a decision that constitutes a course or principle of action based on Canada's health policy. It was a decision based on [page104] social and economic factors. As a core government policy decision, it cannot ground a claim for negligent design. This conclusion makes it unnecessary to consider the argument of indeterminate liability also raised as a stage-two policy objection to the claim of negligent design.

F. *The Direct Claims Under the Costs Recovery Acts*

117 The tobacco companies submit that the Court of Appeal erred when it held that it was plain and obvious that Canada could not qualify as a manufacturer under the *CRA*. They also present three alternative arguments: (1) that if Canada is not liable under the Act, it is liable under the recently adopted *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 ("*HCCRA*"); (2) that if Canada is not liable under either the *CRA* or the *HCCRA*, it is nonetheless liable to the defendants for contribution under the *Negligence Act*; and (3) that in the further alternative, Canada could be liable for contribution under the common law (joint factum of Rothmans, Benson & Hedges ("RBH") and Philip Morris only).

118 Section 2 of the *CRA* establishes that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco related wrong". The words "manufacture" and "manufacturer" are defined in s. 1(1) of the Act as follows:

> **1** (1) ...
>
> **"manufacture"** includes, for a tobacco product, the production, assembly or packaging of the tobacco product;
>
> [page105]
>
> **"manufacturer"** means a person who manufactures or has manufactured a tobacco product and includes a person who currently or in the past
>
> (a) causes, directly or indirectly, through arrangements with contractors, subcontractors, licensees, franchisees or others, the manufacture of a tobacco product,
>
> (b) for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons,
>
> (c) engages in, or causes, directly or indirectly, other persons to engage in the promotion of a tobacco product, or
>
> (d) is a trade association primarily engaged in
>
> (i) the advancement of the interests of manufacturers,
>
> (ii) the promotion of a tobacco product, or
>
> (iii) causing, directly or indirectly, other persons to engage in the promotion of a tobacco product;

The third-party notices allege that Canada grew (manufactured) tobacco and licensed it to the tobacco industry for a profit, and that Canada "promoted" the use of mild or light cigarettes to the industry and the public. These facts, they say, bring Canada within the definition of "manufacturer" of the *CRA*.

119 Canada submits that it is not a manufacturer under the Act. In the alternative, it submits that it is immune from the operation of this provincial statute at common law and alternatively under the Constitution.

120 For the reasons that follow, I conclude that Canada is not a manufacturer under the Act. Indeed, [page106] holding Canada accountable under the *CRA* would defeat the legislature's intention of transferring the health-care costs resulting from tobacco related wrongs from taxpayers to the tobacco industry. This conclusion makes it unnecessary to consider Canada's arguments that it would in any event be immune from liability under the provincial Act. I would also reject the tobacco companies' argument for contribution under the *HCCRA* and the *Negligence Act*, and the common law contribution argument.

(1) Could Canada Qualify as a Manufacturer Under the *Tobacco Damages and Health Care Costs Recovery Act*?

121 The Court of Appeal held that the definition of "manufacturer" could not apply to the Government of Canada. I agree. While the argument that Canada could qualify as a manufacturer under the *CRA* has superficial appeal, when the Act is read in context and all of its provisions are taken into account, it is apparent that the British Columbia legislature did not intend for Canada to be liable as a manufacturer. This is confirmed by the text of the statute, the intent of the legislature in adopting the Act, and the broader context of the relationship between the province and the federal government.

(a) *Text of the Statute*

122 The definition of manufacturer in s. 1(1) "manufacturer" (b) of the Act includes a person who "for any fiscal year of the person, derives at least 10% of revenues, determined on a consolidated basis in accordance with generally accepted accounting principles in Canada, from the manufacture or promotion of tobacco products by that person or by other persons". Hall J.A. held that this definition indicated that the legislature intended the Act to apply to companies involved in the tobacco industry, and not to governments.

[page107]

123 The tobacco companies respond that the definition of "manufacturer" is disjunctive since it uses the word "or", such that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). Even if Canada is incapable of meeting the definition in (b) of the Act (deriving 10% of its revenues from the manufacture or promotion of tobacco products), Canada qualifies under subparagraphs (a) (causing the manufacture of tobacco products) and (c) (engaging in or causing others to engage in the promotion of tobacco products) on the facts pled, they argue.

124 Like the Court of Appeal, I would reject this argument. It is true that s. 1 must be read disjunctively, and that an individual will qualify as a manufacturer if it meets any of the four definitions in (a) to (d). However, the Act must nevertheless be read purposively and as a whole. A proper reading of the Act will therefore take each of the four definitions into account. It will also consider the rest of the statutory scheme, and the legislative context. When the Act is read in this way, it is clear that the B.C. legislature did not intend to include the federal government as a potential manufacturer under the *CRA*.

125 The fact that one of the statutory definitions is based on revenue percentage suggests that the term "manufacturer" is meant to capture businesses or individuals who earn profit from tobacco-related activities. This interpretation is reinforced by the provisions of the Act that establish the liability of defendants. Section 3(3)(b) provides that "each defendant to which the presumptions [provided in s. 3(2) of the *CRA*] apply is liable for the proportion of the aggregate cost referred to in paragraph (a) equal to its market share in the type of tobacco product". This language cannot be stretched to include the Government of Canada.

126 I conclude that the text of the *CRA*, read as a whole, does not support the view that Canada is a "manufacturer" under the Act.

(b) *Legislative Intention*

127 I agree with Canada that considerations related to legislative intent further support the view that Canada does not fall within the definition of "manufacturer". When the *CRA* was introduced in the legislature, the Minister responsible stated that "the industry" manufactured a lethal product, and that "the industry" composed of "tobacco companies" should accordingly be held accountable (B.C. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 20, 4th Sess., 36th Parl., June 7, 2000, at p. 16314). It is plain and obvious that the Government of Canada would not fit into these categories.

128 Imperial submits that it is improper to rely on excerpts from *Hansard* on an application to strike a pleading, since evidence is not admissible on such an application. However, a distinction lies between evidence that is introduced to prove a point of fact and evidence of legislative intent that is provided to assist the court in discerning the proper interpretation of a statute. The former is not relevant on an application to strike; the latter may be. Applications to strike are intended to economize judicial resources in cases where on the facts pled, the law does not support the plaintiff's claim. Courts may consider all evidence relevant to statutory interpretation in order to achieve this purpose.

(c) *Broader Context*

129 The broader context of the statute strongly supports the conclusion that the British Columbia legislature did not intend the federal government to be liable as a manufacturer of tobacco products. The object of the Act is to recover the cost of providing health care to British Columbians from the companies that sold them tobacco products. As held by this Court in *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49, [2005] 2 S.C.R. 473:

> [T]he driving force of the Act's cause of action is compensation for the government of British Columbia's health care costs, not remediation of tobacco manufacturers' breaches of duty. While the Act makes the existence of a breach of duty one of several necessary conditions to a manufacturer's liability to the government, it is not the mischief at which the cause of action created by the Act is aimed. [para. 40]

The legislature sought to transfer the medical costs from provincial taxpayers to the private sector that sold a harmful product. This object would be fundamentally undermined if the funds were simply recovered from the federal government, which draws its revenue from the same taxpayers.

130 The tobacco companies' proposed application of the *CRA* to Canada is particularly problematic in light of the long-standing funding relationship between the federal and provincial governments with regards to health care. The federal government has been making health transfer payments to the provinces for decades. As held by Hall J.A.:

> If the *Costs Recovery Act* were to be construed to permit the inclusion of Canada as a manufacturer targeted for the recovery of provincial health costs, this would permit a direct economic claim to be advanced against Canada by British Columbia to obtain further funding for health care costs. In light of these longstanding fiscal arrangements between governments, I cannot conceive that the legislature of British Columbia could ever have envisaged that Canada might be a target under the *Costs Recovery Act*. [para. 33]

131 Imperial argues that the only way to achieve the object of the *CRA* is to allow the province to recover from all those who participated in the tobacco industry, including the federal government. I disagree. Holding the federal government accountable under the Act would defeat the legislature's intention of transferring the cost of medical treatment from taxpayers to the tobacco industry.

[page110]

(d) *Summary*

132 For the foregoing reasons, I conclude that it is plain and obvious that the federal government does not qualify as a manufacturer of tobacco products under the *CRA*. This pleading must therefore be struck.

(2) Could Canada Be Found Liable Under the *Health Care Costs Recovery Act*?

133 The tobacco companies submit that if Canada is not liable under the *CRA*, it would be liable under the *HCCRA*, which creates a cause of action for the province to recover health care costs generally from wrongdoers (s. 8(1)). Canada submits that the *HCCRA* is inapplicable because it provides that the cause of action does not apply to cases that qualify as "tobacco related wrong[s]" under the *CRA* (s. 24(3)(b)). RBH and Philip Morris respond that a "tobacco related wrong" under the *CRA* may only be committed by a "manufacturer". Consequently, if the *CRA* does not apply to Canada because it cannot qualify as a manufacturer, it is not open to Canada to argue that the more general *HCCRA* does not apply either.

134 In my view, the tobacco companies cannot rely on the *HCCRA* in a *CRA* action for contribution. While it is true that Canada is incapable of committing a tobacco-related wrong itself if it is not a manufacturer, the underlying cause of action in this case is that it is the defendants who are alleged to have committed a tobacco-related wrong. The *HCCRA* specifies that it does not apply in cases "arising out of a tobacco related wrong as defined in the *Tobacco Damages and Health Care Costs Recovery Act*" (s. 24(3)(b)). This precludes contribution claims arising out of that Act.

[page111]

(3) Could Canada Be Liable for Contribution Under the *Negligence Act* if It Is Not Directly Liable to British Columbia?

135 RBH and Philip Morris submit that even if Canada is not liable to British Columbia, it can still be held liable for contribution under the *Negligence Act*. They argue that direct liability to the plaintiff is not a requirement for being held liable in contribution.

136 As noted above, I agree with Canada's submission that, following *Giffels*, a party can only be liable for contribution if it is also liable to the plaintiff directly.

137 Accordingly, I would reject the argument that the *Negligence Act* in British Columbia allows recovery from a third party that could not be liable to the plaintiff.

(4) Could Canada Be Liable for Common Law Contribution?

138 RBH and Philip Morris submit that if this Court rejects the contribution claim under the *Negligence Act*, it should allow a contribution claim under the common law. They rely on this Court's decisions in *Bow Valley* and *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, in which this Court recognized claims of contribution which were not permitted by statute.

139 I would reject this argument. In my view, the cases cited by RBH and Philip Morris support common law contribution claims only if the third party is directly liable to the plaintiff. In *Bow Valley*, the Court recognized a limited right of contribution "between tortfeasors", and noted that the defendants were "jointly and severally liable to the plaintiff" (paras. 101 and 102). A similar point was made by this Court in *Blackwater* (*per* McLachlin C.J.), which stated that a "common law right of contribution between tortfeasors may exist" (para. 68 [page112] (emphasis added)). There is no support in our jurisprudence for allowing contribution claims in cases where the third party is not liable to the plaintiff.

G. *Liability Under the Trade Practice Act and the Business Practices and Consumer Protection Act*

140 In the *Knight* case, Imperial alleges that Canada satisfies the definition of a "supplier" under the *Trade Practice Act* ("*TPA*") and the *Business Practices and Consumer Protection Act* ("*BPCPA*"). The *TPA* was repealed and replaced by the *BPCPA* in 2004. Imperial argues that the Court of Appeal erred in striking its claim against Canada under these statutes.

141 In my view, Canada could not qualify as a "supplier" under the Acts on the facts pled. Section 1 of the *TPA* defined "supplier" as follows:

> **1** ...
>
> "**supplier**" means a person, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier.

Section 1(1) of the *BPCPA* defines "supplier" as follows:

> **1** (1) ...
>
> **"supplier"** means a person, whether in British Columbia or not, who in the course of business participates in a consumer transaction by
>
>
>
> (a) supplying goods or services or real property to a consumer, or
>
> (b) soliciting, offering, advertising or promoting with respect to a transaction referred to in paragraph (a) of the definition of "consumer transaction",
>
> whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of that person and, except in Parts 3 to 5 *[Rights of Assignees and Guarantors Respecting Consumer Credit; Consumer Contracts; Disclosure of the Cost of Consumer Credit]*, includes a person who solicits a consumer for a contribution of money or other property by the consumer;

142 The Court of Appeal unanimously held that neither definition could apply to Canada because its alleged actions were not undertaken "in the course of business". The court held that the pleadings allege that Canada promoted the use of mild or light cigarettes, but only in order to reduce the health risks of smoking, not in the course of a business carried on for the purpose of earning a profit (*Knight* case, para. 35).

143 Imperial submits that it is not necessary for Canada to have been motivated by profit to qualify as a "supplier" under the Acts, provided it researched, designed and manufactured a defective product. Canada responds that its alleged purpose of improving the health of Canadians shows that it was not acting in the course of business. This was not a case where a public authority was itself operating in the private market as a business, but rather a case where a public authority sought to regulate the industry by promoting a type of cigarette.

144 I accept that Canada's purpose for developing and promoting tobacco as described in the third-party notice suggests that it was not acting "in the course of business" or "in the course of the person's business" as those phrases are used in [page114] the *TPA* or the *BPCPA*, and therefore that Canada could not be a "supplier" under either of those statutes. The phrases "in the course of business" and "in the course of the person's business" may have different meanings, depending of the context. On the one hand, they can be read as including all activities that an individual undertakes in his or her professional life: e.g., see discussion of the indicia of reasonable reliance above. On the other, they can be understood as limited to activities undertaken for a commercial purpose. In my view, the contexts in which the phrases are used in the *TPA* and the *BPCPA* support the latter interpretation. The definitions of "supplier" in both Acts refer to "consumer transaction[s]", and contrast suppliers, who must have a commercial purpose, with consumers. It is plain and obvious from the facts pleaded that Canada did not promote the use of low-tar cigarettes for a commercial purpose, but for a health purpose. Canada is therefore not a supplier under the *TPA* or the *BPCPA*, and the contribution claim based on this ground and the *Negligence Act* should be struck.

145 Having concluded that Canada is not liable under the *TPA* and the *BPCPA*, it is unnecessary to consider whether, if it were, Canada would be protected by Crown immunity.

H. *The Claim for Equitable Indemnity*

146 RBH and Philip Morris submit that if the tobacco companies are found liable in the *Costs Recovery* case, Canada is liable for "equitable indemnity" on the facts pleaded. They submit that whenever a person requests or directs another person to do something that causes the other to incur liability, the requesting or directing person is liable to indemnify the other for its liability. Imperial adopts this argument in the *Knight* case.

147 Equitable indemnity is a narrow doctrine, confined to situations of an express or implied understanding that a principal will indemnify its agent for acting on the directions given. As stated in *Parmley v. Parmley*, [1945] S.C.R. 635, claims of equitable indemnity "proceed upon the notion of a request which one person makes under circumstances from which the law implies that both parties understand that the person who acts upon the request is to be indemnified if he does so" (p. 648, quoting Bowen L.J. in *Birmingham and District Land Co. v. London and North Western Railway Co.* (1886), 34 Ch. D. 261, at p. 275.

148 In my view, the Court of Appeal, *per* Hall J.A., correctly held that the tobacco companies could not establish this requirement of the claim:

> [I]f the notional reasonable observer were asked whether or not Canada, in the interaction it had over many decades with the appellants, was undertaking to indemnify them from some future liability that might be incurred relating to their business, the observer would reply that this could not be a rational expectation, having regard to the relationship between the parties. Likewise, if Canada through its agents had been specifically asked or a suggestion had been made to its agents by representatives of the appellants that Canada might in future be liable for any such responsibility or incur such a liability, the answer would have been firmly in the negative. [*Costs Recovery* case, para. 57]

When Canada directed the tobacco industry about how it should conduct itself, it was doing so in its capacity as a government regulator that was concerned about the health of Canadians. Under such circumstances, it is unreasonable to infer that Canada was implicitly promising to indemnify the industry for acting on its request.

I. *Procedural Considerations*

149 In the courts below, the tobacco companies argued that even if the claims for compensation against Canada are struck, Canada should [page116] remain a third party in the litigation for procedural reasons. The tobacco companies argued that their ability to mount defences against British Columbia in the *Costs Recovery* case and the class members in the *Knight* case would be severely prejudiced if Canada was no longer a third party. This argument was rejected in chambers by both Wedge J. and Satanove J. The majority of the Court of Appeal found it unnecessary to consider the question, while Hall J.A. would have affirmed the holdings of the chambers judges.

150 The tobacco companies did not pursue this issue on appeal. I would affirm the findings of Wedge J., Satanove J. and Hall J.A. and strike the claims for declaratory relief.

V. Conclusion

151 I conclude that it is plain and obvious that the tobacco companies' claims against Canada have no reasonable chance of success, and should be struck out. Canada's appeals in the *Costs Recovery* case and the *Knight* case are allowed, and the cross-appeals are dismissed. Costs are awarded throughout against Imperial in the *Knight* case, and against the tobacco companies in the *Costs Recovery* case. No costs are awarded against or in favour of British Columbia in the *Costs Recovery* case.

Appeals allowed and cross-appeals dismissed with costs.

Solicitors:

Solicitor for the appellants/respondents on cross-appeal (33559-33563): Attorney General of Canada, Ottawa.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Limited (33559): [page117] Hunter Litigation Chambers Law Corporation, Vancouver.

Solicitors for the respondent Her Majesty the Queen in Right of British Columbia (33563): Bull, Housser & Tupper, Vancouver.

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End of Document

Sahyoun v. Ho, [2013] B.C.J. No. 1388

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

P.G. Voith J.

Heard: April 25-26, 2013.

Judgment: June 26, 2013.

Docket: S080713

Registry: Vancouver

[2013] B.C.J. No. 1388 | 2013 BCSC 1143 | 229 A.C.W.S. (3d) 681 | 41 C.P.C. (7th) 231 | 2013 CarswellBC 1922

Between Antonios Nabil Riad Sahyoun, By His Committee and Father, Dr. Nabil Riad Sahyoun, and Mariam Nabil Riad Sahyoun, and Bishoy Nabil Riad Sahyoun., and Mrs. Sanaa Riad Sahyoun, and Dr. Nabil Riad Sahyoun, Plaintiffs, and Dr. Helena Ho, Dr. Anton Miller, Speech and Language Pathologist Elizabeth Payne, Provincial Health Services Authority (doing business as Sunny Hill Health Centre for Children, formerly Sunny Hill Hospital For Children, and doing business as BC Children's Hospital), The University of British Columbia, Speech and Language Pathologist Martha Hilliard, Vancouver Coastal Health Authority, formerly Vancouver Health Department, Her Majesty the Queen In Right of the Province Of British Columbia, as represented by the BC Ministry of Health, Audiologist Margaret Hardwick, Dr. Kevin Farrell, Dr. Jean Hlady, Dr. Fred Kozak, Dr. Keith Riding, Dr. Neil Longridge, Vancouver Coastal Health Authority (doing business as Vancouver General Hospital), Laura Wang, Dr. Brian Westerberg, Providence Health Care (doing business as St. Paul's Hospital), Dr. Jason Chew, Dr. Douglas Graeb, Beverley Underhill, Dr. Jean Moore, Karen Till, Robert Pearmain, Allan McLeod, Donald Goodridge, Carol McRae, Deceased, Kenneth Ronald Bradley McRae, as Representative and Administrator of the Estate of the Deceased Carol McRae, Vancouver Board of Education, formerly Vancouver School Board, Her Majesty the Queen In Right of the Province of British Columbia, as represented by the BC Ministry of Education, David Duncan, BC Legal Services Society, Harinder Mahil, Judith Williamson, Her Majesty the Queen in Right of the Province of British Columbia, as represented by The Attorney General of BC for the former BC Council of Human Rights, Ross Dawson, Cheryl Carteri, Haris Zakouras, Her Majesty the Queen in Right of the Province of British Columbia, as represented by the BC Ministry of Children and Family Development, formerly BC Ministry for Children and Families, Lorill Johl, Gateway Society: Services for Persons with Autism, Detective Constable Ennis, Constable Schaaf, Acting Sergeant Schilling, Constable Lemcke, Sergeant Pike, Constable Green, Vancouver Police Department, City of Vancouver, Her Majesty the Queen in Right of the Province of British Columbia, Defendants

(63 paras.)

Counsel

Appearing on behalf of Mariam Nabil Riad Sahyoun and Bishoy Nabil Riad Sahyoun and on his own behalf: Dr. Nabil Riad Sahyoun.

Appearing on her own behalf: Mrs. Sanaa Riad Sahyoun.

Counsel for the Defendants Dr. Helena Ho, Dr. Anton Miller, Dr. Brian Westerberg, Dr. Keith Riding, Dr. Neil Longridge, Dr. Fred Kozak, Dr. Jean Hlady, Dr. Douglas Graeb: Kim Yee.

Counsel for the Defendant, The University of British Columbia: Erica C.L. Miller.

Counsel for the Defendants, Elizabeth Payne, Sunny Hill Health Centre, Martha Hilliard, Margaret Hardwick, Vancouver Coastal Health Authority, Vancouver General Hospital, Laura Wang, Robert Permain, St. Paul's Hospital, Beverley Underhill, Dr Jean Moore, Karen Till, Allan McLeod, Carol McRae, Donald Goodridge, Lorill Johl, Gateway Society: Services for Persons with Autism: Timothy C. Hinkson, T. Schapiro, A/S.

Counsel for the Defendants, Haris Zakouras, Judith Williamson, Harinder Mahil, Ross Dawson, Cheryl Carteri and HMTQ (British Columbia): Bryant A. Mackey.

Reasons for Judgment

P.G. VOITH J.

Overview

1 These reasons arise out of cross-applications brought by the plaintiffs other than Antonios Sahyoun (the "Plaintiffs") and by many, but not all, of the defendants. The defendants who were involved in the application are identified on the front page of these reasons and fall into four groups: a) 10 different physicians (the "Defendant Physicians"); b) a collection of individuals, health care facilities and authorities, the Vancouver School Board and Gateway Society: Services for Persons with Autism (the "Health and School Defendants"); c) the University of British Columbia; and d) various individuals employed by the Province of British Columbia and the Province of British Columbia.

2 For the purposes of these reasons, I have described these four groups of defendants collectively as the "Defendants" recognizing full well that there are still other defendants named in the action. Though the specific positions of the Defendants vary modestly in some details, I consider that those positions can be expressed collectively.

3 The Defendants seek to compel the plaintiffs to file an amended notice of civil claim which complies with the Supreme Court Civil Rules, B.C. Reg. 168/2009 (the "Rules"). In response to this application, the Plaintiffs seek to file the draft amended notice of civil claim which they have prepared. The Defendants oppose the filing of this pleading on the basis that it continues to suffer from numerous deficiencies and that it does not address the concerns that arise from the Plaintiffs' earlier pleadings.

Background

4 I was appointed to case manage this action in December 2009. There are five plaintiffs. Dr. and Mrs. Sahyoun are the parents of Antonios, Bishoy and Miriam Sahyoun. Bishoy and Miriam have reached the age of majority. Dr. Sahyoun appeared and spoke on their behalf with their authority and without opposition from any party. Mrs. Sahyoun addressed the court on her own behalf.

5 Antonios was born on February 9, 1987. In December 2009, Mr. Justice Bracken declared that Antonios was, as a result of various limitations, incapable of managing himself or his affairs. In that same order, Dr. Sahyoun was appointed committee of the person and the estate of Antonios.

6 On January 31, 2008, this action was brought in the name of Antonios by his committee, Dr. Sahyoun. On January 31, 2008, Master Tokarek declared that the plaintiffs in this action were indigent.

7 The claim against the various Defendant Physicians regarding the plaintiff Antonios is in medical negligence and relates to an alleged delay in the diagnosis and treatment of an ear infection and a misdiagnosis of autism.

8 The action was commenced by writ of summons filed on January 31, 2008. An amended writ of summons was filed on February 7, 2008. A statement of claim was filed on January 2, 2009. A second amended writ of summons was filed on April 14, 2009. An amended statement of claim was filed on April 14, 2009.

9 On October 3, 2011, I stayed the claim brought by Antonios until such time as counsel could be retained for him. As I indicated, Antonios had been represented by his father as litigation guardian, in the absence of counsel, contrary to Rule 20-2(4). The remaining plaintiffs were permitted to proceed with their action.

10 Because the action brought by Antonios was stayed, only the four remaining plaintiffs participated in the present application. My use of the word "Plaintiffs" for the balance of the reasons refers to only these four remaining plaintiffs.

11 In response to various communications from the defendants, an amended notice of civil claim was filed on April 2, 2012. Thereafter, counsel for both the Defendant Physicians and for the Health and School Defendants wrote to the Plaintiffs indicating that their amended pleadings did not comport with the requirements of Rule 3-1. The focus of these concerns related to the fact that the amended notice of civil claim failed to: a) establish or identify which of the plaintiffs were said to have a claim against which defendant, b) identify the nature of the duty, or the legal basis for the duty, that the plaintiffs say various of the defendants owed them, c) describe how that duty or any other cause of action was breached and d) describe the damages or the nature of the damages the individual plaintiffs allege they suffered.

12 The Defendants argue, as I have said, that the Plaintiffs' proposed amended notice of civil claim (the "Proposed Pleading") does not address the concerns that they identified earlier and that it is also deficient in multiple other respects.

13 On February 21, 2013, the Plaintiffs served the Defendants, or some of them, with an unfiled notice of application indicating that they sought an order to file the Proposed Pleading.

14 This action was commenced more than five years ago. It pertains to conduct that dates as far back as 1990. No trial date has yet been set. The Proposed Pleading names 49 defendants. It is 49 pages and 191 paragraphs long. A number of the Defendants intend, if and when the pleadings are closed, to bring a summary trial application.

Analysis

i) The General Objects and Requirements of a Notice of Civil Claim

15 Rule 3-1(2) provides, in part:

> (2) A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the plaintiff against each named defendant;
>
> (c) set out a concise summary of the legal basis for the relief sought;
>
> ...
>
> (g) otherwise comply with Rule 3-7.

16 The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice,* 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at 3-4 - 3-4.1:

> If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their

> natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such...

17 These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

18 I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.

19 A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.

20 In *Keene v. British Columbia (Ministry of Children and Family Development)*, 2003 BCSC 1544, 20 B.C.L.R. (4th) 170, Justice Parrett confirmed that the essential purpose of pleadings is to define the issues, giving the opposing parties notice of the case they have to meet and to provide the "boundaries and the context for effective pre-trial case management, the extent of disclosure required, as well as the parameters or necessity of expert opinions" (para. 27).

21 In *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), a case which is often referred to because of the succinctness and clarity with which it describes the object and required structure of an appropriate pleading, Justice K. Smith, as he then was, said:

> 5 The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: Troup v. McPherson (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

22 Furthermore, notwithstanding the changes in form that are required by the present Rules and by Form 1, certain essential aspects of the structure of pleadings also remain the same. In *Homalco*, Justice Smith described that structure and said:

> 6 A useful description of the proper structure of a plea of a cause of action is set out in J.H. Koffler and A. Reppy, Handbook of Common Law Pleading, (St. Paul, Minn.: West Publishing Co., 1969) at p. 85:
>
>> Of course the essential elements of any claim of relief or remedial right will vary from action to action. But, on analysis, the pleader will find that the facts prescribed by the substantive law as necessary to constitute a cause of action in a given case, may be classified under three heads: (1) The plaintiff's right or title; (2) The defendant's wrongful act violating that right or title; (3) The consequent damage, whether nominal or substantial. And, of course, the facts constituting the cause of action should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, to wit, the right, the wrongful act and the damage.
>
> If the statement of claim is to serve the ultimate purpose of pleadings, the material facts of each cause of action relied upon should be set out in the above manner. As well, they should be stated succinctly and the

> particulars should follow and should be identified as such: Gittings v. Caneco Audio-Publishers Inc. (1988), 26 B.C.L.R. (2d) 349 (C.A.) at 353.

ii) The Need to be Clear and Concise

23 The requirement in Rule 3-1(2), that a notice of civil claim "set out a concise statement of the material facts giving rise to the claim" and "set out a concise summary of the legal basis for the relief sought", are mandatory and directed to promoting clarity. Indeed, the word "concise" is defined in *The Oxford English Dictionary*, 11th ed. Revised, as "giving information clearly and in a few words". Thus, both brevity and lucidity are important.

iii) The Requirement to Identify Material Facts

24 Though the Rules do not define what constitutes a "material fact", that concept is well defined in the case law.

25 A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pled. The foregoing definition of "material fact" was specifically approved by the Court of Appeal in *Skybridge Investments Ltd. v. Metro Motors Ltd.,* 2006 BCCA 500 at para. 9, 61 B.C.L.R. (4th) 241, and in *Young v. Borzoni,* 2007 BCCA 16 at para. 20, 64 B.C.L.R. (4th) 157. That same definition was also referred to and applied by judges of this court in *Budgell v. British Columbia,* 2007 BCSC 991 at para. 8, and in *Micka v*. *Oliver & District Community Economic Development Society,* 2008 BCSC 1623 at para. 9.

26 More recently, in *Jones v. Donaghey,* 2011 BCCA 6, 96 C.P.C. (6th) 10, the court explained that a material fact is one that, when resolved, will have legal consequences as between the parties to the dispute. At para. 18, the court provided that "a material fact is the ultimate fact, sometimes called 'ultimate issue', to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put 'in issue' by the pleadings. Facts that tend to prove the fact in issue, or to prove another fact that tends to prove the fact in issue, are evidentiary or 'relevant' facts". See also *British Columbia Teachers' Federation v. British Columbia,* 2012 BCSC 1722 at paras. 15-17 [*BCTF*].

iv) Particulars

27 At the same time, though the distinction can be difficult to apply, material facts are not particulars. In *McLachlin and Taylor* at 3-6, the authors state:

> There is a distinction between material facts and particulars. A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded. Particulars, on the other hand, are intended to provide the defendant with sufficient detail to inform him or her of the case he or she has to meet. Particulars are provided to disclose what the pleader intends to prove.

28 Rule 3-7(18), which is also relevant in this case, states:

> If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

v) No Evidence

29 Rule 3-7(1) confirms that "[a] pleading must not contain the evidence by which the facts alleged in it are to be proved".

vi) The Relief Sought

30 Rule 3-1(2)(b), to which I referred earlier, requires a notice of civil claim to "set out the relief sought ... against each named defendant".

31 To the extent a plaintiff sues multiple defendants and seeks different forms of relief against those various defendants, such differences must be apparent.

vii) The Legal Basis for the Relief Sought.

32 Historically, it was not necessary to identify by name the cause of action that a plaintiff sought to advance: *Alford v. Canada (Attorney General)* (1997), 31 B.C.L.R. (3d) 228 (S.C.), aff'd [1998] B.C.J. No. 2965 (C.A.). Nor was it necessary for the plaintiff to plead a statute that he or she relied on: *Gold v. Toronto Dominion Bank*, [1998] B.C.J. No. 3074 (S.C.).

33 Neither of these propositions appears to remain valid under the current Rules. Thus, the authors of *McLachlin and Taylor* state at 3-5 and 3-7, respectively:

> ... under Rule 3-1(2)(c) a notice of civil claim must "set out a concise summary of the legal basis for the relief sought". It would appear that where the cause of action is breach of contract, that must be stated as the basis for the relief sought. Similarly, where the cause of action is a nominate tort, the tort must be named. Where the cause of action is negligence, it may not be necessary to identify that as the cause of action, but in that case there would have to be a statement that the legal basis of the claim made is the existence of a duty of care, breach of the duty of care, and damages resulting from the breach of a duty of care.
>
> ...
>
> The requirement under [Rule 3-1(2)(c)] to set out a concise summary of the legal basis for the relief sought means that earlier case law stating that it was not necessary to plead a statute if the material facts giving rise to the right to relief under the statute were pled is no longer applicable in British Colombia.

Deficiencies in the Proposed Pleading

34 The Proposed Pleading is severely deficient. It offends virtually all of the foregoing Rules and requirements of a proper pleading.

35 The Proposed Pleading is extremely prolix. It was fairly described by one counsel as a "running narrative". It contains a great deal of evidence. In those instances where it is possible to discern what cause of action is being advanced, the material facts which would be necessary to establish that cause of action are often absent.

36 Importantly for present purposes, it is not possible to identify which plaintiff asserts what cause of action against which defendant.

37 Broadly speaking, this is apparent in several ways. In many instances, the Proposed Pleading alleges that some wrong was committed against all of the plaintiffs. After I asked Dr. or Mrs. Sahyoun questions, however, it became apparent that not all the plaintiffs were advancing these causes of action. Conversely, other paragraphs purport to pertain to multiple defendants; on questioning, it became clear that only some of the defendants were alleged to have harmed one or more (but not all) of the plaintiffs. An example which captures both of these difficulties is found at paragraph 120 of the Proposed Pleading:

> 120. Moreover, the Defendant the Vancouver Board of Education is vicariously and [severally] liable for the actions and omissions ... of its employees Dr. Jean Moore, Beverley Underhill, Karen Till, Robert Pearmain, Allan McLeod and Donald Goodridge, who obstructed and hindered Antonios's, Miriam's and Bishoy's education, and caused the unlawful and the forceful removal of the three children from their parents' care on November 5, 1998, and caused severe injury, harm, loss, and damages to the Plaintiffs which have and will continue to affect all Plaintiffs for the duration of their lifetimes.

38 Following a series of questions that I posed, it became apparent that Dr. and Mrs. Sahyoun only purport to have a claim against Messrs. McLeod and Goodridge, though this is clearly not apparent from reading paragraph 120.

39 Throughout the application, I repeatedly asked Dr. and Mrs. Sahyoun to identify with precision what cause of action they and/or Bishoy and Miriam purported to advance against which defendant. The very fact that that exercise was necessary speaks to the extent of the problem. The exercise revealed further difficulties.

40 Thus, the position of Dr. Sahyoun changed between the first and second day of the hearing. Furthermore, the positions of Dr. Sahyoun and Mrs. Sahyoun were not entirely consistent. Still further, I explained to Dr. Sahyoun on the first day of the application that some of the conduct he complained of (for example against Dr. Ho, one of the Defendant Physicians) did not appear to ground a cause of action that either he or his wife could advance. On the second day of the application, he announced that he had, overnight, obtained new information against Dr. Ho that would cause him to now add new causes of action to the Proposed Pleading.

41 Portions, but not all, of the Proposed Pleading are structured chronologically. The consequence is that the role of various Defendants and the claims advanced against such defendants are interspersed throughout the pleading.

42 The foregoing difficulties, individually and collectively, make it virtually impossible for the Defendants to either identify or to understand the claims being advanced against them.

43 There were further problems with some of the causes of action that the Plaintiffs wished to advance. The following examples are simply illustrative and not exhaustive of these difficulties.

44 Mrs. Sahyoun repeatedly told me that she had a claim against a particular defendant because that defendant's conduct had somehow affected one of her children and "what affects my children affects me". Though this may be true in the broadest sense, it is not a proposition that can ground a cause of action.

45 In *B.D. (Litigation guardian of) v. Halton Region Children's Aid Society*, [2004] O.J. No. 6196 at paras. 18-21 (S.C.J.), Justice Hoilett referred to various decisions which confirm, for example, that a physician who provides care to a child owes a duty of care to the child and not to the child's parents. Similar principles and limitations would govern claims apparently being made by Dr. and Mrs. Sahyoun against various defendants who are not physicians.

46 The plaintiffs also advanced claims against various defendants because they had "perjured" themselves. In *D.L.H. v. M.J.M.*, 2011 BCSC 1228 at para. 63, Justice Verhoeven confirmed that the criminal offences of perjury and of fabricating evidence do not give rise to a civil claim; see also *Workum v. Olnick*, 2005 BCSC 1262 at paras. 6-11; and *Sahyoun v. Broadfoot* (4 February 2011), Vancouver S084539 (B.C.S.C.) oral reasons at para. 8 [*Broadfoot* 2011]. This last decision is particularly relevant, for reasons that I will come to, because it involved Dr. and Mrs. Sahyoun.

47 The Proposed Pleading also purports to advance various claims as a result of the adverse administrative decisions that were made by various tribunals and tribunal members. Such claims appear to be ill conceived and to constitute impermissible collateral attacks on the decisions that were made; see for example *Budgell* at paras. 23-27; *Shaw Cablesystems Limited v. Concord Pacific Group Inc.*, 2009 BCSC 203 at para. 24, 80 R.P.R. (4th) 163; and *Sahyoun v. Broadfoot*, 2008 BCSC 1836 at paras. 54-55 [*Broadfoot* 2008], var'd on other grounds 2009 BCCA 489. Once again this latter decision is of some import because it involves Dr. and Mrs. Sahyoun.

48 Part 2 of the Proposed Pleading, under the heading "Relief Sought", advances a single, generic prayer for relief by all plaintiffs against all defendants. It includes claims for special as well as punitive, aggravated and general damages. It does not begin to set out the relief that is claimed "against each named defendant". While I do not suggest that such relief must be repeated in rote form against each of 49 defendants, this portion of the pleading must surely signal to a defendant, as well as to the trier of fact, what relief is being claimed against a particular defendant or a particular group of defendants.

49 Part 3 of the Proposed Pleading, under the heading "Legal Basis", lists some 15 legal authorities, 21 statutes, regulations or international conventions, 14 articles from various medical journals and miscellaneous appendices including the 1990 and 1991 Vancouver White Pages. It does not, in any way, tie any of these materials to any particular defendant, though some of the materials, and in particular some statutes, are referred to earlier in Part 1 of the Proposed Pleading.

50 In *BCTF*, Justice Griffin, in the context of an application for particulars, dealt with the required content of Part 3 of a notice of civil claim under the new Rules, and said:

> [14] Starting out with Part 3 of the notice of civil claim itself, I see nothing wrong with the way in which the plaintiff has set out the legal basis for the relief sought. The "Legal Basis" portion of the notice of civil claim is appropriately concise; it commits the BCTF to a cause of action and it adequately informs the Province of the legal foundation of claim.

51 Accordingly, a plaintiff must, in its pleadings, commit to a cause of action and adequately inform the defendant of the legal foundation of its claim. Part 3 of the Proposed Pleading does not begin to achieve these objects; see also *Fletcher v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 554 at paras. 25-27.

52 The current Rules and Form 1 have, as I said earlier, changed the traditional structure of a notice of civil claim. Nevertheless, the need for clarity and coherence persists. In *Homalco*, Justice Smith addressed these requirements and said:

> 9 Nevertheless, Mr. Clark submitted, it is enough if the material facts can be found in the statement of claim and a plaintiff cannot be compelled to prepare it in the conventional form. I cannot agree. A statement of claim must plead the causes of action in the traditional way so that the defendant may know the case he has to meet to the end that clear issues of fact and law are presented for the court. The comments of Thesiger L.J. in Davy v. Garrett (1877), 7 Ch. D. 473 (C.A.) at 488 and 489 are apt here:
>
>> I am disposed to agree with the contention that the mere stating material facts at too great length would not justify striking out a statement of claim. But when in addition to the lengthy statement of material facts we find long statements of immaterial facts, and of documents which are only material as evidence, a Defendant is seriously embarrassed in finding out what is the case he has to meet.
>>
>> ...
>>
>> Now, in any properly constituted system of pleading, if alternative cases are alleged, the facts ought not to be mixed up, leaving the Defendant to pick out the facts applicable to each case; but the facts ought to be distinctly stated, so as to shew on what facts each alternative of the relief sought is founded.

53 At bottom, in a case that involves multiple plaintiffs, multiple defendants and multiple causes of action, it remains necessary for each plaintiff to identify with precision what material facts (not evidence), what causes of action and what relief he or she is advancing against which defendant(s).

54 Neither a defendant nor a trier of fact should have to parse through a notice of civil claim and either cobble together or speculate about what cause of action is being advanced against which defendant.

The Test for Amending Pleadings

55 In *Shaw Cablesystems Limited*, Justice N. Smith said:

> [8] Rule 24(1) allows a party to amend a pleading at any time with leave of the court. Applications for leave to amend should be considered on the same basis as applications to strike existing pleadings. In *Victoria Grey Metro Trust Company v. Fort Gary Trust Company* [(1982)], 30 B.C.L.R. (2d) 45 at page 47 (S.C.) McLachlin J. (as she then was) said:
>
>> ...it seems to me obvious that the court will not give its sanction to amendments which violate the rules which govern pleadings. These include the requirements relating to conciseness (R. 19(1)); material facts (R. 19(1)); particulars (R. 19(11)); and the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious (R. 19(24)). With respect to the latter, it may be noted that it is only in the clearest cases that a pleading will be struck out as disclosing no reasonable claim; where there is doubt on either the facts or law, the matter should be allowed to proceed for determination at trial... While these cases deal with striking out claims already pleaded,

> > consistency demands that the same considerations apply to the question of amendment to permit new claims.
>
> ...
>
> [9] Rule 19(24) reads:
>
> > (24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other documentation on the ground that
> >
> > (a) it discloses no reasonable claim or defence as the case may be,
> >
> > (b) it is unnecessary, scandalous, frivolous or vexatious,
> >
> > (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
> >
> > (d) it is otherwise an abuse of the process of the court,
> >
> > And the court may grant judgment or other the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.
>
> ...
>
> [12] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (B.C.S.C.) at para. 34 Romilly J. said:
>
> > ... as long as the pleadings disclose a triable issue, either as it exists, or as it may be amended, then the issue should go to trial. The mere fact that the case is weak or not likely to succeed is no ground for striking it out under the provisions of Rule 19(24).

56 Although *Shaw Cablesystems Limited* was decided under Rule 19(24) of the old Rules of Court, the present rule, Supreme Court Civil Rule 9-5(1), mirrors its language.

57 The decision in *Victoria Grey Metro Trust Company*, cited in the foregoing quote, is also pertinent in that the court said:

> [2] ... These provisions arguably support a generous approach to the question of amendments. However, the court will not allow useless amendments[.]

Ultimately, *Victoria Grey Metro Trust Company* was overturned as the B.C. Court of Appeal found that the proposed amendments "raise[d] questions which are proper to raise having regard to the origin of the proceeding" ((1982), 30 B.C.L.R. (2d) 50 at para. 4). But the principle articulated - that a useless amendment will not be allowed - still holds.

58 In this case, having regard to the numerous and varied deficiencies in the Proposed Pleading, I am satisfied that it should not be filed. There was some suggestion by some of the Defendants that I ought not to allow the Plaintiffs to redraft the Proposed Pleading. In *The Owners, Strata Plan LMS3259 v. Sze Hang Holdings Inc.*, 2009 BCSC 473 at paras. 40-43, Justice Sinclair Prowse described both the authorities that addressed the circumstances in which a party will not be permitted to redraft pleadings that were struck by the court as well as the conceptual basis for the exercise of that discretion.

59 The notices of application that were filed by the Defendants do not seek any such relief nor do I consider that it would be appropriate, for various reasons, to limit the Plaintiffs' ability to amend and file a proper claim.

60 The courts will, to the extent reasonably possible and depending on the history of a matter, extend some indulgence to a self-represented litigant who is not conversant with the Rules or the law. Such indulgences do not, however, extend to any diminution or impairment of another party's substantive rights. Allowing the Proposed Pleading to be filed, for example, would impair the ability of the Defendants to respond to and defend the claims being made against them. It would render their defence inefficient. It would impede their intended application to strike all or parts of the claims being made against them. An indulgence granted to a self-represented litigant cannot extend this far.

61 Providing the Plaintiffs a further opportunity to prepare a proper claim does not engage these concerns. Having said this, other concerns do arise. In *Broadfoot 2011* and *Broadfoot 2008*, Justices Silverman and Williams, respectively, identified various deficiencies in the pleadings advanced by Dr. and Mrs. Sahyoun. Some of those deficiencies are repeated in the Proposed Pleading. Furthermore, in *Broadfoot 2008,* Justice Williams addressed Dr. and Mrs. Sahyoun's attacks on various administrative decision-makers and observed:

> [80] I reach my conclusion having carefully examined the statement of claim. While it is important to be cautious of allegations that they are really just attacks on the decision dressed up to allege serious bad faith misconduct, the court must bear carefully in mind the test which is to be employed in assessing this application and to which I adverted earlier. It must be assumed that the facts alleged can be proved.

62 These comments resonate in the present case. The Proposed Pleading contains numerous serious allegations of fraudulent misrepresentation, falsification of materials, perjury and malicious behavior on the part of numerous unrelated defendants. It is open to a plaintiff, on a proper basis, to advance some of these matters either independently or in support of an action if a proper foundation exists for the allegation. It is thoroughly wrong to do so for strategic reasons. I have explained to Dr. and Mrs. Sahyoun that they must reflect carefully on what allegations they advance and should be mindful of the sanctions that potentially exist where a claim of this nature is not made out.

63 I am ordering the Plaintiffs to provide the Defendants with a further amended notice of civil claim, which complies with Rule 3-1, within 60 days of receipt of these reasons. That timeframe provides the Plaintiffs ample time to reflect on these reasons and to make the amendments that are required. It also recognizes that the Defendants have been seeking to obtain a proper pleading from the Plaintiffs for many months and that they wish to address the claims being made against them.

P.G. VOITH J.

End of Document

Simon v. Canada (Attorney General), [2015] B.C.J. No. 1122

British Columbia Judgments

British Columbia Supreme Court

Salmon Arm, British Columbia

S.A. Donegan J. (In Chambers)

Heard: January 27, 2015.

Oral judgment: February 27, 2015.

Docket: 4756

Registry: Golden

[2015] B.C.J. No. 1122 | 2015 BCSC 924

Between Zoltan Andrew Simon and Zuan Hao Zhong, Plaintiffs, and Attorney General of Canada and Attorney General of British Columbia, Defendants

(156 paras.)

Counsel

The Plaintiff, Zoltan Andrew Simon, appeared on his own behalf.

No one appeared on behalf of the Plaintiff, Zuan Hao Zhong.

Counsel for Defendant, Attorney General of Canada: T.E. Fairgrieve.

Counsel for Defendant Attorney General of British Columbia: M.A. Witten.

Oral Reasons for Judgment

S.A. DONEGAN J. (orally)

INTRODUCTION

1 Zoltan Simon and his wife have sued the Attorney General of Canada and the Attorney General of British Columbia. In their 72 page notice of civil claim, they seek damages of nearly $10 million as well as various declaratory and other relief.

2 The precise number of proposed or potential causes of action against the two named and various unnamed defendants is difficult to determine. The parties themselves are only able to provide a broad estimate of somewhere between 20 and perhaps 60 various proposed causes of action, although some of the proposed causes are not known to law.

3 The defendants each bring applications pursuant to Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Civil Rules*] seeking to strike the notice of civil claim in its entirety without leave to amend. Both defendants rely upon Rule 9-5(1) (a), (b) and (d), with the Attorney General of Canada placing primary emphasis on subparagraph (d), abuse of process.

4 Mr. Simon, on behalf of both plaintiffs, opposes these applications. In the event that the defendants' applications are successful, he made it very clear that he does not seek leave to amend his pleadings.

5 I have taken a great deal of time since and prior to the oral hearing of this matter to carefully consider the written materials, the oral submissions, the notice of civil claim in its entirety, and the numerous case authorities that all three parties provided, as I recognize that, as "[v]aluable as it is, the motion to strike is a tool that must be used with care." As the Supreme Court of Canada indicated in *R. v. Imperial Tobacco*, 2011 SCC 42, the law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. As I say, the motion to strike is a tool that must be used with care.

BACKGROUND

6 In January of 1999, Mr. Simon signed a sponsorship agreement in support of his then wife, Ms. Reyes, and her sons for immigration to Canada. In the agreement, Mr. Simon undertook to provide for their essential needs. The undertaking he signed included a provision that he would be in default of the undertaking if those he sponsored received social assistance during the validity period of the undertaking. The undertaking also included provisions that any social assistance paid during that period would become a debt owed by Mr. Simon. Any default of the undertaking would prohibit him from sponsoring another person.

7 Unfortunately, within only a few months of her arrival in Canada, Ms. Reyes and Mr. Simon parted ways. Between approximately 2000 and 2005, Ms. Reyes received social assistance benefits from the Province of British Columbia ("British Columbia") in the amount of approximately $38,000.

8 In 2008 and 2009, British Columbia garnished approximately $3,800 from funds standing to Mr. Simon's credit in his tax account with Canada Revenue Agency ("CRA"), on the basis of the sponsorship undertaking. Nothing further has been paid on the outstanding amount.

9 In December of 2006, Mr. Simon married the other plaintiff in this matter, Zuan Hao Zhong, a Chinese citizen. In February of 2007, he applied to Citizenship and Immigration Canada ("CIC"), to sponsor her and her son for immigration to Canada. His application was refused, because he was found to be in default of his previous undertaking.

10 CIC's refusal of his sponsorship application triggered a series of court actions brought by Mr. Simon over the last several years. These unsuccessful actions have been brought in various courts at various levels and in various jurisdictions. This action is the latest in this series.

11 The Attorney General of Canada fairly summarized these various actions at paragraphs 4-13 of its notice of application:

> 4. On October 1, 2007, Mr. Simon brought a Federal Court action, alleging wrongdoing in relation to the Citizenship and Immigration Canada ("CIC") sponsorship forms, British Columbia's provision of social benefits to Ms. Reyes, and CIC's treatment of his application to sponsor Ms. Zhong. On November 7, 2007, Justice Mactavish struck out Mr. Simon's Statement of Claim, because, *inter alia,* he had not yet exhausted his remedies at the IAD.
> 5. On May 27, 2009, Mr. Simon sought an Order for mandamus compelling the IAD to issue a decision. This application was dismissed on September 10, 2009.
> 6. On October 29, 2009, Mr. Simon brought an action in the Supreme Court of British Columbia ("BCSC"), Registry No. S-097926, with allegations similar to his October 2007 Federal Court action. Mr. Simon discontinued this action on May 27, 2010.

> 7. On November 17, 2009, the IAD issued a decision dismissing Mr. Simon's appeal. Mr. Simon brought an application for leave and judicial review to challenge that refusal. The Federal Court dismissed that application on March 30, 2010.
>
> 8. On April 23, 2010, Mr. Simon brought a second action in the Federal Court, again raising similar allegations as in his October 2007 Federal Court action. He sought a declaration that he did not owe a debt to British Columbia under the sponsorship agreement. On June 8, 2010, the Federal Court struck out Mr. Simon's Statement of Claim, without leave to amend. However, the Federal Court of Appeal allowed Mr. Simon's appeal in part, so as to grant leave to Mr. Simon to file an amended statement of claim. The Federal Court of Appeal found that the "propriety of the Canada Revenue Agency's treatment of monies otherwise owing to Mr. Simon unquestioningly falls within the jurisdiction of the Federal Court."
>
> 9. Mr. Simon filed an Amended Statement of Claim on February 17, 2011. The Federal Court again struck this amended claim without leave to amend on May 19, 2011. The Federal Court concluded that Mr. Simon's claim suffered from various defects. Further the Federal Court found that "this claim is one against the BC Provincial Crown" and "[a]ny complaints about the actions of the Federal Crown appear to be ancillary to his main allegations against the BC government". The Federal Court concluded that Mr. Simon's Amended Statement of Claim "does not disclose a reasonable cause of action against the Defendant in respect of the actions of the CRA" and that his pleadings raised the issue of collateral attack on the refusal of the Visa Officer to allow him to sponsor his second wife.
>
> 10. The Federal Court of Appeal upheld this decision, concluding that "B.C.'s assertion of a debt claim against Mr. Simon is at the root of his legal difficulties." Mr. Simon's "Notice of Appeal" to the Supreme Court of Canada was treated as an application for leave to appeal. This application was refused on October 4, 2012.
>
> 11. On May 25, 2012, Mr. Simon brought his third action in the Federal Court against the Ministry of Human Resources and Skills Development, the Registry of the Supreme Court of Canada, and "the federal authority that approved the official website [of the Supreme Court of Canada]", among others. Mr. Simon claimed damages "in lieu of' Canada Pension Plan and Old Age Security benefits because "the authorities have been unwilling to issue any official document regarding a guaranteed amount of his future pension benefits." He also claimed damages against Supreme Court officials in relation to their treatment of documents that he wished to file.
>
> 12. The Federal Court dismissed his claim in two Orders dated July 20, 2012 on the basis that allegations did not disclose a viable cause of action. The Federal Court of Appeal upheld these Orders on February 18, 2014, rejecting Mr. Simon's argument that the judge was biased.
>
> 13. Mr. Simon has attempted to appeal this Federal Court of Appeal decision to the Supreme Court of Canada. He has been informed that his Notice of Appeal will be treated as an application for leave to appeal but that he must provide additional documents. On April 14, 2014, he filed a "Notice of Motion to the Chief Justice or a Judge to state a Constitutional Question". This motion was dismissed on October 23, 2014.
>
> [Footnotes omitted]

12 To this summary I would add that Mr. Simon also commenced an action against British Columbia and a particular Ministry of Justice lawyer in the Provincial Court of British Columbia. In that case, Mr. Simon alleged that the defendants misinterpreted statutes and denied him a reasonable payment plan with respect to the undertaking debt. This action was dismissed in May of 2009.

13 I would also add that a few days ago Mr. Simon's application for leave to appeal in respect of the Federal Court matter was denied by the Supreme Court of Canada.

ISSUES

14 The issues to be considered in these two companion applications are as follows:

1) Does the notice of civil claim fail to disclose a reasonable claim against either or both of the defendants?

2) Are the pleadings against either or both of the defendants unnecessary, scandalous, frivolous or vexatious?

3) Are the pleadings an abuse of process of this court?

4) If the answer to any one of the preceding three questions is "yes", should the plaintiffs be granted leave to amend their pleadings?

ANALYSIS

Pleadings: General

15 Rule 3-1(2) of the *Civil Rules* sets out what a notice of civil claim must do. It provides, in part:

> (2) A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the plaintiff against each named defendant;
>
> (c) set out a concise summary of the legal basis for the relief sought;
>
> ...
>
> (g) otherwise comply with Rule 3-7.

16 Rule 3-7 of the *Civil Rules* provides, in part:

> (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
>
> ...
>
> (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
>
> ...
>
> (14) If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading.

17 The function of pleadings is to clearly define the issues of fact and law to be determined by the court. A plaintiff must state, for each cause of action, the material facts. Material facts are those necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the allegations. By referring to the pleadings, the court will understand what issues of fact and law it will be called upon to decide: *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.) at para. 5.

18 This very basic rule of pleadings involves four separate elements:

1) every pleading must state facts and not merely conclusions of law;

2) it must include material facts;

3) it must state facts and not the evidence by which they are to be proved; and

4) it must state facts concisely in a summary form.

Glaxo Canada Inc. v. Canada (Department of National Health and Welfare) (1987), 15 C.P.R. (3d) 1 at para. 11.

19 A "material fact" was defined by Mr. Justice K.J. Smith in *Jones (Litigation Guardian of) v. Donaghey*, 2011 BCCA 6 at para. 18, as follows:

> [18] ... a material fact is the ultimate fact, sometimes called "ultimate issue", to the proof of which evidence is directed. It is the last in a series or progression of facts. It is the fact put "in issue" by the pleadings.

20 A plaintiff must clearly plead the facts upon which he relies in making his claim. Where a claim is brought by a self-represented litigant, the court should consider amendments to correct defective pleadings. However, it is not the court's role to give advice to a plaintiff about how to cure deficiencies or how to present their claim: *Ahmed v. Assu*, 2014 BCSC 1768 at para. 19.

Rule 9-5(1) Striking Pleadings: An Overview

21 Rule 9-5(1) of the *Civil Rules* provides, in part, as follows:

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> ...
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

22 Rule 9-5(2) of the *Civil Rules* stipulates that:

> (2) No evidence is admissible on an application under subrule (1)(a).

23 I also note that a high onus must be met before a cause of action may be struck under Rule 9-5: *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 at para. 45.

24 It is trite law that before a claim may be struck under Rule 9-5, it must have "no reasonable prospect of success". Stated another way, it must be "plain and obvious" that the cause will fail: *Imperial Tobacco* at para. 17. However, as held by the British Columbia Court of Appeal in *Moses v. Lower Nicola Indian Band* at para. 41:

> [41] ...At the same time, the law must be permitted to evolve. If there is some realistic chance that the cause of action could be 'saved' by a future development, the court should allow the action to proceed. As Chief Justice McLachlin stated in *Imperial Tobacco*:
>
>> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
>
> [Emphasis in original]

25 The Court then confirmed the importance of allowing amendments, writing at para. 41:

> [41] ...Further, if a cause of action requires clarification by an amendment, the court should allow the plaintiff to make such amendment as a condition of dismissing the application under Rule 9-5.

The Notice of Civil Claim: An Overview

26 Mr. Simon and his wife commenced this action in May of 2014, following Mr. Simon's seven-year unsuccessful odyssey through the processes of the Immigration and Refugee Board, its Appeal Division, the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Supreme Court of British Columbia, and the Provincial Court of British Columbia. Many of these courts confronted prolix and confusing pleadings filed by Mr. Simon, leading to successful defence applications to strike. On occasion, guidance and further opportunities were given to Mr. Simon to amend his pleadings. Unfortunately, Mr. Simon's pleadings in the case before me appear to have become even more prolix and convoluted than in the past. To borrow the words of Mr. Justice K. Smith in *Homalco* "to review this notice of civil claim requires a "tortuous analysis" of the document in order to attempt to discern its nature and effect.

27 In this 72-page typed, single-spaced document, it is difficult, if not impossible, to identify what claims the plaintiffs seek to advance against the named defendants. As I indicated at the outset, the parties themselves are unable to provide a clear number of proposed causes of action.

28 I believe the root of Mr. Simon's complaint is the 1999 sponsorship agreement and undertaking that he signed. I can glean from the pleadings that he appears to question the propriety of that document, the propriety of British Columbia's support of his ex-wife and her sons, his obligation to repay those support benefits, and the propriety of the $3,800 that was garnished. Other than these general impressions regarding the genesis of his various complaints, it is difficult to disentangle the myriad of intertwined complaints contained in the notice of civil claim.

29 I will take some time to provide a detailed overview of this document. It is divided into three parts. In Part 1: Statement of Facts, the plaintiffs have written nearly 22 pages outlining Mr. Simon's perception of his dealings with, and wrongs committed by, various persons over the last 15 years. His complaints include accusations against his first wife, his second wife (Ms. Reyes); various provincial and federal government officials including ministers, deputy ministers, and various public servants; government lawyers; court registry staff; administration staff; a number of ambassadors to several different countries; as well as many unnamed persons.

30 Many of the "facts" alleged by the plaintiffs involve convoluted and bizarre assertions of cover-ups, misleading of the courts, judicial bias, conspiracy, fraud, and perjury (to name a few), committed by various named and unnamed persons. Many of these "facts" can be, I think, fairly described as inflammatory arguments. A small sampling of paragraphs from Part 1 will suffice to demonstrate this point:

> 4. The key officials of the Crown that have caused the damages in different torts for the plaintiffs will be called "honourable tortfeasors" below, since it is hard to find a better definition for this group. It includes the ministers of the CIC (Citizenship and Immigration Canada, or Citizenship, Immigration and Multiculturalism): Mr. Monte Solberg (January 2006 to January 3, 2007), Ms. Diane Finley (January 4, 2007 to October 29, 2008), Mr. Jason Kenney (October 30, 2008 to July 14, 2013), and Mr. Chris Alexander (from July 15, 2013); the ministers of Human Resources and Skills [or Social] Development: Ms. Diane Finley (January 2006 to January 4, 2007 and from October 30, 2008 to July 15, 2013); ministers of Department of Justice [Ministers of Justice and Attorneys General]: Mr. Vic Toews (February 6, 2006 to January 3, 2007), Mr. Rob Nicholson (January 4 2007 to July 14, 2013), and Mr. Peter MacKay (since July 15, 2013). The Commissioner and Chief Executive Officer, the head of the CRA, also belongs to this group. Or, rather, the Deputy Commissioner named Mr. Bill Baker who had knowledge of the matters. Further members of this honourable group are Mr. Stephen Harper, Prime Minister, Mr. Wally Oppal (A.G. of BC), Ms. Penelope Lipsack (Counsel to the Government of BC was also involved and even sued by the plaintiff), Mr. Gordon O'Connor and Jean-Pierre Blackburn, both Minister of National Revenue, Ms.

> Sylvia Dalman (CRA), and Ms. Sharon Shanks (Service Canada). On behalf of Ombudsman BC, R. Brown and Ms. Judy Ashbourne may be mentioned. As for the employees of the Registry of the Supreme Court of Canada, Mr. Roger Bilodeau, Ms. Mary Ann Achakji, Ms. Barbara Kincaid, Ms. Nathalie Beaulieu and Mr. Michel Jobidon belong to this group of tortfeasors. Finally, Mr. Daniel Gosselin is a tortfeasor representing the Courts Administration Service. The Attorneys General of Canada and BC have vicarious liability for the acts, errors, and omissions of all these officials listed above.

...

> 99. In a series of legal controversies, the federal administrators unexplainably kept relying on the personal decisions of one or a few provincial administrators that seemed to be unfamiliar with the laws of Canada but were protected by their provincial superiors. The federal and provincial administrators relied on each other's policies and ignored many of the related federal and provincial laws. More than thirty paragraphs or subparagraphs of the (mainly federal) legislation have been knowingly violated by the Crown's servants.

...

> 117. On or about May 24, 2012, the plaintiff received the letter of Ms. Barbara Kincaid, legal counsel for the Registry of the Supreme Court of Canada. She wrote that there was "no automatic right to appeal" in civil cases so the document could not be filed. Thus, she contradicted and contravened the French version of 61. of the *Supreme Court Act* that prescribed automatic appeal (without the application for leave to appeal stage).

...

> 120. On or after June 18, 2012, the plaintiff received the Response of the Crown in the file #34831 that was a deposition into the Registry of the SCC. In it, the Crown's Counsel -- Ms. Wendy Bridges -- kept repeating a false statement, claiming that the plaintiff had had claims only against British Columbia (and not against Canada). Counsel's false statement was determinative for the three judges of the Supreme Court of Canada. They fully relied on her statement while perhaps they did not have time to read the plaintiff's pleadings in full.

...

> 128. During 2012 or 2013, the Plaintiff informed the Head of the Courts Administration Service regarding the long list of torts and unlawful controversies, regarding the lack of procedural fairness, in the whole administration service nationwide. He has not received any answer. (It seems probably that Mr. Gosselin or one of his deputies had orchestrated those torts.)

...

> 137. In about this time, the plaintiff received a copy of a booklet entitled *Representing Yourself in the Supreme Court of Canada*, Volume I (a guide published by Mr. R. Bilodeau, or the Registry of the SCC). The booklet tortuously omits section 61. of the *Supreme Court Act*, just like the official website of the SCC Registry with the step-by-step filing instructions.

...

> 139. Early in 2013, the unprofessional, vague, "Dodonaic" or controversial Order of Mr. Justice Marc Nadon initiated another unfairness. He failed to specify or identify the documents in question by name, and there were several pending motions. The Registry, in bad faith, arbitrarily interpreted his Order and returned too many of those documents to the plaintiff. (Mr. Harper, observing Mr. Nadon's potential usefulness for him, soon appointed Mr. Nadon to the Supreme Court of Canada.)

31 Part 1 also contains lengthy arguments, not material facts, that are based upon an erroneous understanding of the law. As only one example, in arguing that sponsorship agreements generally are invalid all over Canada, the plaintiffs write:

159. About every third sponsored immigrant wants to leave his or her sponsor and become independent a.s.a.p. Thus, the only practical solution for a sponsor to prevent a sponsored person from entering a government office is to lock him or her up as prisoner. (One may imagine a fragile lady that sponsored a 300-lbs heavy man from a Third World country. The man, after landing in Canada, notices hundreds of beautiful women on his city's streets, many of whom are smiling or winking at him. He cannot resist and wants to become independent from his sponsor wife. He applies for benefits in the first office of the Crown. The wife's only solution would have been his forceful confinement, so she could have kept him as her "sex slave" locked up in a room for ten years.) However, ss. 279. (2) (a) of the *Criminal Code* states about forcible confinement, "Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding ten years..." Thus, the cornerstone of the Sponsorship Agreement is a condition that is a punishable offence under the *Code*. Such circumstance makes the plaintiff's Sponsorship Agreement void *ab initio*.

160. Thus, the only 100% effective way for a sponsor to prevent a sponsored person from applying and receiving social assistance is only by committing a crime, an indictable offence. Therefore, due to this *main condition precedent*, the essence of the text on the CIC sponsorship forms is unconstitutional, unlawful and prescribes a physical impossibility. It is typical maxim "*ex turpi causa*" situation that renders the sponsorship agreements invalid, a nullity from the legal and constitutional point of view in cases where the sponsored person has no intention to stay with the sponsor. Please refer to paragraph 4 (3) of the *Immigration Regulations*, *1978* SOR/ 78-172 -- under which the sponsorship agreement was signed in 1999 and under which the default took place in 2000. It states, "The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse." The same *Regulations* adds, under ss. 6.1 (2), "Where a sponsor sponsors an application for landing of a member of the family class described in paragraph *(h)* of the definition "member of the family class" in subsection 2(1) and that member is unable to meet the requirements of the Act and these Regulations or dies, the sponsor may sponsor the application for landing of another member of the family class described in that paragraph."

32 At the conclusion of Part 1, the plaintiffs provide a summary of damages caused by torts of the Crown. Those summaries are contained at paragraphs 167 through 193. They appear as an itemized list of wrongs alleged to have been committed where the plaintiffs have assigned a monetary value for damages:

167 BALLPARK FIGURES FOR THE PLAINTIFF'S

DAMAGES BASED ON THE CRIMINAL CODE:

168. A. False statement related to Crown Counsel $600,000

169. B. Tort of material misrepresentation of the *IRPA* $350,000

170. C.Tort of fraud or false pretences: $100,000 or $700,000 $400,000

171. D. Misfeasance in public office=punitive

damages for 7 yrs separation $2,818,200

172. E. Tort of breach of trust $250,000

173. F. Tort of fraudulent conversion $100,000

174. G. Tort of interference and failure to deliver monies $700,000

175. H. Tort of contravening several Acts of Parliament $300,000

176. I. Tort of fraudulent conspiracy and attempt of conspiracy $700,000

177. J. Tort of mental torture of the plaintiffs by conspiracies $700,000

178. K. Tort of corruption, fraud on government $250,000

179. L. Tort of facilitating terrorist activity against re-victimized sponsors $500,000

180. M. Possession and laundering the proceeds of crime $500,000

181. N. Unjust enrichment of the Crown by using CIC processing fees $ 1,190

182. O. Restitution of the plaintiff's tax credits taken unlawfully in 2008-9 $ 3,542

183. P. Crown's unjust enrichment related to plaintiff's tax returns 2009 -13 $ 12,500

184. Q. The plaintiff's losses due to his wasted travel costs caused by torts $ 14,120

185. R. The plaintiffs' loss due to need to

maintain more than 1 household $ 56,800

186. S. Tort of defrauding the public by deceit $700,000

187. T. Violations of the plaintiff's *Charter* rights, mental suffering $ 55,000

188. U. Plaintiff's losses due to the necessity to declare personal bankruptcy $ 4,800

189. V. Aggravated damages for reduction of life expectancy by 7 years $350,000

190. W. Plaintiff's lost (past and future) earnings if he needs to live abroad $131,500

191. X. The family's damages due to loss of Canadian medical coverage $300,000

192. Y. Plaintiff's losses due to costs, orders and fees paid in 9 court cases $ 9,000

193. **Y. TOTAL LOSSES OF THE PLAINTIFFS CAUSED BY CROWN TORTS $9,806.452**

[Emphasis in original]

33 Part 2 of the notice of civil claim contains the relief sought. Here, the plaintiffs seek various declaratory orders, an order in the nature of mandamus, restitution, and specific amounts for general damages.

34 Part 3 of the notice of civil claim entitled "Legal Basis", is, like Part 1, prolix and convoluted. This part is scattered with various arguments that attempt to fit vague yet serious allegations against a multitude of government, judicial, and legal officials into two broad causes of action: contract and tort, with primary emphasis and argument placed upon the tort claim.

Contract Claim

35 A portion of the plaintiffs' action in contract is found at paragraphs 2-5 of Part 3:

2. The plaintiff's action is framed both in contract and tort. The alleged Crown parties to the alleged contract on which this action is based were the plaintiff and a Minister, apparently the Minister of Immigration (CIC). The action in contract is based on wrongs done to the plaintiff because he has never received a photocopy of that alleged contract.
3. The Crown -- either Canada or BC -- claims that an alleged debt of the plaintiff, in the amount of $38,149.45, arose out of a contract. Thus, the financial subject-matter before this Honourable court is more than thirty-eight thousand dollars. (Due to the unlawful garnishments on two counts, it has decreased to about thirty thousand dollars.) The amount involved here is definitely over $5,000 that is often a threshold in the *Criminal Code*. The two governments are adamant about the magnitude of the amount involved.
4. The plaintiff's wife and stepson had no contract with Canada or BC. However, they are and have been clients of the CIC since February 2007, with an assigned client file number.

5. On or about January 4, 2011, Ms. Zuanhao ZHONG and her son Jianfeng YE, citizens of China, assigned their rights in this action to the plaintiff personally by an official affidavit. It took place in the Guangzhou Notary Public Office in China, by a bilingual affidavit. They authorized Zoltan A. Simon to represent them at any time in any Canadian court, primarily in legal and financial issues related to immigration, human rights, and work permits. Thus, the main plaintiff, Zoltan A. Simon, is bringing the action on behalf of his wife (Ms. Zhong) and himself. The claim on Ms. Zhong's behalf also contains the claim for damages for her son --Jian Feng YE -- while the latter was a minor under her guardianship. Considering that he was a minor until his age of 19 years, based on the laws of Canada, the interval of Ms. Zhong's claim for damages on behalf of Mr. Ye started in April 2007 and ended on October 3, 2010.

Action in Tort

36 The plaintiffs' tort claims are outlined mainly throughout pages 24-67. In these pages, the plaintiffs attempt to categorize and argue various interlocking and overlapping "tort" claims. Paragraphs 7-15 of Part 3 read as follows:

7. The action in tort is complicated to characterize because it partly overlaps with the claims for fraudulent misrepresentation, fraud or false pretences, conversion or theft, abuse of power, misfeasance in a public office, conspiracy, money extortion, etc. These torts are comparable to a pyramid that has been constructed by improper stones or bricks of many different colours. (In our case the different colours are the different torts that interlocking and overlapping with each other. However, studying the stones of a certain colour only, taken out of context as floating in the air, the pyramid-shape would hardly appear.)

8. Since we have a long list of independent and interlocking torts, the plaintiffs have no means to specify and repeat the names of the public servants involved in each individual tort or count. As a general rule, at each tort claim, the so-called "Honourable tortfeasors" indicate or include the following federal ministers: Mr. Stephen Harper, Mr. Rob Nicholson, Mr. Jason Kenney, and Ms. Diane Finley. Please refer to the full list of the Crown tortfeasors' names on page 3 above. All of them acted knowingly, in bad faith, in order to get unlawful gains for the Crown by creating deprivation for the re-victimized sponsors (that had signed their CIC forms before June 28, 2002) -- including the instant plaintiff -- and often ruining the lives of their families. They are the key persons that invented, approved, promoted or/and maintained most of the torts or several systems of tort. Under certain claims below, where the tortfeasors were the employees of the SCC Registry, or administrators of British Columbia, that circumstance will be indicated or emphasized separately.

9. There are and have been, in all material times, five major groups of Crown conspirators as follow:

10. (A) Ms. Wendy Bridges, Counsel, with at least one of her superiors;

11. (B) The top administrators of the CIC, CRA and the federal Ministry of Justice;

12. (C) The top administrators or officials of the RSBC, Ministry of Housing and Social Development of BC, Ministry of Finance of BC, and Ombudsman BC, with some moral support from the BC Ministry of Justice;

13. (D) The top officials or administrators of the FC/ FCA Registry in Edmonton, with the moral support of the Courts Administration Service;

14. (E) The administrators of the SCC Registry, including Mr. Bilodeau and one of his superiors.

15. In our case, the entire structure of the Crown's policies and tricks is false and unlawful. One cannot study only one of them absolutely separately from the other torts, taken out of context.

37 The plaintiffs then go on to discuss these tort claims. Again, only a small sample of these pleadings is required to exemplify their inappropriate, prolix, and convoluted nature.

Fraudulent Misrepresentation

38 The plaintiffs discuss a nationwide tort involving a governmental "pyramid of power" at paragraphs 18, 19, and 20 of Part 3:

> 18. In the case at bar, the plaintiffs respectfully submit, the issues are related to a pyramid of power that has been carefully designed by the honourable tortfeasors by several unlawful elements. One cannot say that several such pyramids of power have been built by the Crown, totally independently from each other.
>
> 19. A person with reasonable mind cannot imagine that tens of thousands of public servants revolted simultaneously from the laws of Canada as a "grassroots movement." The Government of Canada would have notified the media regarding such problem. Also, one cannot imagine such grassroots movement, revolt, or conspiracy of the Cabinet's ministers against the Prime Minister of Canada. The media would have informed the country about such thing, and the P.M. would have ordered them to resign.
>
> 20. Therefore, a reasonably thinking average Canadian can assume that the pyramid of power is associated with the person of the Prime Minister that must have known about the existence of such nationwide torts in four of his federal ministries. He may state or swear by an affidavit that he had zero knowledge of such ongoing torts between 2006 and 2014. Or, he may show an official paper issued by his family doctor stating, say, that he had suffered by brain tumor or bipolar disorder during those years. Canadians may accept such circumstance as an explanation but they are entitled to challenge the ministers' unlawful actions and omissions that have turned Canada upside down, so to speak.

39 The plaintiffs then seek to draw an analogy between their claims and the Nuremberg Trials at paragraph 21:

> 21. However, people should keep in their minds the Nuremberg Trials for the prosecution of prominent members of the political, military, and economic leadership of Nazi Germany. Hitler committed suicide but his ministers were prosecuted. If that trial was based on legal foundations and principles -- and few people doubt that -- a somewhat similar conspiracy of Canadian ministers against innocent citizens may be and shall be prosecuted as well although they did not institute gas chambers for the re-victimized sponsors.

40 The plaintiffs then go on to outline a "bad faith element" where, with no factual foundation, the plaintiffs plead the existence of a wide-ranging cover-up at paragraph 23:

> 23. The bad faith element is clear and obvious from the extents of the torts as nationwide, during eight years (2006 to present), involving more and more cover-ups or larger and larger cover-ups through increasing oppression placed on the plaintiffs and the civil servants involved. The peak of such cover-ups is the heavy pressure on the administrators in several court registries, also the undue pressure placed on many federal judges in order to stop the plaintiff's appeals and proceedings in general, mainly by refusing to file documents that may hurt the Harper Government's reputation.

41 Under the heading "False Statements", the plaintiffs allege that a government lawyer made deliberately false or misleading statements before the Supreme Court of Canada, arguing that such conduct amounts to perjury or obstruction of justice. Again, with no factual foundation pleaded, the plaintiffs assert that this lawyer acted somehow not of her own free will. Paragraph 40 in Part 3 reads:

> 40. The plaintiff claims that Counsel representing Her Majesty the Queen in Right of Canada made and deposited a misleading statement in the SCC Registry on or about June 18, 2012 in her printed Response pleadings. The deliberately false or misleading representations or declarations of Crown Counsel -- Ms. Wendy Bridges -- before the Supreme Court of Canada, by commission or omission, the plaintiff respectfully submits, should be determinative. Although the plaintiff is certain that Ms. Bridges is/has been a person with high personal integrity, honesty and goodwill, obviously she has been under a tremendous pressure of her superior(s) that instructed or

> pressured her toward the last-ditch effort of the Crown, namely to make a false statement by affidavit or deposition. Subsection 131.(1) of the *Criminal Code* refers such false or misleading statements, whether by affidavit, under oath, or by deposition. The plaintiff submits that Counsel committed such indictable offence under ss. 131. (1) by knowingly making such false statement.

42 As with several other of these type of claims, the plaintiffs then go on to calculate a specific amount for damages as a result of this alleged "false statement". This is done by some method of translating *Criminal Code* sentencing ranges into monetary awards.

43 Paragraph 75 appears to summarize some or all of the allegations identified by the plaintiffs as tort claims. It reads:

> 75. The plaintiffs respectfully submit that in the case at bar the federal and provincial Crown(s) were cheating and defrauding deliberately dishonestly to the prejudice of their and the re-victimized sponsors' proprietary rights through a sophisticated tort system and conspiracy and extortion, by preventing the plaintiffs to defend themselves before a Court of competent jurisdiction before garnishment, and creating insurmountable obstacles for the unification of their family.

44 As I have indicated, many of the "causes of action" that are pleaded are not known to law, including:

1) the torts of contravening several acts of Parliament;
2) the torts of interference and failure to deliver monies;
3) the torts of fraudulent conversion;
4) the torts of mental torture by the plaintiff by conspiracies; and
5) the tort of defrauding the public by deceit.

45 As well, the plaintiffs allege numerous violations of the *Criminal Code* against various individuals who are not named as defendants. These allegations include money laundering, torture, perjury, obstruction of justice, and terrorist activities on the part of various government and other officials, to name a few. These are spurious allegations that are not supported by any pleaded material facts and are not properly raised in a civil action.

46 I also note that, throughout Part 3, the plaintiffs rely upon at least 40 statutes, many of which could have no possible bearing on this case. For example, under the "tort claim" identified as the "*contra proferentem* rule - released from liability", the plaintiffs refer to the Laws of Hammurabi, King of Babylonia. At paragraph 86, in reference to those laws, the plaintiffs argue that "a man is not responsible for the debts created by his wife". Paragraph 86 reads as follows:

> 86. The laws of Hammurabi, king of Babylonia (r. 1848-1805 BC), recorded that a man is not responsible for the debts created by his wife. This principle has been accepted universally and it is valid in our days world-wide. If the CIC or the CRA wishes to challenge such massively established international common law, they must produce some good legal argument to this Honourable Court.

47 As another example, under the "tort claim" identified as "mental torture by conspiracies and an extortion scheme", the plaintiffs allege that several public servants, most unnamed, have participated in the long-lasting mental torture of Mr. Simon, and this can be found at paragraph 166 under Part 3 of the notice of civil claim:

> 166. The In the case at bar, torture by a conspiracy and fraudulent money extortion scheme is associated with *mental torture*. Several public servants (ministers, officers and administrators of the federal Crown) participated in the long-lasting mental torture of the plaintiff. Their degree of involvement and the cruelty of each participant may have been different. The plaintiff does not know the details and the names, only the devastating effects. An exception is the mental torture caused by the false testimony of Ms. Bridges at the SCC for which the details are shown under that claim (Perjury or False Testimony). Perhaps the most heinous crime was the mental torture committed by the administrators of

> the FCA Registry in Edmonton. Between 2012 and 2014, they committed seven major errors against the plaintiff, probably by following the oral orders issued by the Head Office of the Courts Administration Service. The purpose of such conspiracy was to break the plaintiff mentally and spiritually, so he would give up his legal actions and quit for good.

48 Under this same "tort claim", paragraph 168 provides a good example of a highly improper pleading:

> 168. The plaintiff often feels fits of anger and anguish. For example, the seven cowardly administrative tortures during the seven (or so) procedural steps in the federal court system made him so furious that he often felt like being able to murder any public servant or become a terrorist -- a mental syndrome. He has lost his identity as a good Canadian citizen that had always respected the government and its public servants everywhere.

49 The impropriety of these pleadings might best be exemplified in the section entitled "A concise summary of the legal basis for the relief sought" found at paragraphs 234-237 of Part 3:

> 234. It is not beyond all doubt that the plaintiffs' claim is clearly impossible to success. British Columbia is under a Liberal government that is careful in observing the laws of Canada and the Province. The court system of BC is not as corrupt as the federal one, particularly keeping the Courts Administration Service in mind. It is not certain that this matter would get into the hands of judges that are corrupt, biased, or not independent. Therefore, the plaintiffs respectfully submit that they have more than a scintilla of chance to succeed.
>
> 235. By and large, the (Conservative) Crown's typical tricks are as follow: Through silencing and eliminating a paragraph "A" that a minister or a registrar does not like while arbitrarily extrapolating a bit similar paragraph "B" beyond logic, against the *Interpretation Act*. The final result is that paragraph "A" disappears and the modified paragraph "B" is exactly the opposite of the original purpose of paragraph "A." Thus, the minister defeats the legislation and Parliament's will by fraud.
>
> 236 In the case at bar, the Crown (CIC, CRA, and RSBC) eliminates section 146. of the *IRPA* while misinterprets its section 145. (3) by unlawful extrapolation. Similarly, the Registrar of the SCC and his administrators eliminate section 61. of the *Supreme Court Act* and unlawfully extrapolate its ss. 40. (1). By doing this, they arbitrarily add a condition (automatic appeal applies in certain criminal cases only) and remove a condition (that when errors in law are alleged, the appeal is automatic).
>
> 237. In addition, the Registrar of the SCC ignores and contravenes s. 52. of the *Supreme Court Act*, "52. The Court shall have and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada, and the judgment of the Court is, in all cases, final and conclusive." The Registrar is not a judge but he usurps the role of the SCC and asserts that the last word belongs to him. In other words, he acts as he would be the "exclusive ultimate appellate" jurisdiction in Canada: a major fraud. His fraud and the conspiracy in his Registry makes Canada seem like an airplane flying upside down.

50 These paragraphs are followed by complex diagrams purporting to depict the various interconnected allegations made in the notice of civil claim, again all of which is not, in my view, supported by any pleaded material facts.

Issue #1 - Rule 9(1)(a) of the *Civil Rules*

51 Do the pleadings fail to disclose a reasonable claim against either or both of the defendants?

52 As I indicated at the outset, the test for striking a pleading on the basis that it discloses no reasonable claim is set out in *Imperial Tobacco*. A claim will only be struck if it is plain and obvious, assuming the facts pleaded are true, that the pleading discloses no "reasonable cause of action", has no "reasonable prospect of success", or if it is "certain to fail".

53 If there is a chance the plaintiff might succeed, he or she should not be "driven from the judgment seat": *Ahmed* at para. 16.

54 The rule that material facts in the notice of civil claim must taken as true requires explanation, particularly in a case like this where the notice of civil claim is replete with assumptions, speculation, and in some instances, outrageous allegations. The law is clear that allegations based on assumption and speculation need not be taken as true. In *Willow v. Chong*, 2013 BCSC 1083, Madam Justice Fisher provided a concise summary of the law in this area at para. 19:

> [19] The rule that material facts in a notice of civil claim must be taken as true does not mean that allegations based on assumption and speculation must be taken as true. This was discussed in *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, where Dickson J. (as he then was) stated that "[n]o violence is done to the rule where allegations, incapable of proof, are not taken as proven". In *Young v Borzoni*, 2007 BCCA 16, the court stated (at paras. 30-31) that great caution must be taken in relying on *Operation Dismantle* as a general authority that allegations in pleadings should be weighed as to their truth, but it is not fundamentally wrong to look behind allegations in some cases, and it may be appropriate to subject the allegations in the pleadings to a sceptical analysis. It was considered appropriate in *Young*, where the plaintiff made sweeping allegations of things like intolerance, deceit, harassment, intimidation and falsifying documents against the defendants, which the court concluded could only be viewed as speculation.

55 Mr. Justice Rogers put it another way, to the same effect, in *Gill v. Canada*, 2013 BCSC 1703 at para. 7:

> [7] Rule 9-5(2) stipulates that no evidence is admissible in the context of an application under Rule 9-5(1)(a). Another way of putting this stipulation is that the court should assume that the facts [pleaded are] true as it considers whether those facts disclose a reasonable claim. A common sense exception to this stipulation exists when the pleadings assert some bizarre or impossible proposition. The purpose of Rule 9-5(1)(a) is to ensure that the parties and the court have a clear understanding of the nature of the claims advanced. A clear understanding of the claims will allow the parties to efficiently litigate the issues and will allow the court to make considered and judicious findings on those issues. Prolix, convoluted, and incomprehensible pleadings do not lend themselves to permit in the parties to achieve a clear understanding of the claims advanced. Further, a party pleading a particular type of claim must, at a minimum, plead assertions of fact which, if proven, would establish the essential elements of a successful claim.

56 It is apparent that this notice of civil claim suffers from many defects and deficiencies, many of which I have highlighted already. In my view, it is plain and obvious that the action against both defendants cannot succeed.

57 First, the pleadings fail to satisfy their basic purpose. The issues are not defined. There is no concise statement of material facts that are necessary to support any complete cause of action. Instead of pleading material facts, the plaintiffs have filed a lengthy, rambling, at some points bizarre narrative filled with irrelevant information, sweeping allegations against named and unnamed persons based upon assumptions and speculation, with scattered references to legislation bearing no relevance to the remedies that are sought.

58 Second, a number of potential causes of action are pleaded that are unknown to the law. They are not, in my view, the type of novel but arguable claims as described in the case law such that they should be allowed to proceed to trial.

59 Third, insofar as I can identify any potential causes of action known to law against either or both of the defendants, they appear to include a claim in contract, an overall claim in tort, and a claim based upon unjust enrichment. The tort claim involves a complex combination of various "torts", including perhaps, negligence, breach of statutory duty, misfeasance of public office, and conspiracy. I will address all of these, but I will say that overall my conclusions about all of the plaintiffs' claims are similar to those found by Associate Chief Justice Cullen in *Fowler v. Canada (Attorney General)*, 2012 BCSC 367. I find that the plaintiffs have failed to plead material facts in support of each element of these claims. Any of the claims raised rely upon the plaintiffs' lengthy and argumentative narrative in which it is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from that of another, or conjecture and opinion from the asserted facts: *Fowler* at para. 54. In my view, none of these claims disclose any reasonable cause of action, specifically a contract claim.

1. Contract Claim

60 As I have outlined, the pleadings in support of this claim are conclusory statements with no factual foundation. The terms of any contract has not been pleaded, nor has what or whose conduct is said to constitute a breach.

2. Tort Claim

61 The plaintiffs' allegations against the CRA are articulated best at paragraphs 56-152 of Part 1, where it is asserted that unnamed Crown servants, "wrongfully, knowingly, by tortious conduct, released funds or monies from the 2007 and 2008 tax credits of the plaintiff for the Revenue Services of British Columbia."

62 This bare assertion is insufficient. The plaintiffs do not specify what or whose conduct was tortious. The plaintiffs do not specify what tort any such conduct would constitute. It is plain and obvious that this general tort claim is bound to fail.

(a) Negligence

63 Reading the pleadings as generously as possible, one may perhaps discern an action in negligence attempting to be pleaded. References to negligence are found throughout the document. For example, at Part 3, paragraph 25, the plaintiffs allege that the Government of Canada, the Minister of Immigration and/or Minister of Justice had a duty to use reasonable care in the preparation of printed CIC forms.

64 Further, at paragraph 55 of Part 1, the plaintiffs allege that the BC Ministry of Housing and Social Services wrongfully converted funds from Mr. Simon's tax account, such conversion taking place in the CRA. The pleadings allege that Mr. Simon thought the CRA owed him a duty of care just like a chartered bank and that the plaintiff relied to his detriment on "the CRA as an agency that knew and obeyed the laws of Canada."

65 Similarly, at paragraph 63 of Part 3, the plaintiffs allege that the directors of the CRA involved in this case and the Commissioner of Revenue "failed to exercise a reasonable standard of care, diligence and skill towards the public."

66 One can also see at paragraph 93 of Part 3, after alleging that Crown servants of the federal ministries and the British Columbia ministries or agencies are parties to various crimes, the plaintiffs appear to raise a claim in negligence:

> 93. Even if an Honourable Court would conclude that the ministers and their agents and administrators were only negligent, since they markedly departed from the standard of care required, the fact remains that their superiors -- the ministers -- involved were faulty and malicious, not only negligent. A perpetual system of governmental cover-ups for more than seven years cannot be called mere negligence. They did not participate in those cover-ups negligently. Rather, their participation was a state of art, a very carefully designed system of torts and fraud. But a "Swiss watch" of torts is still a tort. The more sophisticated is the least foolproof.

67 At paragraph 126 of Part 3, the plaintiffs allege criminal wrongdoing by "[a]n unnamed officer or employee of the Government of Canada" in relation to his or her dealings with an immigration officer. The plaintiffs go on to claim it was negligence on the immigration officer's behalf not to investigate the status of the debt claim.

68 The necessary elements that must be established or found in an action in negligence are well known. They are:

1) a duty of care owed by the defendant to the plaintiff;

2) a breach of the duty of care by a failure to exercise the standard of care of a reasonable and careful person in the circumstances; and

3) the plaintiff suffered damages as a result of the breach.

Fowler at para. 24.

69 No particulars of an alleged duty of care are pleaded. No particulars of who specifically might owe this duty to the plaintiffs and by what conduct a breach of such duty occurred is pleaded. The plaintiffs have failed to plead material facts in support of each element of this claim. It is plain and obvious this claim discloses no reasonable cause of action and is bound to fail.

(b) Breach of Statutory Duty

70 The notice of civil claim includes a section entitled "Claim for breach of trust". No material facts are pleaded in support of this claim. A generous reading of this section, in conjunction with other sections, including the one entitled "Charge for contravening several Acts of Parliament", might perhaps be interpreted to mean that the plaintiffs are alleging a breach of statutory duty. Even so, it is not a cause of action. As Mr. Justice Verhoeven noted in *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 35, quoting Madam Justice McLachlin in *Holland v. Saskatchewan*, 2008 SCC 42:

> [35] To the extent that the plaintiffs allege breach of statutory duty, without more (as in paras. 12, 17(c), and 17(i) of the amended statement of claim), that is not a cause of action. As stated by McLachlin C.J.C. in *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9:
>
>> The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence: *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. The proper remedy for breach of statutory duty by a public authority, traditionally viewed, is judicial review for invalidity. The appellant pursued this remedy before Gerein C.J.Q.B. and obtained a declaration that the government's action of reducing the herd certification status was unlawful and invalid. No parallel action lies in tort.

71 Indeed, in this case Mr. Simon did pursue judicial review in respect of some of the decisions made in his case. He has been unsuccessful. In my view, it is plain and obvious that the claim discloses no reasonable cause of action and is bound to fail.

(c) Misfeasance of Public Office

72 The plaintiffs also advance a claim for misfeasance of public office, which is found primarily at paragraphs 117-124 in Part 3. The plaintiffs' argument, and it is properly classified as argument, in support of such a cause of action can be seen at paragraphs 118(a)-(c) and 119:

> 118. Misfeasance in public office is an intentional tort. The tort is meant to provide a measure of accountability for public officials who do not exercise their duties of office in good faith. To make out this tort, the instant plaintiffs are demonstrating the four elements as follow:
>
> (a) The public officials deliberately engaged in unlawful conduct in the exercise of public functions. Namely, the ministers responsible for the lawful operation of the CRA and the CIC knowingly issued unlawful policies (*IP 2* and *MuO*) in 2006), in order to mislead the public servants. They forced all of their employees to follow those rules while ignore the relevant legislation (the *IRPA* and its *Regulations*, the *Interpretation Act*, federal and provincial legislation related to garnishment, the laws regarding limitation of acts, etc.);
>
> (b) The public officials, including the ministers mentioned above plus the Minister of Justice, the minister responsible for Service Canada, and the Minister of Housing and Social Development, etc. (of BC) were aware since 2006 that the conduct was unlawful and was likely to injure the plaintiff and their class: the re-victimized sponsors. They admitted in print that the said two policies, at least the *MoU*, may not be valid before a Court. They indicated in the IMM 1344 C (02-98) E or/and IMM 1344 B (02-

98) E forms that a court may -- and probably would -- find certain parts of the CIC sponsorship undertaking forms unlawful or unconstitutional and, therefore, severable from the agreements. [Please note that the severability clause seems to be missing from the modern versions of those forms.] The Minister of Justice knew that the *IRPA* prescribed the operation of a filing system in the Federal Court in order to keep track of sponsorship debts. However, he ignored the law and allowed or encouraged his employees to do the same by skipping the involvement of any Court in real practice. The plaintiff kept informing the top officials of Canada and BC about their unlawful policies. The leaders of Service Canada and its Minister knowingly intimidated the plaintiff by the false claim that his CPP pension benefits may be garnisheed before the involvement of any court. This was a conspiracy between Ms. Sharon Shanks and Minister Diane Finley. In a similar case, the Court ordered the Crown to pay Mr. Longley $55,000 in damages although there was no coercion or intimidating element: *Longley v. Canada (Minister of National Revenue)*, 1999, [1999] B.C.J. No. 1705, In the instant case at bar the silence of the CRA was intimidating, with the aim of coercion in order to get the monies of the concerned plaintiff by misquoting the laws. The plaintiffs submit that an item of $55,000 would apply in this case as shown in the table above.

The officials of the four ministries involved acted dishonestly, in bad faith. As Iacobucci J. said in *Odhavji*, public officials who deliberately engage in conduct that they know to be inconsistent with the obligations of their office risk liability for the tort;

(c) The public officials' tortious conduct was the legal cause of the plaintiffs' injuries. Namely, they conduct influenced the Immigration Officer in Hong Kong in the refusal to grant temporary resident visa to Ms. Zhong in April 2007. The honourable tortfeasors remained adamant in maintaining their systems of torts nationwide. These key factors resulted in the forced separation of Zoltan A. Simon from his family members: Ms. Zhong and Mr. Ye for more than seven years. This is a *Charter* violation as well: a cruel and unusual treatment of innocent and law-obedient human beings, by contravention of section 12. of the *Charter*.

119. The injuries suffered by the plaintiff are compensable in tort law because torts, frauds, deceit, misinterpretation, offences relating to public officers, breach of duty of care, breach of trust, misfeasance, conversion of chattels, intimidation, undue interference, conspiracy, money extortion schemes, laundering of proceeds of crime, terrorist activity and perjury or false statements are all crimes or indictable offences punishable by law. One can find detailed description of these torts and their punishments in the *Criminal Code*.

73 The tort of misfeasance of public office is an intentional tort. It was described in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 32 by the Supreme Court of Canada as having two distinguishing elements:

1) deliberate unlawful conduct in the exercise of public functions; and
2) awareness that the conduct is unlawful and likely to injure the plaintiff.

Of course, the plaintiff must also prove the requirements common to all torts, including causation and compensable damages.

74 As I have repeatedly emphasized in these reasons, the plaintiffs' pleadings involve many assumptions, speculation, and in some instances what I think can fairly be described as bizarre conjecture. They contain no material facts to support a claim for deliberate unlawful conduct by named persons or an awareness that such conduct is unlawful and likely to injure the plaintiffs. They simply make bare allegations of wrongdoing by unnamed defendants, supported by only the plaintiffs' assumptions and speculation. There are no material facts pleaded in support of the elements of this claim, and as such it is plain and obvious that this claim is bound to fail.

(d) Conspiracy

75 The plaintiffs reference various conspiracies against them throughout the pleadings, but specifically outline the claim at paragraphs 161-171 of Part 3. As I understand the complex allegations and arguments advanced, the plaintiffs assert that one conspiracy exists between CRA and the CIC to possess proceeds of crime. They also allege another conspiracy between various public servants, Ministers, officers, and administrators of the Federal Crown. All of these persons, known and unknown, all participated, it is alleged, in mental torture of the plaintiffs. Overall, the plaintiffs seem to allege a complex conspiratorial web, woven between most courts and government officials with whom Mr. Simon has come into contact. The aim of the conspiracy, it seems, is to tortiously and criminally victimize him and his family.

76 Madam Justice Fisher summarized the requirements of the tort of conspiracy in *Willow* at para. 67:

> [67] The tort of conspiracy requires three essential elements, all of which must be pleaded: (1) an agreement, including a joint plan or common intention by the defendant, to do the act which is the object of the conspiracy; (2) an overt act consequent on the agreement; and (3) resulting damage: *Kuhn v American Credit Indemnity Co.*, [1992] B.C.J. No. 953 (SC). In *Kuhn*, the court added:
>
> > The defendants must intend to be a party to the combination. Mere knowledge of or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view to furtherance of the common design and purpose.

77 The pleadings in this case, no matter how generously read, do not contain material facts to support the elements of the tort of conspiracy. Again, the pleadings only contain speculative assumptions. This claim, plainly and obviously, discloses no reasonable cause of action and is bound to fail.

(e) Charter Breaches

78 The plaintiffs appear to allege a cause of action arising from breaches of the *Charter*. General, conclusory statements in relation to this assertion are found scattered throughout the pleadings. For example, at Part 1, paragraph 155, the plaintiffs claim they are entitled to damages, namely for pain and mental distress, suffering and violations of the plaintiffs' *Charter* rights with punitive damages, all of which are personal in nature.

79 At paragraph 187 of Part 1, the plaintiffs list in their improper claim for specific damages, among other things: "T. Violations of the plaintif's *Charter* rights, mental suffering $55,000".

80 Another example can be found at paragraph 157 of Part 1. Comparing the substantial financial responsibility born by sponsors to that of the sponsored person, the plaintiffs write: "This is a prejudiced statement of discrimination based on nationality."

81 As well, at paragraph 31 of Part 3, under the heading "Invalid Sponsorship Agreement and Undertaking", the plaintiffs plead:

> [31] The cornerstone of the CIC Sponsorship Agreement and Undertaking constitutes an infringement of ss. 15. (1) of the *Charter*, Canada's constitution, regarding equality rights. It cannot be justified in a free and democratic society, and s. 1 of the *Charter* does not save it. As in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, some important factors influencing the determination of whether (sub)sections of several acts and regulations have been infringed are, among others: (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue; (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; (D) The nature and scope of the interest affected by the impugned law.

82 Another example can be found at paragraph 118(c) of Part 3 under the heading "The claim for misfeasance in public office". Here, following an argument and allegation that the "honourable tortfeasors remained adamant in maintaining their systems of torts nationwide", the plaintiffs go on to allege this to be a *Charter* violation as well. Mr. Simon asserts that by forcing his wife and her son to live apart from him, he is subject to "cruel and unusual treatment of innocent and law-obedient human beings", a violation of s. 12 of the *Charter*.

83 At paragraph 132 of Part 3, under the heading "Claim in tort for breach of duty of care," the plaintiffs make the bare allegation that the CIC sponsorship and undertaking form violates several *Charter* rights, such as discrimination between Canadian sponsors, sponsored aliens, and public servants of the Crown as three distinct groups of the society, with such violations not justified by s. 1 of the *Charter*.

84 Another reference to the *Charter* can be found in Part 3 under a section entitled "Claim for violations of the plaintiffs' *Charter* rights, mental suffering". The various lengthy paragraphs contain what can only be described as submissions regarding alleged violations of ss. 7, 8, 11(a), (b), (e), 12, and 15 of the *Charter* is found at paragraph 217:

> 217. After this long introduction, the plaintiff submits that his *Charter* rights set in sections 7., 8., 11. (a), (b), and (e), 12., and 15. (1) have been violated. He submits that his family -- particularly his person -- has been subject to unusual and cruel treatment and punishment, also excessive stress since 2006. Pursuant to s. 8. of the *Charter*, "Everyone has the right to be secure against unreasonable search or seizure." The plaintiff submits that the snatching of his tax credit amounts in 2008 and 2009 by the CRA and the RSBC were "unreasonable seizures." He was charged with the offence of a major debt but the Crown failed to inform him without unreasonable delay -- that is maximum 30 days -- of the specific offence, and avoided to take him to a trial within the same reasonable time. Therefore, the Crown infringed his *Charter* rights regarding ss. 11. (a) and (b). Also, applying the liberal and remedial reading of the *Interpretation Act*, he was denied reasonable bail without just cause. Namely, Ms. P. Lipsack, Counsel and representative of the British Columbia ministry involved, denied him a reasonable payment plan that would have been equivalent with a bail. Therefore, ss. 11. (e) of the *Charter* was contravened as well. A "bail" -- by $200 monthly payments -- was allowed for a Vietnamese man that owed over $101,000 to British Columbia.

85 Another example of the plaintiffs' inappropriate and argumentative pleadings can also be found at paragraph 221 of Part 3. In relation to their s. 15 of the *Charter* claim, the plaintiffs allege that Canada's authorities have discriminated against Chinese and Hungarian people based on nationality. The plaintiffs decline to quantify this particular damage claim, writing at paragraph 25 that: "... his table on page 22 is complete and the insertion of a line now would scramble his whole document and ruin the dollar figures."

86 No matter how generously one reads these pleadings, it is plain and obvious there are no material facts pleaded to support any cause of action based on *Charter* violations. All that is pleaded are assumptions, speculation, and misconstrued legal argument.

(f) Abuse of Process

87 It is unclear if the plaintiffs are attempting to plead the tort of abuse of process. Scattered references throughout the notice of civil claim to malicious conduct by various court officials in conjunction with the overall tenor of the pleadings lead me to conclude that this could be what the plaintiffs intend.

88 Madam Justice Fisher summarized the elements of tort of abuse of process in *Willow* at para. 54:

> [54] The tort of abuse of process requires the following elements to be established: (1) a willful misuse or perversion of a court process for an extraneous or improper purpose; and (2) some damage resulting: *Border Enterprises Ltd. v Beazer East Inc.*, 2002 BCCA 449 at para. 51. An additional element, that some act or threat has been made in furtherance of the process, may also be required, although this is not clear in British Columbia: see *Smith v Rusk*, 2009 BCCA 96 at para. 34; *Bajwa v British Columbia Veterinary Medical Association*, 2012 BCSC 878 at paras. 178-181; and *Home Equity Development Inc. v Crow*, 2002 BCSC 1747 at para. 19. In *Home Equity*, it was held that some definite conduct in furtherance of an illegitimate purpose is essential, as there is no liability where the defendant is employing its regular process, even if it does so with bad intentions: see para. 20, citing *Guilford Industries Ltd. v Hankinson Management Services Ltd.*, [1974] 1 WWR 141.

89 As with the other asserted causes of action, in my view the pleadings fall far short of stating material facts in support of any of the elements of the tort of abuse of process. I am satisfied that it is plain and obvious that any claim in relation to this claim is also bound to fail.

3. Unjust Enrichment

90 The plaintiffs claim unjust enrichment at paragraphs 193-202 of Part 3. As I understand it, the plaintiffs assert that the Crown has been unjustly enriched in three ways:

1) by use of CIC processing fees paid by Mr. Simon in the amount of $1,190;
2) by unlawful taking of tax credits, roughly $3,500; and
3) by its unlawful conduct which forced Mr. Simon to not file personal tax returns for five years. This is quantified at approximately $12,500.

91 The elements of an unjust enrichment claim are well known:

1) the enrichment of the defendant;
2) a corresponding deprivation of the plaintiff; and
3) the absence of juristic reason for the enrichment.

92 Once again, in my opinion, there are no material facts pleaded in support of these claims, only speculation and allegations. I am satisfied it is plain and obvious that this claim too is bound to fail.

93 As I am confident my reasons thus far have made clear, the plaintiffs' pleadings are so prolix and convoluted that it is difficult, if not impossible, to ascertain what causes of action are brought against whom and why. The plaintiffs make sweeping allegations of unlawful conduct against nearly every government and court official with whom Mr. Simon has had contact with regard to these matters. No material facts are asserted in support of these claims. To the extent that some causes of action are identifiable, I have concluded that it is plain and obvious that they all disclose no reasonable claim and are bound to fail.

Rule 9-5(1)(b) of the *Civil Rules*

94 I conclude that these pleadings run afoul of this subrule as well. Unlike Rule 9-5(1)(a), evidence is admissible on an application brought pursuant to Rules 9-5(1)(b) through (d).

95 A pleading is frivolous if it is without substance, groundless, fanciful, "trifles with the court" or wastes time: *Borsato v. Basra*, 2000 BCSC 28 at para. 24.

96 A pleading may be vexatious if it is irrelevant to the plaintiff's cause of action, whatever that cause of action may be, or if it does not disclose a claim known to law: *Fowler* at para. 40.

97 The nature of a vexatious action was described by Henry J. in *Re Lang Michener* (1987), 37 D.L.R. (4th) 685 (Ont. H.C.J.) at 691:

> From these decisions the following principles may be extracted:
>
> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;

(d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;

(e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;

(f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;

(g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

98 A pleading is scandalous if it is so badly drawn that to litigate upon the pleading would require the parties to undertake useless expense or cause them to litigate matters irrelevant to the claim itself: *Gill* at para. 9.

99 Madam Justice Fisher described it this way in *Willow* at para. 20:

> [20] Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] B.C.J. No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

100 In my view, it is plain and obvious that the plaintiffs' claims must be struck under Rule 9-5(1)(b) as well. These claims, I find, are frivolous, vexatious, and scandalous. The pleadings are without substance, fanciful, groundless, and will waste the time of the court. They are so prolix and confusing that it is difficult, if not impossible, for the defence to understand the case to be met in court. The notice of civil claim does not meet any standard which enables a proper response to be filed by the defendants. The pleadings are vague, over-inclusive, and contain a great deal of irrelevant information. The pleadings run afoul of Rule 3-1(2) and Rule 3-7(1), (9) and (14). The plaintiffs' lengthy legal arguments, which include case law, hypothetical scenarios, reference to irrelevant statutes, and diagrams, are incapable of supporting proof of any cause of action.

Rule 9-5(1)(d) of the *Civil Rules*

101 Abuse of process under this subrule is a flexible doctrine allowing the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice: *Willow* at para. 21.

102 A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales, Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342. A claim may also be struck as an abuse of process where it is an attempt to relitigate an issue that has already been decided: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63.

103 In *Toronto (City)*, Madam Justice Arbour explained the concept of abuse of process at para. 37 as follows:

> [37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
>> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the

> > specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/ mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson*, supra*, at pp. 624-25).

104 The vexatious action and one that is an abuse of process are two concepts that courts have noted have strikingly similar features. Mr. Justice Macaulay noted this in *Freshway Specialty Foods v. Map Produce LLC*, 2005 BCSC 1485 at para. 52, where he wrote:

> [52] There is no bright line dividing a vexatious proceeding from one that is an abuse of the court's process. In my view, the factors that signal a vexatious proceeding also signal an abusive process. Abuse of process is a wider concept however and may extend beyond vexatious proceedings to capture any circumstance in which the court's process is used for an improper purpose. As pointed out by Baker J., in *Babavic v. Babowech*, [1993] B.C.J. No. 1802 (S.C.), a decision not referred to by counsel, the categories of abuse of process remain open and include, for example, "proceedings which are without foundation or serve no useful purpose and multiple or successive proceedings which cause or are likely to cause vexation or oppression" (para. 18).

105 The Attorney General of Canada submits that it is plain and obvious that the plaintiffs' allegations against it are a collateral attack against the decisions of the IAD, the Federal Court, and the Federal Court of Appeal. As such, it asserts the litigation is an abuse of the court process. I agree.

106 Insofar as both defendants are concerned, I have already concluded that the pleadings are vexatious, with reference to the criteria in *Lang Michener*.

107 The pleadings make substantial and widespread criminal allegations against numerous government officials, including registry staff, government lawyers, and others, many of whom are unnamed. The pleadings also use inflammatory language to describe alleged actions of government employees and officials as crime, as "cowardly administrative tortures", and "efficient weapons". The plaintiffs have clearly rolled issues raised in previous actions forward into this action, where they have repeated them and supplemented them with allegations brought against the lawyers who have acted against them, or just Mr. Simon, in earlier proceedings, as well as court registry staff and a whole host of other government officials. It is clear that the plaintiffs are attempting to relitigate some matters already decided in respect of the Attorney General of Canada.

108 The plaintiffs' pleadings in regard to the Attorney General of Canada contain allegations against the CIC, CRA, and Service Canada. Regarding the CIC, the plaintiffs allege that its forms are invalid and that Mr. Simon's wife's application for permanent residency was wrongfully refused. Mr. Simon has previously appealed the refusal of that application to the IAD and sought leave to apply for judicial review in Federal Court. The Federal Court's order dismissing that application concluded the matter. Mr. Simon then brought a collateral attack against that order in another Federal Court action, which included appeals to the Federal Court of Appeal and an application for leave to appeal to the Supreme Court of Canada. He repeats this attack in this present action. The matter is clearly *res judicata*.

109 Regarding the claims alleged against the CRA, Mr. Simon again claims that in 2008 and 2009 unnamed Crown servants wrongfully, knowingly, and by tortious conduct, released funds or monies from the 2007 and 2008 tax credits of Mr. Simon to Revenue Services of British Columbia. The same allegation was before the Federal Court in action T-639-10. The Federal Court of Appeal dismissed this claim. Mr. Simon sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada.

110 I agree with the Attorney General of Canada that Mr. Simon has had two opportunities in that Federal Court action to bring a viable cause of action in relation to the CRA, and it would be an abuse of this court's process for him to be allowed to relitigate this matter in this forum.

111 Regarding Service Canada, Mr. Simon alleges that it "threatened" and "tried to coerce" him. He seeks a declaration that his future Canada Pension Plan and Old Age Security benefits cannot be automatically garnished by Service Canada in the context of the case at bar. These issues have been adjudicated by the Federal Court in action T-1029-12. There, the court found that no action for damages premised on a hypothetical administrative decision can succeed, because no damage has yet materialized. This decision was upheld on appeal. This too is *res judicata*.

112 I also note that within the British Columbia Provincial Court action, Mr. Simon alleged that Ms. Lipsack, a BC Ministry of Justice lawyer, misinterpreted statutes and denied him a reasonable payment plan for his debt. A judge of the Provincial Court dismissed this claim on May 14, 2009. The case at bar repeats the allegations against Ms. Lipsack. This issue has been previously decided and is *res judicata*.

113 Further, it must be recognized that it is an abuse of the court process to do any of the following:

1) To make serious and baseless allegations against the court, Federal Court, or Supreme Court of Canada. The plaintiffs' claim that registry staff committed fraud, contravened various pieces of legislation, "silenced" Mr. Simon, covered up errors, acted in bad faith, and acted in furtherance of a conspiracy. The plaintiffs refer to an order of the Federal Court of Appeal as unprofessional, vague, "Dodanaic", and controversial.

2) To make serious and baseless allegations against legal counsel and public officials involved with this case. The plaintiffs allege, without material facts pleaded as a foundation, that legal counsel for the Supreme Court of Canada "contradicted and contravened" the *Supreme Court Act*, R.SC. 1985, c. S-26. They further allege that counsel for the Federal Crown gave false testimony, which amounted to perjury, all in the course of making legal argument. They further allege, without factual foundation, that certain acts or omissions of named and unnamed public servants constitute "terrorist activities" and conspiracy intended to intimidate a segment of the public and endanger a person's life.

3) To calculate damage awards by translating *Criminal Code* sentencing ranges into monetary awards.

4) To disclose that, as a result of mental torture, one of the plaintiffs feels murderous impulses toward government employees.

These examples are but a few of the many that, in my view, clearly demonstrate this action was brought for an improper purpose.

114 In light of the foregoing and considering the pleadings as a whole, I am satisfied that it is plain and obvious this claim is an abuse of process.

CONCLUSION

115 I conclude that both defendants have met the high onus upon them in their applications. Their applications to strike the notice of civil claim in its entirety pursuant to Rule 9-5(1) of the *Civil Rules* is granted, with no leave to amend. Mr. Simon, on behalf of the plaintiffs, made it clear that he does not seek leave to amend. Even so, the law requires that I give it consideration. I have. In light of Mr. Simon's numerous attempts to file proper pleadings in many other courts in relation to these matters over the last several years, it is my view that it would not be appropriate to grant leave to amend in this case. Mr. Simon has demonstrated he is incapable of composing proper pleadings.

116 The parties have already addressed the issue of costs. Both defendants seek a reduced lump sum amount of costs in the event of their success in these applications. The amounts they seek would not even compensate them for their disbursements, but in any event they do seek a reduced sum. Mr. Simon did not oppose such an application.

117 In my view, it is appropriate in the circumstances of this case to exercise my discretion to award costs in favour of the successful parties, in this case both of the defendants. I also find it appropriate to award lump sum costs, consistent with my review of the case law. Those costs will be in an amount that is greatly reduced from an amount that could have been awarded had costs been assessed on the ordinary scale. The plaintiff, Mr. Simon, will be required to pay each defendant costs in the amount of $1,000 each, payable forthwith.

118 This concludes my reasons. Anything further?

119 MR. SIMON: The question to the parties, Your Honour?

120 THE COURT: Pardon me, Mr. Simon?

121 MR. SIMON: Was your question to the parties if there is any comment?

122 THE COURT: No comments, but just any questions.

123 MR. SIMON: Well, my question is that it is no material facts have been pleaded or too many material facts have been pleaded? That's a bit unclear for me, because there were [inaudible] kind of causes of action and you admitted in your speech that several of them -- some of them have legal grounds. No, the thing is the pleading, if something is vague, like not mentioning like unnamed public officials or public servants, I would like to refer to the case *of Just v. British Columbia*, the falling rock, and that gentleman won the case in British Columbia. I think it was a separate court eventually. And he didn't name the official who failed to remove that rock which killed his daughter. Anyway, I found several case which the judge decides that it's not necessary to name by name the officials who failed, like acted improperly or illegally. My claim doesn't really show negligence. Only one case that say -

124 THE COURT: Mr. Simon, I am sorry to interrupt you, but I feel that I have to. By my question I meant if there were any sort of procedural type of questions. This is not an opportunity to reargue the case. I have made my decision and I have outlined my reasons just now. Unless there is any sort of procedural type questions, we will conclude proceedings now.

125 MR. SIMON: Yeah, the procedural type that if all my facts are taken as true or pled as true, that condition is satisfied, you think that not even one of the 60 allegations would be able to prove? Because the IP too and those kind of controversies between the forms, the government forms, and I can prove the conspiracy [inaudible], but I was not allowed to produce evidence, though the Crown was allowed to show evidence, because affidavit is in evidence and I didn't have that advantage. So I could prove everything if not [inaudible] misconstrued, scattered references and rambling allegations or speculation, but I am able to prove everything, all the 60, and it is very unlikely that even if one of my facts can be, you know, supported by evidence, that means that a judge won't have the right to discuss this as [inaudible]. There is a good chance that one of the 60 would succeed, because there would be another government and there would be more reasonable staff who let me review all the errors of the present government. So it's not absolutely impossible that a new government would return to obey the laws of Canada. I don't think that's impossible.

126 THE COURT: Thank you, Mr. Simon.

127 MR. SIMON: Thank you.

128 MR. WITTEN: My Lady, it's Mark Witten here in for the Province, and I understand from Ms. Brown that when the order was circulated that you previously made about adjourning the trial date -

129 THE COURT: Yes.

130 MR. WITTEN: -- that Mr. Simon was unwilling to sign that order. So I would ask that you make an order dispensing with the need for Mr. Simon or the plaintiffs' signature with respect to the judgment that you just gave today.

131 THE COURT: Mr. Simon, just so you understand, oftentimes when there are self-represented litigants, or the parties are a great distance apart, or if one party has demonstrated an inability or unwillingness to sign the form of prior orders, a judge will make an order dispensing with the signature of one of the parties on the form of the order.

132 The order that I have made today striking your claim in its entirety without leave to amend is valid as of today. What happens from here is that the successful parties or party will prepare the order, will type it up, and normally they would send it to the lawyer for the unsuccessful party to sign to indicate by their signature that the wording of the order is consistent with as I said today. It would then be sent to the court registry for them to ensure its accuracy, and then once that step is completed and the registry is assured it is accurate, it gets sent to me to sign to also ensure that it is accurate. There are a number of steps to ensure the actual order entered is accurate, and what counsel has just asked me for is an order that is typically asked for in these types of circumstances, to save time and to add convenience, that is to dispense with your signature on the form of the order. Do you have any opposition to that?

133 MR. SIMON: Well, you know, that's -- my letter, you know, that's two pages. That's irrelevant now, because of course I obey your judgment and it doesn't matter. I will appeal it as soon as possible, and I am just wondering, if I appeal it, that means that I don't need to pay the $2,000 today, or do I have to?

134 THE COURT: I am not going give you any legal advice, Mr. Simon.

135 MR. SIMON: No, but the requirement on -

136 THE COURT: I am not going to give you any legal advice at all.

137 MR. SIMON: Okay.

138 THE COURT: All right. What about this application to dispense with your signature?

139 MR. SIMON: Well, it's irrelevant, Your Honour, because if you dismiss my claim, that means that that scheduled -- hearing scheduled to the 16th of March is probably not tenable. I don't know. It's in the air. That's your decision, and I don't think it's applicable. I have to go to the British Columbia Court of Appeal I think. That would be maybe an abuse of process to hear it by another judge or whatever who is not more knowledgeable than yourself, so unless a panel of three judges would hear it at this level, at the Supreme Court of British Columbia, which I don't think that option exists. So my only choice is acceptance, obey your order, your decision, and whatever the Crown parties' counsel would trust with that order, I may make a comment that they change this word or insert that word or only that word, but otherwise I -- but even if I don't sign it, it won't make any difference, because I have to obey your order [inaudible].

140 THE COURT: The trial date scheduled sometime in March, which had been scheduled unilaterally by the plaintiffs, was cancelled last day. I am going to make it clear again today. That trial date no longer exists for this matter. I have dismissed this claim now. Mr. Simon, there is no court date in March. There is no necessity for Mr. Simon to sign the form of that order that I made last day.

141 MR. SIMON: Okay. Yes.

142 THE COURT: I will dispense with Mr. Simon's signature on the form of that order, where I adjourned that trial date. Given the history of this matter and Mr. Simon's comments just now, I will make an order today dispensing with Mr. Simon's signature on the form of the order that I have made today. Mr. Simon, you will get a copy of the entered order in due course, so if you do change your address, your mailing address, please advise the court registry so they know where to mail it to.

143 MR. SIMON: Yes, Your Honour. I know.

144 MR. WITTEN: Thank you, My Lady.

145 THE COURT: Thank you.

146 MS. FAIRGRIEVE: My Lady.

147 THE COURT: Yes.

148 MR. FAIRGRIEVE: Sorry, this is Tim Fairgrieve for the Attorney General of Canada. There is one other matter that I wanted to raise. I believe -- it's my understanding that my colleague Alison Brown had requested that if costs were to be ordered in a lump sum at the conclusion of the application against the plaintiffs, that they be ordered against Mr. Simon alone and not the wife.

149 THE COURT: That is quite right. Mr. Simon, I think you had agreed with that the other day as well.

150 MR. SIMON: Yes, yes.

151 THE COURT: Yes, I had forgotten about that. Thank you very much for reminding me. Costs will be payable by Mr. Simon only.

152 MR. SIMON: Yes.

153 MR. FAIRGRIEVE: So we'll include that in the order.

154 THE COURT: Yes. Thank you very much.

155 MR. FAIRGRIEVE: Thank you.

156 MR. SIMON: Thank you everybody.

S.A. DONEGAN J.

Strata Plan LMS3259 v. Sze Hang Holding Inc., [2009] B.C.J. No. 694

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

J.A. Sinclair Prowse J.

Heard: October 11, 2007; September 2-4, 2008.

Judgment: April 7, 2009.

Dockets: L050030 and L052756

Registry: Vancouver

[2009] B.C.J. No. 694 | 2009 BCSC 473 | 178 A.C.W.S. (3d) 341

Between The Owners, Strata Plan LMS3259, Plaintiff, and Sze Hang Holding Inc. and Leon Lam, Defendants And between The Owners, Strata Plan LMS3259, Plaintiff, and Sze Hang Holding Ltd. and Leon Lam, Defendants

(94 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking pout pleadings or allegations — Grounds — False, frivolous, vexatious or abuse of process — Parties — Capacity to sue or be sued — Party types — Corporations, partnerships and sole proprietorships — Motion by the defendant unit owners for dismissal of two actions on the ground that the Strata Corporation had no jurisdiction to bring the actions dismissed — Motion by Strata Corporation to strike out the defences and for judgment allowed — Strata Corporation sued defendants for failing to comply with various bylaws and for payment of fines levied — Strata Corporation had standing to bring action as required resolution was passed — Defences and counterclaims were confusing and prolix — Allowing defendants to amend pleading would constitute abuse of process — Rules of Court, Rule 19(24).

Motion by the defendant unit owners for dismissal of two actions on the ground that the Strata Corporation had no jurisdiction to bring the actions. Motion by the Strata Corporation to strike out the defences and for judgment. The plaintiff Strata Corporation sued the defendants to enforce various bylaws against them. The plaintiff was the strata corporation of a commercial development. The plaintiff alleged that the defendants failed to open these units for business as required under the bylaws resulting in unpaid fines and that the defendants stored items on the common property contrary to the bylaws. In the second action, the Strata Corporation alleged the defendants failed to grant it access to the units to check the repairs on a sewer line and to investigate the cause of steam coming from an adjacent unit. The defendants argued the Strata Corporations had not passed the required resolution to bring the actions.
HELD: Motion by the defendants dismissed.

Motion by the Strata Corporation allowed. The required resolution to commence these actions was passed by a vote at the 2006 annual meeting. The statements of defence were so prolix and confusing that it was difficult to understand the case to be met. These pleadings included arguments, opinions, and allegations against non-parties. The defendants should not be granted the opportunity to redraft their pleadings as to do so would constitute an abuse of process. Some of the proposed defences and counterclaims could not be redrafted as they were without legal foundation. The defendants had been given several opportunities to draft appropriate pleadings in other actions that raised essentially the same issues. The defendants also brought counterclaims prohibited by a prior court order and endeavoured to re-litigate matters that they knew had already been considered and decided.

Statutes, Regulations and Rules Cited:

Rules of Court, Rule 19(24), Rule 57(9)

Strata Property Act, SBC 1998, CHAPTER 43, s. 3, s. 4, s. 26, s. 56, s. 129, s. 133, s. 147(1), s. 292(2)(g)

Counsel

Counsel for the Plaintiff: R. Shore, P. Mendes.

Leon Lam: Appearing on his own behalf.

S.H. Lee: Appearing on behalf of Sze Hang Holding Inc.

[Editor's note: A corrigendum was released by the Court April 16, 2009; the correction has been made to the text and the corrigendum is appended to this document.]

Reasons for Judgment

J.A. SINCLAIR PROWSE J.

(I) NATURE OF THE HEARING

1 The Plaintiff is the Strata Corporation of the strata development in which the Defendants own two units. In these two actions (which have been ordered to be heard together), the Strata Corporation is seeking to enforce various bylaws against the Defendants as owners of those units.

2 In this hearing, the Defendants seek to have these actions dismissed on the ground that the Strata Corporation is without jurisdiction to bring them. The Strata Corporation, on the other hand, seeks, pursuant to R. 19(24), to have the Defendants' pleadings struck; to have the Defendants denied permission to redraft any of their pleadings; and to have Judgment entered on its behalf.

3 Before addressing these applications, it became apparent upon reviewing the pleadings of all of the parties that a typographical error had been made in the style of cause in the second action (Vancouver Registry No. L0527856). Specifically, the Defendant Sze Hang Holding Inc. is mistakenly described as Sze Hang Holding Ltd. Because this is a typographical error, leave is granted to the Strata Corporation to amend its pleading to correct this error.

(II) BACKGROUND CIRCUMSTANCES

4 To put the issues raised in these applications in context, the Strata Corporation is the strata corporation for Pacific Plaza, a business as opposed to a residential strata development. Although there is a dispute as to whether the proper business designation of this strata development is "wholesale industrial" (the position of the Defendants) or "a combination of wholesale industrial and commercial retail" (the position of the Strata Corporation), there is no issue that it is a "business" as opposed to a "residential" strata development.

5 This strata development was built by Ernest & Twins Ventures (PP) Ltd. and completed in 1998. The Defendants were not original owners. Rather, it was about 3 years after it was built that Sze Hang Holding purchased two units (namely, the North and South Units).

6 It was not until 1 year after that (or 4 years after it was built) that Mr. Lam acquired any ownership interest in any of the strata units. This is the ownership that he continues to hold. Specifically, the South Unit is owned by him and

Sze Hang Holding - Mr. Lam having acquired a 1% interest and Sze Hang Holding having a 99% interest. The North Unit is wholly owned by Sze Hang Holding.

7 Although Mr. Lam did not acquire an ownership interest in any of the strata units until the summer of 2002, he has operated a business from those units from the time that they were acquired by Sze Hang Holding. For much, if not all, of this time, Extra Gift Exchange Inc. has been the tenant of these units. (Extra Gift Exchange is a company in which Mr. Lam and Ms. Sze Hang Lee are principals. Ms. Lee is also a principal in Sze Hang Holding.)

8 In addition, to operating a business in this strata development from at least 2001, Mr. Lam has been actively involved in the affairs of the strata development and in particular of the Strata Council. (As with all strata developments, pursuant to s. 4 and s. 26 of the ***Strata Property Act***, S.B.C. 1998, c. 43 [***SPA***] the strata council is the mechanism through which the powers and duties of the strata corporation are exercised. Put another way, the strata council acts as the board of directors for the strata corporation.)

9 Over the last 8 years, Mr. Lam has been involved in a number of actions pertaining to various aspects of this strata development. Although some of these matters have been completed, there are approximately 5 other outstanding actions in addition to the present actions. While some of these actions include claims of defamation and personal injury, for the most part these actions pertain to claims regarding the construction, sale, management, and governance of this development. (This was also the situation with the actions that are now completed.) I am the Case Management Judge for the present actions as well as the 5 other outstanding ones.

10 As far as the present actions are concerned, as was set out earlier, the Strata Corporation is seeking to enforce various bylaws. Specifically, in the first action (Vancouver Registry No. L050030) which will hereinafter be referred to as the Fines Action, the Strata Corporation claims that for the last few years the Defendants have failed to open either of these units for business at all, let alone for the requisite number of business hours required under the bylaws; that as of December 2007, the Defendants had incurred fines in the amount of $91,571.58 with respect to the South Unit and $38,840.15 with respect to the North Unit because of these violations; and that to date the Defendants have neither paid these fines nor complied with the bylaws by opening their units for business.

11 Moreover, the Strata Corporation claims that the Defendants have posted notices in the windows of their units, the purpose of these notices being to criticize and embarrass the members of the Strata Council.

12 Further, the Strata Corporation claims that the Defendants stored items on the common property adjoining the South Unit contrary to the bylaws and that the Strata Corporation had to incur the costs of removing and then storing these items. (It still has these items and is still paying the costs of this storage.)

13 With respect to the second action (Vancouver Registry No. L052756) which will hereinafter be referred to as the Access Action, the Strata Corporation claims that, contrary to the bylaws, the Defendants failed to grant it access to the North Unit to check that a sewer line that had backed up had been properly repaired (that is, in accordance with the building code); to the South Unit to investigate the cause of steam that was coming from it into an adjacent unit; and to the North Unit to investigate whether it was being used as a residence.

14 As far as the present hearing is concerned, as is set out in an earlier decision in these proceedings (namely, 2008 BCSC 481), it was set at my direction for the purpose of clarifying the pleadings and specifically clarifying the claims, defences, and counterclaims to be made. The basis for this direction was that it had become apparent in pre-trial applications, pertaining to such matters as the extent of document production, the extent of examinations for discovery, and the period of time needed for trial, that the pleadings would have to be clarified sooner rather than later as the issues raised in these pre-trial applications could not be decided until that was done.

15 As an example, in these pre-trial applications the Defendants took the position that their defences and claims raised issues requiring extensive document production from the Strata Corporation (approximately 600,000 documents) and a trial of at least a month in length. The Strata Corporation, on the other hand, took the position that the issues in these actions were simple matters, requiring modest document production, and a trial of two weeks at the very most. Specifically, the Strata Corporation took the position that most, if not all, of the Defendants' pleadings were without legal foundation and would have been struck when considered by the Court.

16 It was in these circumstances that I directed this hearing. The parties were invited to make whatever applications that they considered appropriate regarding the clarification of the pleadings.

(III) THE APPLICATION OF THE DEFENDANTS THAT THESE ACTIONS SHOULD BE DISMISSED BECAUSE THE STRATA CORPORATION DOES NOT HAVE THE AUTHORITY TO BRING THEM

17 In this application, the Defendants submit that the Strata Corporation was not authorized to bring these actions as it had not passed the resolution required by s. 171 of the ***SPA***. This section of the ***SPA*** specifies that a resolution must be passed by a 3/4 vote at an annual or special general meeting before litigation may be commenced by a strata corporation.

18 Included in their arguments, the Strata Corporation submits that the Defendants do not have standing to bring this application. Rather, it is only the other owners that have standing to bring this application as they will be required to finance these purportedly unauthorized actions.

19 It was unnecessary to determine this issue as the evidence does not support this application of the Defendants. To the contrary, the evidence shows that the required resolution to commence these actions was passed by a 3/4 vote at the annual or special general meeting held on October 26, 2006.

20 Given these circumstances, this preliminary objection is dismissed.

(IV) THE APPLICATION OF THE STRATA CORPORATION TO STRIKE AND DISMISS THE PLEADINGS OF THE DEFENDANTS PURSUANT TO R. 19(24)

21 The Strata Corporation brings this application pursuant to R. 19(24). Not only do the Defendants oppose this application, but they also contend that it should be dismissed on a preliminary basis as the Court is without jurisdiction to hear it.

(A) *The Preliminary Application Of The Defendants To Dismiss The R. 19(24) Application Of The Strata Corporation*

22 The Defendants submit that the Court has already approved all of their pleadings as presently drawn and, therefore, it is without jurisdiction to revisit the matter. The Defendants contend that the matter is *res judicata*.

23 The record of these proceedings does not support this contention.

24 As is set out in my earlier decision (namely, 2008 BCSC 481), in the fall of 2007 at the request of both parties I directed that issues that had been raised regarding the Defendants' pleadings be postponed until the trial. (That is, those issues would be determined at trial by the trial judge.) However, as was touched upon earlier in these Reasons for Judgment as well as being set out in the aforementioned decision, it became apparent in the course of subsequent pre-trial applications that those issues could not be deferred until trial.

25 There was never a decision made that the Defendants' pleadings were valid pleadings. To the contrary, the earlier direction went no further than postponing that decision until trial.

26 As the issues raised in this hearing have not been addressed by the Court, these applications are not *res judicata*.

27 For these reasons, this application is dismissed.

(B) *The R. 19(24) Application Of The Strata Corporation*

28 The Defendants filed individual pleadings in each of these actions. In the Fines Action, they individually filed a Statement of Defence and Counterclaim and in the Access Action, they filed individual Statements of Defence. Mr. Lam also filed a Counterclaim in the Access Action while Sze Hang Holding did not.

29 With respect to the South Unit, because they are joint owners Mr. Lam and Sze Hang Holding do not have the standing individually to raise defences or to bring claims as owners: ***Extra Gift Exchange Inc., Lam and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd. et al***, 2007 BCSC 426. Rather, the standing to raise defences and to bring counterclaims as owners of the South Unit rests with the Defendants jointly.

30 Although as the sole owner of the North Unit, Sze Hang Holding could file individual pleadings on behalf of that unit, it makes little sense to do so in this case, as for the most part (if not entirely) the Defendants bring the same defences and counterclaims for each of the units.

31 For example, in the Fines Actions, with the exception of paragraphs 1-3, 38-40, 46, 55, 66, 83, and 96-98 in Mr. Lam's pleadings and paragraphs 1, 2, 38, 42, 51, 79, 92, and 93 in Sze Hang Holding's pleadings, the pleadings are essentially the same. In the Access action, with the exception of paragraphs 1, 30-36, 43, 60, 63-66, 68-70, 72-74, and 80-104 in Mr. Lam's pleadings and paragraphs 1, 30, 53, 54, 56, and 57 in Sze Hang Holding's pleadings, the pleadings are the same.

32 During his submissions, Mr. Lam explained that, in addition to the defences and counterclaims that he is pursuing as an owner, he is also pursuing some individual claims as a tenant - that is, Sze Hang Holding is not pursuing these tenant claims. Because he has these individual claims, he argued that his pleadings should be individual.

33 This argument is not sound in law. Rather, as was just set out, because neither Mr. Lam nor Sze Hang Holding has standing to individually defend or pursue any claims based as owners of the South Unit, their pleadings must be joint. Any claims made solely by one of the Defendants on grounds other than as owners should be set out as an individual claim within that joint pleading.

34 However, even though these pleadings were not brought in the proper form for purposes of this hearing, I have proceeded as if they had been. Furthermore, as the parties did during the hearing, I have addressed the pleadings in both actions collectively. (Many of the defences and counterclaims are repeated in both actions.)

35 As was set out at the beginning of this section of this Judgment, the application of the Strata Corporation to strike the Defendants' pleadings is brought pursuant to R. 19(24). That rule provides that:

> At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

36 Pursuant to this rule, pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck: ***Gittings v. Caneco Audio-Publishers Inc.*** (1987), 17 B.C.L.R. (2d) 38 (S.C.), rev'd (1988), 26 B.C.L.R. (2d) 349 (C.A.) but not on this point. The underlying rationale of this principle is that if causes of action (or defences for that matter) are not properly pleaded, it is impossible for a defendant (or a plaintiff) to know the case to meet: ***Homalco Indian Band v. British Columbia*** (1998), 25 C.P.C. (4th) 107 (B.C.S.C.).

37 The Defendants' pleadings are lengthy. In the Fines Action, Mr. Lam's Statement of Defence and Counterclaim (including the Prayer for Relief) is 51 pages long with 120 paragraphs while Sze Hang Holding's Statement of Defence and Counterclaim (including the Prayer for Relief) is 48 pages and 115 paragraphs. In the Access Action, Mr. Lam's Statement of Defence and Counterclaim is 42 pages and 114 paragraphs long while Sze Hang Holding's Statement of Defence is 25 pages and 65 paragraphs long. (As was touched on earlier, Sze Hang Holding did not file a Counterclaim in the Access Action.)

38 These pleadings are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met. In addition to the proposed defences and counterclaims being incomprehensible, these pleadings include arguments, opinions, and allegations against people and businesses which are not parties - for example, allegations against members of the Strata Council, the present property management company, and a lawyer who has provided legal services to the Strata Corporation.

39 Given these facts, the pleadings must be struck. Thus, the next issue is whether the Defendants should be permitted to redraft these pleadings.

40 Generally, if the problem with a pleading is that it is inadequately drafted, a party will be given the opportunity to redraft it. However, if it is plain and obvious that even if redrafted a pleading is bound to fail because it does not raise an arguable issue (that is, it is without legal foundation), a party will not be granted the opportunity to redraft: ***Braun Investment Group Inc. v. Emco Investment Corp.*** (1984), 58 B.C.L.R. 396, 46 C.P.C. 85 (S.C.), aff'd (1985), 67 B.C.L.R. 247 (C.A.); and ***McNaughton v. Baker*** (1988), 25 B.C.L.R. (2d) 17, [1988] 4 W.W.R. 742 (C.A.).

41 In addition to this ground for denying a party the opportunity to redraft a pleading, the Court may deny that opportunity on the ground that to grant it would constitute an abuse of process.

42 That is, as explained in John W. Horn & Hon. Susan A. Griffin, ***Fraser Horn & Griffin, The Conduct of Civil Litigation in British Columbia***, 2d ed., looseleaf (Markham, Ont.: LexisNexis, 2007) at 25-5:

> A pleading or portion of a pleading may be struck out on any of the grounds set out in Rule 19(24)(b), (c) and (d). Though such an application is not usually made with the object of securing judgment in a summary way, the Rule in terms provides that this result may follow. If the ground of the application is that the entire proceeding is ... an abuse of process ... then the entire action may be stayed or dismissed or the entire defence struck out.

43 As described in Frederick M. Irvine, ***McLachlin & Taylor British Columbia Practice***, 3rd ed., looseleaf (Markham, Ont.: LexisNexis, 3006) at 19-63(3):

> Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.)*, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, the court stated at para. 37:
>
>> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

44 Applying these principles to the circumstances of this case, for the reasons that follow I have concluded that the Defendants should not be granted the opportunity to redraft their pleadings. Given this decision, in turn, results in there being no Statements of Defences or Counterclaims field in either of these actions, I have also concluded that the Strata Corporation should be granted judgment.

45 Some of the proposed defences and claims of the Defendants could not be redrafted in any event as they are without legal foundation. That is, no matter how they are redrafted, they are bound to fail because they do not raise an arguable issue.

46 For example, as they explained in their submissions (because it could not be discerned in their pleadings) the Defendants contend that the bylaws which form the basis of the Strata Corporation's claims are invalid because they are *ultra vires*. In other words, those bylaws are beyond the authority of the Strata Corporation to pass, let alone enforce.

47 This contention is not supported by the law. Pursuant to s. 3 of the ***SPA*** "... the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners." Moreover, as is set out in s. 119 of the ***SPA***, strata corporations "must have bylaws" and the bylaws "may provide for the control, management, maintenance, use and enjoyment of the strata lots, common property and common assets of the strata corporation and for the administration of the strata corporation."

48 Under s. 129 and s. 133 of the ***SPA***, the Strata Corporation may impose fines to enforce bylaws and may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including doing work on or to a strata lot, the common property, or common assets; removing objects from the common property or common assets; and requiring that reasonable costs of remedying the contravention be paid by the person who may be fined.

49 As the bylaws in the present actions fall within the scope of the statutory responsibilities of strata corporations and as strata corporations are statutorily required to exercise these responsibilities through the passage and enforcement of bylaws, the bylaws are not *ultra vires* the power of the Strata Corporation.

50 Given the statutory provisions governing strata corporations, there is no legal foundation for this contention either as a defence or as a claim. It is bound to fail.

51 As another example of a pleading that cannot be redrafted in any event because it is without legal foundation, the Defendants submit that invalid proxies have been used to elect many, if not all, of the members of the Strata Council and have been used to pass resolutions, including the resolutions creating the bylaws that the Strata Corporation seeks to enforce in these actions. The Defendants argue that the proxies are invalid because the owners of the proxies sold them to other owners. As a result of this flawed process, the Defendants submit that the bylaws are invalid and unenforceable.

52 Assuming that some owners sold their proxies to other owners and that those proxies were used to elect members of the Strata Council and/or to pass resolutions creating or enforcing these bylaws, that fact alone does not invalidate the election of the members of Strata Council; the creation of the bylaws; and/or the enforcement of the bylaws.

53 The fact that an owner chooses to sell his/her proxy to another owner does not invalidate that proxy. Pursuant to s. 56 of the ***SPA***, a person who is otherwise eligible to vote at a general meeting may do so in person or by proxy. In other words, whether it is the election of members to the strata council or the passage of a resolution, a strata unit owner may exercise his/her vote by proxy.

54 To be valid, as is set out in s. 56 of the ***SPA***, a proxy must:

(a) be in writing and signed by the person appointing the proxy;

(b) be general or for a specific meeting or resolution; and

(c) be revocable (and, by extension, a later proxy must be considered to revoke an earlier one).

In other words, as long as the proxy meets these statutory requirements, it is valid. The fact that an owner chooses to sell his/her proxy to another owner does not invalidate it.

55 Although s. 292(2)(g) of the ***SPA*** authorizes the making of regulations "respecting the person who may be proxies, the number of proxies they may hold, the circumstances in which they may be proxies and restrictions on their powers as proxies", to date no regulations have been made that hold that the selling of a proxy invalidates it.

56 Given these conclusions, any defences and/or counterclaims based on the premise that a proxy that has been sold is invalid are bound to fail because that is not a basis on which a proxy would be rendered invalid. Consequently, there is no point in redrafting these pleadings because they are without legal foundation.

57 A further example of pleadings that cannot be redrafted in any event are the counterclaims brought by Mr. Lam as a tenant. (Presumably, these claims are brought as the tenant of the North Unit as he is an owner of the South Unit.) Aside from the fact that Mr. Lam has consistently maintained in these actions, as well as in related actions, that Extra Gift Exchange is the tenant of this unit as well as the South Unit, tenants do not have standing to bring claims or to raise a defence with respect to the bylaws.

58 That is, although some powers and duties can be assigned to a tenant pursuant to s. 147(1) of the ***SPA***, the landlord (that is, Sze Hang Holding as the owner) cannot assign to a tenant the responsibility for fines or the costs of remedying a contravention of the bylaws or rules.

59 Mr. Lam relies on the provisions of the now-repealed ***Condominium Act***, R.S.B.C. 1996, c. 64 to provide him with standing to bring claims as a tenant. In addition to the fact that claims based on this statute are bound to fail because this statute has been repealed, as was set out in ***Extra Gift Exchange Inc., Lam and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.***, 2007 BCSC 426 when Mr. Lam brought claims on behalf of Extra Gift Exchange as a tenant, the provisions of the ***Condominium Act*** pertain to tenants of "residential" strata units. Given this situation, even if this statute had not been repealed, any claims or defences of the Defendants brought pursuant to its provisions would be bound to fail as it does not give them standing, the Pacific Plaza being a business rather than residential strata development.

60 Quite apart from the fact that many, if not most, of the Defendants' pleadings could not be redrafted in any event because there is no legal foundation for the defences and counterclaims made, in the circumstances of this case it would be inappropriate to grant the Defendants permission to redraft their pleadings as to do so would constitute an abuse of process.

61 To begin with, over the last 7, almost 8, year period the Defendants have been given at least 4 opportunities (including this time) to draft appropriate pleadings. These earlier opportunities were granted by Mr. Justice Thackray in ***Extra Gift Exchange Inc. and Lam v. The Strata Corporation LMS3259*** (18 September 2001), Vancouver No. S014678; Mr. Justice Shabbits in ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (18 February 2004), Vancouver No. L031802; ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (19 February 2004), Vancouver No. L031802; ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (20 February 2004), Vancouver No. L031802; and ***Extra Gift Exchange Inc., Lam, and Richmond Liquidation Sales v. Ernest & Twins Ventures (PP) Ltd.*** (18 March 2004), Vancouver No. L031802; and by myself in ***Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.***, 2007 BCSC 426.

62 Although the actions were different, the claims made in them are basically the same claims as the claims and defences made by the Defendants in these actions. That is, the claims pertain to the governance, management, and construction of this strata development.

63 Furthermore, although Sze Hang Holding was not a party in any of these earlier actions, Mr. Lam brought all of the claims for its benefit as well as his own. In addition, Ms. Sze Hang Lee (who is a principal of Sze Hang Holding and who represented it throughout this proceeding) was in attendance for all of these other matters, either by assisting Mr. Lam or as the representative of Extra Gift Exchange. Moreover, as a review of the pleadings in these earlier efforts disclose, although not named as a party the claims were brought for the benefit of Sze Hang Holding as well as the named parties.

64 Given the direct involvement of a principal of Sze Hang Holding in most if not all of these actions and the fact that claims were for the benefit of Sze Hang Holding as well as the named parties, I am satisfied that, for all practical purposes, Sze Hang Holding has also been given the benefit of these earlier opportunities.

65 As occurred in the present actions, the Defendants were self-represented in these other actions. Because of that fact, in my view they have been given more opportunities than would normally have been given to redraft their pleadings properly. On a number of previous occasions, the Court has urged them to secure legal assistance in this process. They have been advised that there are various legal organizations that can provide assistance at a modest cost. Given the state of the present pleadings, I can only conclude that the Defendants have either chosen not to get that assistance or have chosen not to follow the advice given.

66 There may be defences or claims that if properly drafted, the Defendants could have pursued. However, that opportunity is now gone. Given the number of previous opportunities, it would be an abuse of process to permit the Defendants yet another opportunity to redraft their pleadings.

67 In addition to being given these previous opportunities, it would be an abuse of process to permit the Defendants to redraft because of the fact that in their pleadings in the present actions the Defendants raised (as defences and counterclaims) claims that they knew had already been addressed and dismissed. Furthermore, they contravened earlier Court orders by raising matters that they had been specifically prohibited from raising in these actions.

68 To put this conclusion in context, although the present actions were commenced before ***Extra Gift Exchange Inc. et al. v. Ernest & Twins Ventures (PP) Ltd.***, 2007 BCSC 426, was released, the pleadings of the Defendants in these actions were drafted and filed after that judgment was issued.

69 In the ***Ernest & Twins*** matter, Mr. Lam and Extra Gift Exchange (Ms. Lee, a principal in Sze Hang Holding, is also a principal in Extra Gift Exchange), made claims against a number of parties including the developer, the past and current property management companies, and the former and current members of Strata Council. The claims pursued in that action pertained to construction, sale, management, and governance of the strata development.

70 In the ***Ernest & Twins*** action, Mr. Lam and Extra Gift Exchange were the plaintiffs. Judgment was granted against the plaintiffs with respect to most of their claims. That is, most of the claims were dismissed because they were without legal foundation. There was no point to redrafting them because they did not raise an arguable issue-they were bound to fail.

71 However, with respect to a few claims pertaining to the Strata Corporation and the current members of the Strata Council (current being defined as from 2002 onward), Mr. Lam was granted permission to redraft because there was potentially an arguable issue if they were properly drafted and if they were properly brought. However, that permission to redraft was subject to terms. Included in those terms was the requirement that the orders for special costs had to be paid before those potential claims could be pursued. (There were two orders for special costs - one in one of the earlier actions and the second I made in the ***Ernest & Twins*** matter.)

72 However, there was an exception to the payment of that special costs term. In particular, Mr. Lam was granted the opportunity to redraft some of the claims against the Strata Corporation and bring them as counterclaims in the present actions, without having to pay the special costs order first.

73 The rationale behind this exception was that some of the potential claims that Mr. Lam had been given the opportunity to redraft against the Strata Corporation pertained to bylaw matters such as the oppressive and unfair levying of fines. Because these potential claims were interrelated to the claims that were being brought against him and Sze Hang Holding in the present actions, I concluded that it was inappropriate to require Mr. Lam to pay the special costs orders before they could pursue these potential claims as counterclaims in these actions.

74 However, the claims from the ***Ernest & Twins*** decision that Mr. Lam was given the opportunity to redraft and pursue in the present actions were very limited. Specifically, as far as the present actions were concerned:

> With the exception of claims pertaining to the oppressive and unfair levying of fines and penalties, and the arbitrary and improper waiving of these fines and penalties (which also includes the improper acquisition and use of proxies), none of the potential claims may be brought until the outstanding orders of special costs have been paid.

In addition, "the potential counterclaims will not extend to potential claims against the Current Strata Council Members." That is, this exception did not extend to any of the potential claims against the current members of the Strata Council - the current members of the Strata council being defined as members from 2002 onwards. Put another way, before these claims could be redrafted and pursued Mr. Lam had to comply with all of the terms set out in ***Ernest & Twins*** decision which included the payment of the special costs orders.

75 Unfortunately, not only did the Defendants pursue defences and claims in the present actions that went beyond the permitted categories, they pursued defences and counterclaims that had been dismissed (that is, had been found to be without legal foundation) in the ***Ernest & Twins*** action.

76 Included in the defences and counterclaims that fall outside the permitted categories are the allegations that the Defendants have made in their pleadings against the members of the Strata Council. Although the Defendants have framed their defences and counterclaims as allegations of mismanagement by the Strata Corporation, these allegations are really against the members of Strata Council as it is their purported unauthorized acts and misconduct that the Defendants plead constitutes this mismanagement.

77 Another prohibited claim that was included in the Defendants' pleadings in the present actions is the claim that the Strata Corporation failed to pursue an action for fraudulent misrepresentation against the developers, an action that was purportedly authorized by a resolution supported by at least 3/4 of the owners.

78 To bring claims that contravene a Court order is an abuse of process.

79 As was just touched upon earlier, with respect to many of the claims in the ***Ernest & Twins*** action, judgment was granted against the plaintiffs (that is, Mr. Lam) because the claims were without legal foundation - they did not raise an arguable issue. The Defendants bought many of these dismissed claims in the present actions, claims such as the failure of the Strata Corporation to take action regarding structural deficiencies; the alleged misconduct of the Strata Corporation regarding the payment of legal expenditures incurred by the Strata Corporation to defend or pursue actions; and breaches of fiduciary duty. These claims are *res judicata*. The Court has already determined that they are bound to fail. To bring them again is an abuse of process.

80 Sze Hang Holding argues that as it was not a party to the ***Ernest & Twins*** action, it is not bound by any orders arising from that decision. I do not agree.

81 As was just touched upon, some of the claims in the ***Ernest & Twins*** decision were dismissed. Those claims were dismissed because they were without legal foundation and therefore were bound to fail. With respect to these dismissed claims, the fact that there are now brought by Sze Hang Holding alone or jointly with Mr. Lam does not change the fact that they are not legally recognized claims. They do not raise an arguable issue.

82 As far as the other orders in the ***Ernest & Twins*** decision are concerned, Sze Hang Holding's standing to defend the claims brought in the present actions and to bring counterclaims against the Strata Corporation is as an owner. As its ownership in the South Unit is joint with Mr. Lam, Sze Hang Holding cannot defend any claims or bring any counterclaims with respect to that unit without Mr. Lam.

83 Consequently, because Mr. Lam was a party in the ***Ernest & Twins*** decision; because some of the orders in that case limited his capacity to bring or defend claims as an owner of the South Unit; and because Sze Hang

Holding cannot raise defences or bring claims as an owner of the South Unit without Mr. Lam, Sze Hang Holding is bound by the orders made in that decision.

84 Sze Hang Holding argues that with respect to the North Unit, however, because it was not a party to the ***Ernest & Twins*** decision and because it is the sole owner of that unit, it is not bound by the ***Ernest & Twins*** decision with respect to counterclaims and defences raised on behalf of that unit. In the circumstances of this case, that argument is not persuasive.

85 For the most part, if not entirely, the defences and counterclaims that it raises as owner of the North Unit are the same defences and counterclaims that it raises jointly with Mr. Lam as owners of the South Unit. In these circumstances, to permit Sze Hang Holding to pursue counterclaims or defences as the owner of the North Unit that it is prohibited from pursuing on behalf of the South Unit, as a result of the ***Ernest & Twins*** decision, would constitute an abuse of process as it would thwart that earlier decision.

86 To summarize, in my view given all of the circumstances set out above, to allow the Defendants the opportunity to redraft some or all of their pleadings would, in the circumstances of this case, constitute an abuse of process. It would violate the principles of judicial economy, consistency, finality, and the integrity of the administration of justice.

87 Having denied the Defendants the opportunity to redraft their pleadings, their Statements of Defence and Counterclaims are dismissed.

(C) *Conclusion*

88 The Defendants pleadings are struck because they are so prolix and confusing that it is impossible for the Strata Corporation to discern the case that it is to meet.

89 The Defendants are denied the opportunity to redraft not only because many of their defences and counterclaims are bound to fail as they do not raise an arguable issue, but primarily because it would constitute an abuse of process. Not only have the Defendants been granted previous opportunities to redraft but in these pleadings they contravened court orders and endeavoured to re-litigate matters that they knew had already been considered and decided.

90 As the Defendants pleadings have been struck and as they have been denied the opportunity to redraft them, this matter will proceed as if Statements of Defence or Counterclaims had not been filed. Given those circumstances, Judgment is granted to the Strata Corporation in both actions against both Defendants.

91 As far as the Fines Action is concerned, the question of the quantum of the fines to be awarded against the Defendants in regard to 1080 - 8888 Odlin Crescent, Richmond B.C. (the South Unit) for the breach of the business hour bylaw as of December 1, 2007; of the quantum of the fines to be awarded against the Defendant Sze Hang Holding in regard to 1380 - 8888 Odlin Crescent Richmond B.C. (the North Unit) for the breach of the business hour bylaw as of December 1, 2007; and of the amount to be awarded against the Defendants in regard to the cost of moving and storing the Defendants' property are all referred to the Registrar who will certify their findings.

92 In the Access Action, with respect to the relief granted as a result of the Judgment against the Defendants, this Court orders:

- **(a)** that the Defendants, on or before 5:00 p.m. on May 15, 2009, provide access on a date and time agreed upon by the parties to enable a representative of the Strata Corporation (that representative having been chosen by the Strata Corporation) to attend the premises located at 1010 - 8888 Odlin Crescent in Richmond B.C. (the South Unit), the purpose of that access being to enable the Strata Corporation to determine whether the Defendants are complying with the bylaws;
- **(b)** that the Defendant Sze Hang Holding, on or before 5:00 p.m. on May 15, 2009, provide access on a date and time agreed upon by it and the Strata Corporation to enable a representative of Strata

Corporation (that representative having been chosen by the Strata Corporation) to attend the premises located at 1380 - 8888 Odlin Crescent in Richmond B.C. (the North Unit), the purpose of that access being to enable the Strata Corporation to determine whether the Defendant Sze Hang Holding is complying with the bylaws;

(c) that if the Defendants or either of them fail to comply with the aforementioned orders, the representative of the Strata Corporation is entitled to enter the premises with the assistance of a locksmith, provided that after that inspection is completed by the representative of the Strata Corporation that he or she secures the premises and provides the owners and/or owner of the premises entered with the new key to those premises or premise; and

(d) that if the Defendants or either of them impedes or attempts to impede the representative of the Strata Corporation from entering 1380 - 8888 Odlin Crescent and/or 1010 - 8888 Odlin Crescent as permitted by this order, any peace officer and member of the Royal Canadian Mounted Police is authorized to arrest and remove that Defendant or Defendants.

(e) COSTS

93 As the successful party, pursuant to R. 57(9), the Strata Corporation is entitled to be awarded costs. Under R. 19(24), the Court may order costs to be paid as special costs.

94 Given that the Defendants included in their pleadings claims that they knew had been dismissed in other proceedings and that the Defendants contravened previous Court orders by including in these pleadings claims that they had been directed not to bring, I will exercise my discretion and award these costs as special costs.

J.A. SINCLAIR PROWSE J.

* * * * *

Corrigendum

Released: April 16, 2009

Revised Judgment

Corrigendum to Reasons for Judgment dated April 7, 2009, issued, advising that:

[1] Paragraph 81 will now read:

> As was just touched upon, some of the claims in the ***Ernest & Twins*** decision were dismissed. Those claims were dismissed because they were without legal foundation and therefore were bound to fail. With respect to these dismissed claims, the fact that there are now brought by Sze Hang Holding alone or jointly with Mr. Lam does not change the fact that they are not legally recognized claims. They do not raise an arguable issue.
>
> (amendment underlined)

The Reasons for Judgment are amended accordingly. In all other aspects, the Reasons stand.

Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79, [2003] 3 S.C.R. 77

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: February 13, 2003;

Judgment: November 6, 2003.

File No.: 28840.

[2003] 3 S.C.R. 77 | [2003] 3 R.C.S. 77 | [2003] S.C.J. No. 64 | [2003] A.C.S. no 64 | 2003 SCC 63

Canadian Union of Public Employees, Local 79 , appellant; v. City of Toronto and Douglas C. Stanley, respondents, and Attorney General of Ontario , intervener.

(135 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Labour law — Arbitration — Dismissal without just cause — Evidence — Recreation instructor dismissed after being convicted of sexual assault — Conviction upheld on appeal — Arbitrator ruling that instructor had been dismissed without just cause — Whether union entitled to relitigate issue decided against employee in criminal proceedings — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Catchwords:

Judicial review — Standard of review — Labour arbitration — Recreation instructor dismissed after being convicted of sexual assault — Arbitrator ruling that instructor had been dismissed without just cause — Whether arbitrator entitled to revisit conviction — Whether correctness is appropriate standard of review — Evidence Act, R.S.O. 1990, c. E.23, s. 22.1 — Labour Relations Act, S.O. 1995, c. 1, Sch. A, s. 48.

Summary:

O worked as a recreation instructor for the respondent City. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. [page78] The trial judge found that the complainant was credible and that O was not. He entered a conviction, which was affirmed on appeal. The City fired O a few days after his conviction. O grieved the dismissal. At the arbitration hearing, the City submitted the complainant's testimony from the criminal trial and the notes of O's supervisor, who had spoken to the complainant at the time. The complainant was not called to testify. O testified, claiming that he had never sexually assaulted the boy. The arbitrator ruled that the criminal conviction was admissible evidence, but that it was not conclusive as to whether O had sexually assaulted the boy. No fresh evidence was introduced. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that O had been

dismissed without just cause. The Divisional Court quashed the arbitrator's ruling. The Court of Appeal upheld that decision.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been applied to preclude relitigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The motive of the party who seeks to relitigate, and the capacity in which he or she does so, cannot be decisive factors in the application of the bar against relitigation. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted. From the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. Casting doubt over the validity of a criminal conviction is a very serious matter. Collateral attacks and relitigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy [page79] result. The common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is no need to endorse a self-standing and independent "principle of finality" as either a separate doctrine or as an independent test to preclude relitigation.

The appellant union was not entitled, either at common law or under statute, to relitigate the issue decided against the grievor in the criminal proceedings. The facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. O was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. There is nothing in this case that militates against the application of the doctrine of abuse of process to bar the relitigation of O's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the respondent City had established just cause for O's dismissal.

Issue estoppel has no application in this case since the requirement of mutuality of parties has not been met. With respect to the collateral attack doctrine, the appellant does not seek to overturn the sexual abuse conviction itself, but rather contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct.

Per LeBel and Deschamps JJ.: As found by the majority, this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. There was also agreement that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law involving the interpretation of the arbitrator's constituent statute, [page80] an external statute, and a complex body of common law rules and conflicting jurisprudence dealing with relitigation, an issue at the heart of the administration of justice. The arbitrator's determination in this case that O's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to O's conviction. His failure to do so was sufficient to render his ultimate decision that O had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of the Court.

Because of growing concerns with the ways in which the standards of review currently available within the pragmatic and functional approach are conceived of and applied, the administrative law aspects of this case require further discussion. The patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. Certain fundamental legal questions -- for instance constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on the correctness standard. Not all questions of law, however, must be reviewed under a standard of correctness. Resolving general legal questions may be an important component of the work of some administrative adjudicators. In many instances, the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. If the general question of law is closely connected to the adjudicator's core area of expertise, the decision will typically be entitled to deference.

In reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the correct result. To pass a review for patent unreasonableness, a decision must be one that can be rationally supported. It would be wrong for a reviewing court to intervene in decisions that are incorrect, rather than limiting its intervention to those decisions that lack a rational foundation. If this occurs, the line between correctness on the one hand, and patent unreasonableness, on the other, becomes blurred. The boundaries between [page81] patent unreasonableness and reasonableness *simpliciter* are even less clear and approaches to sustain a workable distinction between them raise their own problems. In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? In summary, the current framework exhibits several drawbacks. These include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

The role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously. Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds ensures that they are fair.

Administrative law has developed considerably over the last 25 years. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

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By Arbour J.

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621; Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Sarson, [1996] 2 S.C.R. 223; R. v. Consolidated Maybrun Mines Ltd., [1998] 1 S.C.R. 706; R. v. Power, [1994] 1 S.C.R. 601; R. v. Conway, [1989] 1 S.C.R. 1659; R. v. Scott, [1990] 3 S.C.R. 979; Blencoe v. British Columbia (Human Rights Commission), [2000] 2 S.C.R. 307, 2000 SCC 44; R. v. O'Connor, [1995] 4 S.C.R. 411; United States of America v. Shulman, [2001] 1 S.C.R. 616, 2001 SCC 21; Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481, rev'd [2002] 3 S.C.R. 307, 2002 SCC 63; Franco v. White (2001), 53 O.R. (3d) 391; Bomac Construction Ltd. v. Stevenson, [1986] 5 W.W.R. 21; Bjarnarson v. Government of Manitoba (1987), 38 D.L.R. (4th) 32, aff'd (1987), 21 C.P.C. (2d) 302; R. v. McIlkenny (1991), 93 Cr. App. R. 287; United States v. Burns, [2001] 1 S.C.R. 283, 2001 SCC 7; R. v. Bromley (2001), 151 C.C.C. (3d) 480; Q. v. Minto Management Ltd. (1984), 46 O.R. (2d) 756; Nigro v. Agnew-Surpass Shoe Stores Ltd. (1977), 18 O.R. (2d) 215, aff'd (1978), 18 O.R. (2d) 714; Germscheid v. Valois (1989), 68 O.R. (2d) 670; Simpson v. Geswein (1995), 25 C.C.L.T. (2d) 49; Roenisch v. Roenisch (1991), 85 D.L.R. (4th) 540; Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd. (1988), 47 D.L.R. (4th) 431; Canadian Tire Corp. v. Summers (1995), 23 O.R. (3d) 106.

By LeBel J.

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2001), 55 O.R. (3d) 541, 205 D.L.R. (4th) 280, 149 O.A.C. 213, 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40, 2002 CLLC para. 220-014, [2001] O.J. No. 3239 (QL), affirming a judgment of the Divisional Court (2000), 187 D.L.R. (4th) 323, 134 O.A.C. 48, 23 Admin. L.R. (3d) 72, 2000 CLLC para. 220-038, [2000] O.J. No. 1570 (QL). Appeal dismissed.

Counsel

Douglas J. Wray and Harold F. Caley, for the appellant.

Jason Hanson, Mahmud Jamal and Kari M. Abrams, for the respondent the City of Toronto.

No one appeared for the respondent Douglas C. Stanley.

Sean Kearney, Mary Gersht and Meredith Brown, for the intervener.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

ARBOUR J.

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to [page87] testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie* but not conclusive evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted, and that Oliver had been dismissed without just cause.

III. Procedural History

A. *Superior Court of Justice (Divisional Court)* (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64, is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellant's argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision", applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each [page88] case, the standard for judicial review had been met (para. 86).

B. *Court of Appeal for Ontario* (2001), 55 O.R. (3d) 541

7 Doherty J.A. for the court held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing the relitigation of issues finally decided in a previous judicial proceeding", the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results, and which serves to conserve the [page89] resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice (at para. 100):

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest, and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

> **22.1** (1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,
>
> (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
>
> (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.
>
> [page90]
>
> (2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.
>
> (3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A

> **48.** (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. *Standard of Review*

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20.)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 (see also [page91] *Dr. Q, supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

> It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard... . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result. [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex; it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she [page92] must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42, at para. 21.

16 Therefore I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. *Section 22.1 of Ontario's Evidence Act*

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary", that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content, and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction -- the finding of another court -- admissible for the truth of its content, as an exception to the inadmissibility of hearsay (D. M. Paciocco and L. Stuesser, *The Law of Evidence* (3rd ed. 2002), at p. 120; *Phipson on Evidence* (14th ed. 1990), at paras. 33-94 and 33-95).

[page93]

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary". There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound, supra*, at para 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, aff'd (1984), 48 O.R. (2d) 266 (C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits". However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *Hunter v. Chief Constable of the West Midlands Police*, [1982] A.C. 529 (H.L.), at p. 541; see also *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 (C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law [page94] doctrines and the rebuttal is consequently subject to them.

21 The question therefore is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. *The Common Law Doctrines*

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle". I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being cause of action estoppel), which precludes the relitigation of issues previously decided [page95] in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44, at para. 25, *per* Binnie J.). The final requirement, known as "mutuality", has been largely abandoned in the United States and has been the subject of much academic and judicial debate there as well as in the United Kingdom and, to some extent, in this country. (See G. D. Watson, " Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-51.) In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Professor Watson, *supra*, argues that explicitly abolishing the mutuality requirement, [page96] as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also D. J. Lange, *The Doctrine of Res Judicata in Canada* (2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Professor Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

> The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants ... .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). He describes the offensive use of non mutual issue estoppel as follows (at p. 631):

> The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, *etc*., now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due [page97] process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category -- what would be described in U.S. law as "non-mutual offensive preclusion". Although technically speaking the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-33:

> First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".

> Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that [page98] is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.
>
> In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency; and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free [page99] rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Law Society of Upper Canada, *Rules of Professional Conduct* (2000), Commentary Rule 4.01(3), at p. 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Lemay v. The King*, [1952] 1 S.C.R. 232, at pp. 256-57, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621 (C.C.A.), at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation". For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the [page100] arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *Wilson v. The Queen*, [1983] 2 S.C.R. 594, at p. 599, the rule against collateral attack

> has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally -- and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223, at para. 35, this Court held that a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction". Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706, this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: "that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in [page101] subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:

> ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of [page102] oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States of America v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21, at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> [page103]
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application [page104] of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *Hunter, supra*, aff'g *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (C.A.) . The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning, M.R., endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court", but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in [page105] previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *Hunter, supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.), at pp. 304 *et seq*.). In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-18). Although safeguards must be put in place for the protection of the innocent, and, more generally, to ensure the trustworthiness of court findings, continuous re-litigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *Hunter, supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less [page106] on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process, and the importance of preserving its integrity, were well described by Doherty J.A. He said, at para. 74:

> The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the Ontario *Evidence Act*, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to [page107] secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *Hunter, supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not in itself an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms such as appeals or judicial review. Indeed reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Re Del Core, supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Re Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues [page108] determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted (at p. 22):

> The right to challenge a conviction is subject to an important qualification. A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so... . Courts have rejected attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. The ambit of this qualification remains to be determined ... . [Emphasis added.]

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely *Demeter* (H.C.), *supra*, and *Hunter, supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (H.C.), *Franco, supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See for example *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (H.C.), at p. 218, aff'd without reference to this point (1978), 18 O.R. (2d) 714 (C.A.); *Bomac, supra*, at pp. 26-27; *Bjarnarson, supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C.S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Gen. Div.), at p. 115; see also [page109] P. M. Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-97; and Watson, *supra*, at pp. 648-51.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see M. Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective", in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002* (2002), vol. I, 279). A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that [page110] from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk, supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk, supra*, at para. 51; *Franco, supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended [page111] or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not in my view appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. *Application of Abuse of Process to Facts of the Appeal*

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet as pointed out by Doherty J.A. (at para. 84):

> Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of [page112] sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court -- or the jury --, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

The reasons of LeBel and Deschamps JJ. were delivered by

LeBEL J.

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause -- a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard -- patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, [page114] 2002 SCC 86 , I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in all administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may in fact obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, [2003] 3 S.C.R. 149, 2003 SCC 64 , released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise , it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 149 ; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at para. 26; *Chamberlain, supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what in my view is growing criticism with the ways in which the standards of review currently available within the [page115] pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, D. J. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 26; J. G. Cowan, "The Standard of Review: The Common Sense Evolution?", paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; F. A. V. Falzon, "Standard of Review on Judicial Review or Appeal", in *Administrative Justice Review Background Papers: Background Papers prepared by Administrative Justice Project for the Attorney General of British Columbia* (2002), at pp. 32-33). Reviewing courts too, have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Workers' Compensation Commission (Nfld.)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. S.C.T.D.), at para. 27, illustrate:

> In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular [page116] representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and,
- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less [page117] deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. *The Two Standards of Review Applicable in This Case*

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions -- for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation -- typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

[page118]

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 ("*PSAC*"), at pp. 960-61; and *Ivanhoe inc. v. UFCW, Local 500*, [2001] 2 S.C.R. 565, 2001 SCC 47, at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157, at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate [page119] question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp., supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of this particular legal question: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 37; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 , at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan, supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" [page120] (para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan, supra*, at para. 34, once a "broad relative expertise has been established", this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324. This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard", an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education, supra*, at para. 39; *Canadian Broadcasting Corp., supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe, supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 599-600, endorsed in *Pushpanathan, supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop [page121] a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentiality the holding of this Court in *Ivanhoe, supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan, supra*, at para. 49 ; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71, at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can [page122] be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) *The Definitions of Patent Unreasonableness*

78 This Court has set out a number of definitions of "patent unreasonableness", each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp*., [1979] 2 S.C.R. 227 ("*CUPE*"), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (p. 237). Cory J.'s characterization in *PSAC, supra*, of patent unreasonableness as a "very strict test", [page123] which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-64), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam, supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand", drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

82 Similarly, in *C.U.P.E. v. Ontario, supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam, supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario, supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) *The Interplay Between the Patent Unreasonableness and Correctness Standards*

84 As I observed in *Chamberlain, supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain, supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Dr. Q, supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

[page125]

(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *CUPE, supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see D. J. Mullan, *Administrative Law* (2001), at p. 69; see also H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-86).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*CUPE, supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, [1975] 1 S.C.R. 382 ("*Nipawin*") , at p. 389, and in *CUPE, supra*, at p. 237:

> ... acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment" in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147. [page126] *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a correctness basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796*", [1970] S.C.R. 425 (see Mullan, *Administrative Law, supra*, at pp. 69-70; see also *National Corn Growers, supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *CUPE*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law, supra*, at p. 70) .

89 If Dickson J.'s reference to *Anisminic* in *CUPE, supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *CAIMAW v. Paccar of Canada Ltd.*, [1989] 2 S.C.R. 983 ("*Paccar*").

90 In *Paccar*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as [page127] one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*CUPE, supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but ... then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review", *supra*, at p. 20; see also D. J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-70). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see M. Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. [page128] concurring) took to patent unreasonableness in *Paccar, supra*. He wrote, at pp. 1004 and 1005:

> The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.
>
> ...
>
> I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 ("*CUPE, Local 301*"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*CUPE, Local*

301, supra, at para. 59; see also *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756, at pp. 771 and 774-75).

94 This view was recently forcefully rearticulated in *Ryan, supra*. Iacobucci J. wrote, at paras. 50-51:

> [W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been... . The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> [page129]
>
> ... Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar, nor the companion case of *Ontario v. O.P.S.E.U.*, should be misinterpreted as a retreat from the position that in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were two standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness -- whether the employees' criminal convictions could be relitigated -- and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness -- whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "rationally supported"; this standard cannot be met where, as here, what supports the adjudicator's decision -- indeed, what that decision is wholly premised on -- is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable -- a conclusion that flows from the applicability of two separate standards of review -- is very different from suggesting [page130] that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *Paccar*, at p. 1004 -- "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" -- the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, are illustrative:

> Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective

> agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, [page131] there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.
>
> (L. Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 S.C.L.R. (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644:

> In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she ... reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law.*
>
> (I. Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 Man. L.J. 28, at pp. 64-65 (emphasis in original); see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review [page132] under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) *The Relationship Between the Patent Unreasonableness and Reasonableness Simpliciter Standards*

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness *Simpliciter*

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario, supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam, supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute, and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear", [page133] the reviewing court should not intervene (*Nipawin, supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan*, that I cited above:

> Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness... . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.
>
> (*Ryan, supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin, supra*, and *CUPE, supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe, supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to [page134] find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *PSAC, supra*, at pp. 963-64, Cory J. described a patently unreasonable decision in these terms:

> In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational... . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-28; see also G. Perrault, *Le contrôle judiciaire des décisions de l'administration: De l'erreur juridictionnelle à la norme de contrôle* (2002), at p. 116; S. Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (2003), at pp. 34-35; P. Garant, *Droit administratif* (4th ed. 1996), vol. 2, at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

> ... admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term "clearly" for other than rhetorical effect. Indeed, I want to suggest ... that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to make a nonsense [page135] of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

> (Mullan, "Recent Developments in Standard of Review", *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship and Immigration)* (2000), 184 F.T.R. 246, at para. 9:

> I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect, and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focussed on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *Paccar, supra*, at p. 1004, *per* La Forest J.; *Ryan, supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.), or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin, supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead [page136] that tribunal to reach the decision it did" (*Ryan, supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *Paccar, supra*, at pp. 1003-4, *per* La Forest J., and *Chamberlain, supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal ... is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the ... standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan, supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see D. K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser -- *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate (B.C.)* 541, at p. 545). Because the two variants of reasonableness [page137] are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Falzon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam, supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable .

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" [page138] of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see J. L. H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above -- i.e., attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam, supra*, at para. 56) is not clear enough (see D. W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-87). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards."

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education, supra*, [page139] and *Ivanhoe, supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers, supra* (see generally Mullan, "Of Chaff Midst the Corn", *supra*; Mullan, *Administrative Law, supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of *CUPE, supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed . An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: in what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is [page140] flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident -- i.e., clear, obvious, or immediate -- is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law, supra*, at p. 72; see also *Ivanhoe, supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

> In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

[page141]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision", to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam, supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.
>
> (*Ryan, supra*, at para. 53)

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

> whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record ... Or can one go beyond the record to demonstrate -- "identify" -- why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?
>
> (D. P. Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law", paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10.)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See, in this regard, the comments of Mullan in "Recent Developments in Standard of Review", *supra*, at p. 4.)

[page142]

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch -- i.e., interpretations that fall outside the range of those that can be "reasonably", "rationally" or "tenably" supported by the statutory language -- and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning"; provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review", *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-70, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators [page143] in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 , at para. 65, *per* L'Heureux-Dubé J., citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286, and *Ryan, supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: i.e., this decision is irrational enough to be unreasonable, but not so irrational as to be [page144] overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam, supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficultly caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible". While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible -- whether its illegibility is evident on a cursory glance or only after a close examination -- the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the [page145] decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Dr. Q, supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

> [In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault, supra,* at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at pp. 805-6). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 71:

> In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"... . A third aspect of the rule of law is ... that "the exercise of all public [page146] power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance .

"At its most basic level", as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted,

> ... societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals

> ... are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness.*
>
> (See the Honourable Madam Justice B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis in original) ; see also MacLauchlan, *supra*, at pp. 289-91.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (i.e., does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers, supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a [page147] way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J. M. Evans et al., *Administrative Law* (3rd ed. 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps more capable) of choosing among reasonable decisions. It is not to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (i.e., irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts [page148] should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 367-68) . As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an irrational decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *CUPE*. This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Solicitors

Solicitors for the appellant: Caley & Wray, Toronto.

Solicitors for the respondent the City of Toronto: Osler, Hoskin & Harcourt, Toronto.

Solicitor for the intervener: Attorney General of Ontario, Toronto.

End of Document

Toronto (City) v. Ontario (Attorney General), [2021] S.C.J. No. 34

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, R. Brown, M. Rowe, S.L. Martin and N. Kasirer JJ.

Heard: March 16, 2021;

Judgment: October 1, 2021.

File No.: 38921.

[2021] S.C.J. No. 34 | [2021] A.C.S. no 34 | 2021 SCC 34 | 2021EXP-2378

City of Toronto, Appellant; v. Attorney General of Ontario, Respondent, and Attorney General of Canada, Attorney General of British Columbia, Toronto District School Board, Cityplace Residents' Association, Canadian Constitution Foundation, International Commission of Jurists (Canada), Federation of Canadian Municipalities, Durham Community Legal Clinic, Centre for Free Expression at Ryerson University, Canadian Civil Liberties Association, Art Eggleton, Barbara Hall, David Miller, John Sewell, David Asper Centre for Constitutional Rights, Progress Toronto, Métis Nation of Ontario, Métis Nation of Alberta and Fair Voting British Columbia, Interveners

(186 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Constitutional law — Canadian constitution — Unwritten conventions and practices — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — Act imposed no limit on freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Constitutional law — Constitutional validity of legislation — Level of government — Provincial or territorial legislation — Interpretive and constructive doctrines — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — Act imposed no limit on freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Constitutional law — Division of powers — Provincial jurisdiction — Provincial powers (Constitution Act, 1867, s. 92) — Municipal institutions — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal

election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — City was advancing a positive rights claim, to which the Baier framework applied — City failed to demonstrate a substantial interference with freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Constitutional law — Canadian Charter of Rights and Freedoms — Fundamental freedoms — Freedom of thought, belief, opinion and expression — Freedom of expression — Democratic rights — Right to vote and hold elected office — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — City was advancing a positive rights claim, to which the Baier framework applied — City failed to demonstrate a substantial interference with freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Municipal law — Government — Council members — Wards — Appeal by City of Toronto from judgment of Ontario Court of Appeal that held Better Local Government Act, 2018, was constitutional dismissed — During City's municipal election campaign, Province enacted Better Local Government Act, 2018, which reduced size of City's Council — City challenged constitutionality of Act — Application judge found legislation violated s. 2(b) of the Charter, which Court of Appeal overturned — Province had acted constitutionally — City was advancing a positive rights claim, to which the Baier framework applied — City failed to demonstrate a substantial interference with freedom of expression — Unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of Constitution Act, 1867 or to read municipalities into s. 3 of Charter — Better Local Government Act, 2018.

Appeal by the City of Toronto from a judgment of the Ontario Court of Appeal that held that the Better Local Government Act, 2018, was constitutional. During the City of Toronto's municipal election campaign, the Province of Ontario enacted the Better Local Government Act, 2018, which reduced the size of Toronto City Council from 47 wards to 25. The City challenged the constitutionality of the legislation and applied for orders restoring the 47-ward structure. The application judge found the Act limited municipal candidates' right to freedom of expression and municipal voters' right to effective representation under s. 2(b) of the Charter. He found the limits could not be justified under s. 1 of the Charter and set aside the impugned provisions of the Act. The Court of Appeal granted a stay of the judgment. The municipal election proceeded on the basis of the 25-ward structure established by the Act. The Court of Appeal subsequently allowed Ontario's appeal, finding no limit on freedom of expression.
HELD: Appeal dismissed.

The Province had acted constitutionally. The City was advancing a positive rights claim, to which the framework established in Baier v. Alberta applied. The Baier framework set an elevated threshold for positive claims, requiring "substantial interference" with freedom of expression. The applicable factors could usefully be distilled to a single core question: was the claim grounded in the fundamental Charter freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government had either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? The City had failed to demonstrate a substantial interference with freedom of expression. The change in ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure. The Act imposed no limit on freedom of expression and did not violate s. 2(b) of the Charter. Despite their value as interpretive aids, unwritten constitutional principles could not be used as a basis for invalidating legislation. There was no freestanding right to effective representation outside s. 3 of the Charter. The unwritten constitutional principle of democracy could not be used to narrow provincial authority under s. 92(8) of the Constitution Act, 1867 or to read municipalities into s. 3 of the Charter. Dissenting reasons were provided.

Statutes, Regulations and Rules Cited:

Better Local Government Act, 2018, S.O. 2018, c. 11, Sch. 3, s. 1

By-law to amend By-law 267-2017, being a by-law to re-divide the City of Toronto's Ward Boundaries, to correct certain minor errors, City of Toronto By-law No. 464-2017, April 28, 2017

By-law to re-divide the City of Toronto's Ward Boundaries, City of Toronto By-law No. 267-2017, March 29, 2017

Canada Evidence Act, R.S.C. 1985, c. C-5

Canadian Charter of Rights and Freedoms, 1982, s. 1, s. 2(b), s. 2(d), s. 3, s. 7, s. 11(d), s. 15, s. 33

City of Toronto Act, 2006, S.O. 2006, c. 11, Sch. A, s. 128(1)

Constitution Act, 1867, Preamble, s. 91, s. 92, s. 92(8), s. 92(14), s. 96, s. 100, s. 101, s. 129

Constitution Act, 1982, s. 52, s. 52(1)

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 4

Magna Carta (1215)

Municipal Elections Act 1996, S.O. 1996, c. 32, Sch., s. 10.1(8)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Charter of Rights -- Freedom of expression -- Municipal elections -- Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign -- Whether legislation limits electoral participants' right to freedom of expression and, if so, whether limitation justified -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Better Local Government Act, 2018, S.O. 2018, c. 11.

Constitutional law -- Unwritten constitutional principles -- Democracy -- Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign -- Whether legislation unconstitutional for violating unwritten constitutional principle of democracy.

Court Summary:

On May 1, 2018, the City of Toronto municipal election campaign commenced and nominations opened in preparation for an election day on October 22, 2018. On July 27, 2018, the closing day for nominations, Ontario announced its intention to introduce legislation reducing the size of Toronto City Council. On August 14, 2018, the *Better Local Government Act, 2018*, came into force, reducing the number of wards from 47 to 25.

The City and two groups of private individuals challenged the constitutionality of the *Act* and applied for orders restoring the 47-ward structure. The application judge found that the *Act* limited the municipal candidates' right to freedom of expression under s. 2(b) of the *Charter* and municipal voters' s. 2(b) right to effective representation. He held that these limits could not be justified under s. 1 of the *Charter* and set aside the impugned provisions of the *Act*. Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the 25-ward structure created by the *Act*. The Court of Appeal later allowed the appeal, finding no limit on freedom of expression. The majority held that the City had advanced a positive rights claim, which was not properly grounded in s. 2(b) of the *Charter*, and concluded that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression and in finding that the right to effective representation applies to municipal elections and bears any influence over the s. 2(b) analysis. The majority also held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*, nor do they limit provincial legislative authority over municipal institutions.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and Moldaver, Côté, **Brown** and Rowe JJ.: Ontario acted constitutionally. The *Act* imposed no limit on freedom of expression. Further, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can the unwritten constitutional principle of democracy be used to narrow provincial authority under s. 92(8) of the *Constitution Act, 1867*, or to read municipalities into s. 3 of the *Charter*.

A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts. Section 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication, has been interpreted as generally imposing a negative obligation rather than a positive obligation of protection or assistance. A claim is properly characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage. Such claims of right under s. 2(b) are considered under the framework established in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

However, as explained in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Many constitutional rights have both positive and negative dimensions and this is so for s. 2(b). Central to whether s. 2(b) has been limited is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right.

In the context of positive claims under s. 2(b), where a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression, the applicable framework is that of *Baier*. As held in *Baier*, to succeed, a positive claim must satisfy the following three factors first set forth in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016: (1) the claim should be grounded in freedom of expression, rather than in access to a particular statutory regime; (2) the claimant must demonstrate that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression; and (3) the government must be responsible for the inability to exercise the fundamental freedom. These factors set an elevated threshold for positive claims and can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This single question, a salutary clarification of the *Baier* test, emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is effectively precluded. While meaningful expression need not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

In the present case, the City has not established a limit on s. 2(b). The City's claim is a claim for access to a particular statutory platform, and is thus, in substance, a positive claim. The *Baier* framework therefore applies, and the City had to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. The candidates and their supporters had 69 days to re-orient their messages and freely express themselves according to the new ward structure. The *Act* imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression. Some of the candidates' prior expression may have lost its relevance, but something more than diminished effectiveness is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression may rise to the level of a substantial interference with freedom of expression. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

Furthermore, the unwritten constitutional principle of democracy cannot be used as a device for invalidating otherwise valid provincial legislation such as the impugned provisions of the *Act*. Unwritten principles are part of the law of the Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Their legal force lies in their representation of general principles within which the constitutional order operates and, therefore, by which the Constitution's written terms -- its provisions -- are to be given effect. In practical terms, unwritten constitutional principles may assist courts in only two distinct but related ways.

First, they may be used in the interpretation of constitutional provisions. Where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself, the language chosen to articulate the specific right or freedom, and the historical origins of the concepts enshrined. Where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. Structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent.

Neither of these functions support the application of unwritten constitutional principles as an independent basis for invalidating legislation. On the contrary, unwritten constitutional principles, such as democracy, a principle by which the Constitution is to be understood and interpreted, strongly favour upholding the validity of legislation that conforms to the text of the Constitution. Subject to the *Charter*, a province, under s. 92(8) of the *Constitution Act, 1867*, has absolute and unfettered legal power to legislate with respect to municipalities. This plenary jurisdiction is unrestricted by any constitutional principle.

As for s. 3 of the *Charter*, it guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it does not extend to municipal elections. Effective representation is not a principle of s. 2(b) of the *Charter*, nor can the concept be imported wholesale into s. 2(b). Section 3 and its requirement of effective representation also cannot be made relevant to the current case by using the democratic principle. Section 3 democratic rights were not extended to candidates or electors to municipal councils. The absence of municipalities in the constitutional text is not a gap to be addressed judicially; rather, it is a deliberate omission. The text of the Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

Per **Abella**, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and the application judge's declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter* restored. Changing the municipal wards in the middle of an ongoing municipal election was unconstitutional.

When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection.

A stable election period is crucial to electoral fairness and meaningful political discourse. As such, state interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including participation in social and political decision-making.

A two-part test for adjudicating freedom of expression claims was established in *Irwin Toy*. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second asks whether the government action, in purpose or effect, interfered with freedom of expression.

The legal framework set out in *Baier*, which was designed to address under inclusive statutory regimes, only applies to claims placing an obligation on government to provide individuals with a particular platform for expression. Claims of government interference with expressive rights that attach to an electoral process are the kind of claims governed by the *Irwin Toy* framework.

The distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus. They also have negative dimensions because they sometimes require the state not to intervene. A unified purposive approach has been adopted to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*. There is therefore no reason to superimpose onto the constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes.

In the present case, the s. 2(b) claim is about government interference with the expressive rights that attach to the electoral process and it is precisely the kind of claim that is governed by the *Irwin Toy* framework. Applying that framework, it is clear that the timing of the legislation, by interfering with political discourse in the middle of an election, violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries during an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse. The *Act* eradicated nearly half of the active election campaigns, and required candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance. The timing of the *Act* breathed instability into the election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern.

The limitation on s. 2(b) rights in this case was the *timing* of the legislative changes. Ontario offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. In the absence of any evidence or explanation for the timing of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society.

As for the role of unwritten constitutional principles, there is disagreement with the majority's observations circumscribing their scope and power in a way that reads down the Court's binding jurisprudence. Unwritten constitutional principles may be used to invalidate legislation. The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources. Canada's Constitution, as a result, embraces unwritten as well as written rules. Unwritten constitutional principles have been held to be the lifeblood of the Constitution and the vital unstated assumptions upon which the text is based. They are not merely "context" or "backdrop" to the text. On the contrary, they are the Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles.

Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions. The legislative bodies in Canada must conform to these basic structural imperatives and can in no way override them. Accordingly, unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with the Constitution's internal architecture or basic constitutional structure. This would undoubtedly be a rare case; however, to foreclose the possibility that unwritten principles can be used to invalidate legislation in all circumstances is imprudent. It not only contradicts the Court's jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it.

Unwritten constitutional principles are the foundational organizing principles of the Constitution and have full legal force. They serve to give effect to the structure of the Constitution and function as independent bases upon which to attack the validity of legislation since they have the same legal status as the text. Unwritten constitutional principles not only give meaning and effect to constitutional text and inform the language chosen to articulate the specific right or freedom, they assist in developing an evolutionary understanding of the rights and freedoms guaranteed in the Constitution, which have long been described as a living tree capable of growth and expansion. Unwritten constitutional principles are a key part of what makes the tree grow. They are also substantive legal rules in their own right. In appropriate cases, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional.

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By Wagner C.J. and Brown J.

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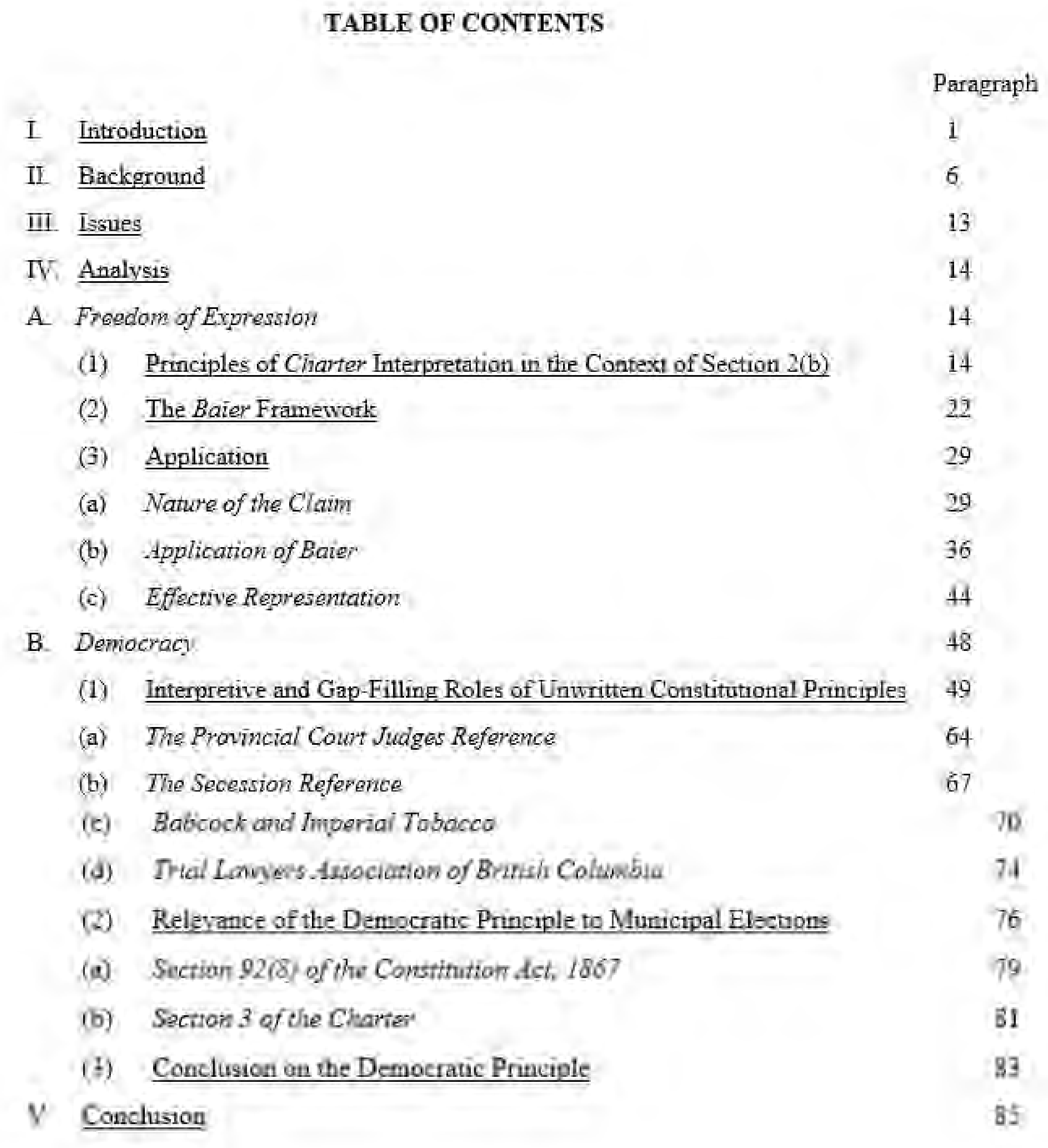

TABLE OF CONTENTS

Paragraph
I. Introduction 1
II. Background 6
III. Issues 13
IV. Analysis 14
A. *Freedom of Expression* 14
(1) Principles of *Charter* Interpretation in the Context of Section 2(b) 14
(2) The *Baier* Framework 22
(3) Application 29
(a) *Nature of the Claim* 29
(b) *Application of Baier* 36
(c) *Effective Representation* 44
B. *Democracy* 48
(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles 49
(a) *The Provincial Court Judges Reference* 64
(b) *The Secession Reference* 67
(c) *Babcock and Imperial Tobacco* 70
(d) *Trial Lawyers Association of British Columbia* 74
(2) Relevance of the Democratic Principle to Municipal Elections 76
(a) *Section 92(8) of the Constitution Act, 1867* 79
(b) *Section 3 of the Charter* 81
(3) Conclusion on the Democratic Principle 83
V. Conclusion 85

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

R. WAGNER C.J. and R. BROWN J.

I. Introduction

1 While cast as a claim of right under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, this appeal, fundamentally, concerns the exercise of provincial legislative authority over municipalities. The issue, simply put, is whether and how the Constitution of Canada restrains a provincial legislature from changing the conditions by and under which campaigns for elected municipal councils are conducted.

2 Section 92(8) of the *Constitution Act, 1867* assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province". Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status (*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409, at paras. 33-34). The province has "absolute and unfettered legal power to do with them as it wills" (*Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 58, quoting with approval Campbell J. in *Ontario Public School Boards' Assn. v. Ontario (Attorney General)* (1997), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*East York (Borough) v. Ontario* (1997), 36 O.R. (3d) 733 (C.A.), at pp. 737-38, per Abella J.A.). And "it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so" (*Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 39).

3 Aside from one reference to s. 92(8) -- and an acknowledgement that the Province of Ontario had constitutional authority to act as it did in this case -- our colleague Abella J. all but ignores this decisive constitutional context (para. 112). And yet, these considerations loom large here. After the closing of a nomination period for elections to the Toronto City Council, the Province legislated a new, reduced ward structure for the City of Toronto and a correspondingly reduced Council. The City says that doing so was unconstitutional, because it limited the s. 2(b) *Charter* rights of electoral participants and violated the unwritten constitutional principle of democracy. It also, says the City, ran afoul of the constitutional requirements of effective representation, which it says flow from s. 2(b) of the *Charter* and s. 92(8) of the *Constitution Act, 1867* by virtue of that same unwritten constitutional principle of democracy.

4 None of these arguments have merit, and we would dismiss the City's appeal. In our view, the Province acted constitutionally. As to the s. 2(b) claim, the City seeks access to a statutory platform which must be considered under the framework stated in *Baier*. The change to the ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure in the 69 days between the *Act* coming into force and the election day. There was no substantial interference with the claimants' freedom of expression and thus no limitation of s. 2(b).

5 Nor did the *Act* otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, and there is no freestanding right to effective representation outside s. 3 of the *Charter*. Further, the unwritten constitutional principle of democracy cannot be used to narrow provincial authority under s. 92(8), or to read municipalities into s. 3.

II. Background

6 In 2013, the City of Toronto engaged consultants to conduct the Toronto Ward Boundary Review of Toronto's then 44-ward structure. They recommended an expanded 47-ward structure, which the City adopted in 2016.

7 On May 1, 2018, the City of Toronto campaign commenced and nominations opened in preparation for an election day on October 22, 2018. By the close of nominations on July 27, 2018, just over 500 candidates had registered to run in the 47 wards. That same day, the Government of Ontario announced its intention to introduce legislation reducing the size of Toronto City Council to 25 wards. On August 14, 2018, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), came into force, reducing the number of wards from 47 to 25 (based on the boundaries of the federal electoral districts), and extending the nomination period to September 14.

8 The City and two groups of private individuals applied on an urgent basis to the Ontario Superior Court of Justice challenging the constitutionality of these measures and seeking orders restoring the 47-ward structure. They argued that the *Act* breached *Charter* guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law.

9 The application judge agreed, finding two limits on s. 2(b) of the *Charter* (2018 ONSC 5151, 142 O.R. (3d) 336). First, he found that the *Act* limited the municipal candidates' s. 2(b) right to freedom of expression, a conclusion largely tied to the timing of the *Act*, enacted as it was during the election campaign. Secondly, he found that the *Act* limited municipal voters' s. 2(b) right to effective representation -- despite the fact that effective representation is a principle of s. 3 (and not s. 2(b)) of the *Charter* - - due to his conclusion that the ward population sizes brought about by the *Act* were too large to allow councillors to effectively represent their constituents. Neither of these limits could, he further held, be justified under s. 1 and he set aside the impugned provisions of the *Act*. As a result, the election was to proceed on the basis of the 47-ward system.

10 The Province appealed and moved to stay the judgment pending appeal. The Court of Appeal for Ontario granted the stay on September 19, 2018, concluding that there was a strong likelihood that the Province's appeal would be successful and, on October 22, 2018, the Toronto municipal election proceeded on the basis of the 25-ward structure created by the *Act* (2018 ONCA 761, 142 O.R. (3d) 481). No issue is taken with the integrity of the election or the results thereof.

11 When the Court of Appeal decided the Province's appeal on its merits, it divided. While the dissenters would have invalidated the *Act* as unjustifiably limiting freedom of expression, the majority allowed the appeal, finding no such limit (2019 ONCA 732, 146 O.R. (3d) 705). The City had advanced a positive rights claim -- that is, a claim for a particular platform and not protection from state interference with the conveyance of a message. Consistent with the *Baier* framework governing such claims, the majority applied the factors stated in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, to conclude that the claim was not properly grounded in s. 2(b) of the *Charter*, and that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression. Further, he had erred in finding that the right to effective representation -- guaranteed by s. 3 -- applies to municipal elections and bears any influence over the s. 2(b) analysis. Finally, the majority held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*; nor do they limit provincial legislative authority over municipal institutions. Though unwritten constitutional principles are sometimes used to fill gaps in the Constitution, no such gap exists here.

12 The Court of Appeal appears to have granted the City public interest standing to argue the appeal (para. 28). The City's standing was not challenged before this Court.

III. Issues

13 Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

IV. Analysis

A. *Freedom of Expression*

(1) Principles of *Charter* Interpretation in the Context of Section 2(b)

14 This appeal hinges on the scope of s. 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication". A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at paras. 8-10) and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344). Yet, it is undeniable that s. 2(b) has traditionally been interpreted expansively (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 765-67). Indeed, s. 2(b) has been interpreted so broadly that the framework has been criticized for setting too low a bar for establishing a s. 2(b) limitation, such that any consideration of its substantive reach and bounds is generally consigned to the limitations analysis under s. 1 (K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 174, citing M. Plaxton and C. Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010), 52 S.C.L.R. (2d) 65). Following *Irwin Toy*, then, if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of "expression" (p. 969). Further, if the purpose or effect of the impugned governmental action is to control attempts to convey meaning through that activity, a limit on expressive freedom will be shown (p. 972).

15 Freedom of expression is not, however, presently recognized as being without internal limits. Activities may fall outside the scope of s. 2(b) where the method of the activity itself -- such as violence -- or the location of that activity is not consonant with *Charter* protection (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60 and 62).

16 Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a negative obligation ... rather than a positive obligation of protection or assistance" (*Baier*, at para. 20 (emphasis added), citing *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" (*Baier*, at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court's *Irwin Toy* framework.

17 In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal's statement in this case that "[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it", and that positive claims under s. 2(b) may be recognized in only "exceptional and narrow" circumstances (paras. 42 and 48 (emphasis in original)).

18 Central to whether s. 2(b) was limited by the Province here is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right. In *Baier*, this Court shielded positive claims from the *Irwin Toy* framework and subjected them to an elevated threshold. This is necessary, given the ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test. An elevated threshold for positive claims narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression. To consider positive claims under *Irwin Toy* would be to force the government to justify, under s. 1, any decisions *not* to provide particular statutory platforms for expression.

19 The *Baier* framework is therefore not confined, as our colleague suggests, "to address[ing] underinclusive statutory regimes" (para. 148). This Court could not have been clearer in *Baier* that it applies "where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(*b*)" (para. 30). Were it otherwise -- that is, were *Baier*'s application limited to cases of underinclusion -- claims seeking the creation or extension of a statutory platform for expression would be considered under *Baier* while claims seeking the preservation of that same platform would be considered under *Irwin Toy*. This is illogical. *Baier*'s reach extends beyond cases of underinclusion or exclusion, and categorically limits the "obligation[s] on government to provide individuals with a particular platform for expression" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This reflects the separation of powers; choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state.

20 We should not be taken as suggesting that s. 2(b) is to be understood as conferring a right that is wholly positive or wholly negative. Many constitutional rights have both positive and negative dimensions and the *Baier* framework explicitly recognizes that this is so for s. 2(b). But the distinction between those positive and negative dimensions remains important when considering the nature of *the obligation* that the claim seeks to impose upon the state: a "right's positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways" (P. Macklem, "Aboriginal Rights and State Obligations"

(1997), 36 Alta. L. Rev. 97, at p. 101; see also A. Sen, *The Idea of Justice* (2009), at p. 282). For instance, would the claim, if accepted, require government action, or is the claim concerned with restrictions on the content or meaning of expression? And, were the claim rejected, would it deny the claimant access to a particular platform for expression on a subject, or would it preclude altogether the possibility of conveying expression on that subject? While in *Haig*, L'Heureux-Dubé J. correctly noted that the distinction between positive and negative entitlements is "not always clearly made, nor ... always helpful", she nevertheless distinguished typical negative claims from those that might require "positive governmental action" (p. 1039). This is the distinction with which we concern ourselves here.

21 This appeal therefore presents an opportunity to affirm and clarify the application of *Baier* to positive claims under s. 2(b). *Baier* remains good law in the context of s. 2(b). It adopts a framework for analysis first set forth in *Dunmore*, which itself decided a claim under s. 2(d) (freedom of association). We need not decide here whether *Dunmore* remains applicable to s. 2(d) claims (an open question, given the decisions of this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3). It suffices here for us to affirm *Baier* as a useful and necessary framework in the context of positive s. 2(b) claims (although, as we will explain, we would simplify the framework).

(2) The *Baier* Framework

22 The *Baier* framework applies if a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression (para. 30; *Greater Vancouver Transportation Authority*, at para. 35). Here, therefore, if the City's claim would require the government or legislature to enact legislation or promulgate regulations, or otherwise act to provide a particular statutory or regulatory platform, it is advancing a positive claim (*Baier*, at para. 35).

23 In *Baier*, this Court held that, to succeed, a positive claim must satisfy the three *Dunmore* factors: (1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime? (2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression? (3) Is the government responsible for the inability to exercise the fundamental freedom?

24 These factors set an elevated threshold for positive claims. The first factor asks what the claimant is really seeking -- in other words, whether the claim is grounded in freedom of expression or whether it merely seeks access to a statutory regime. Likewise, the second factor -- which requires that the claimant establish a *substantial* interference with freedom of expression -- sets a higher threshold than that stated in *Irwin Toy*, which asks only whether "the purpose or effect of the government action in question was to restrict freedom of expression" (p. 971; see also *Baier*, at paras. 27-28 and 45).

25 So understood, these factors can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This is, to be clear, a single question which emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Given what we see as the significant overlap among the factors -- particularly between the first and second -- this is, in our view, a salutary clarification of the *Baier* test, entirely consistent with this Court's approach in *Baier* and *Greater Vancouver Transportation Authority*. To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the *Charter* (*Haig*, at p. 1041).

26 If, therefore, a claimant can demonstrate that, by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so, the claim may proceed.

Despite being a positive claim, the claimant has demonstrated a limit to its s. 2(b) right, and -- subject to justification of such limit under s. 1 -- government action or legislation may be required.

27 There is no suggestion here that the Province acted *with the purpose* of interfering with freedom of expression, and we therefore confine our observations here to the claim presented -- that is, a claim that a law has had *the effect* of substantially interfering with freedom of expression. In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 33). While meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases (*Baier*, at para. 27; *Dunmore*, at para. 25). For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.

28 The height of this bar of effective preclusion is demonstrated by *Baier*. There, legislation was amended to prohibit school employees from running for election as school trustees, and the Court -- applying the *Dunmore* factors - - concluded that no substantial interference with freedom of expression was demonstrated. The claim was grounded merely in access to a particular statutory platform governing school trusteeship, rather than a substantial interference with freedom of expression. And, in any event, there was no interference, substantial or otherwise, with the appellants' ability to express views on matters relating to the education system. Their exclusion from the statutory scheme deprived them only of one particular *means* of such expression (paras. 44 and 48).

(3) Application

(a) *Nature of the Claim*

29 The first question to answer in deciding this appeal is whether the City advances a positive claim. There are two ways in which the City's claim can be understood. Each leads to the conclusion that the claim is, in substance, a positive claim that must, therefore, show a substantial interference with freedom of expression.

30 The first possible view of the City's claim is that of *restoring an earlier statutory platform*, specifically the 47-ward structure. That this is so is evident from the City's requested disposition, which asks that the next municipal election be conducted under the previous framework (A.F., at para. 152). The City, then, would have the Province act (either by enacting new legislation or repealing the impugned provisions of the *Act*) to restore the previous statutory platform. This reveals a straightforward positive claim. The fact that the City and the participants in the election had previously enjoyed access to the 47-ward structure is of no legal significance. In *Baier*, this Court viewed a claim for restoring the status quo as a positive claim, equating it with a demand to legislate a framework for the first time. Such an approach is necessary to prevent fettering; "[t]o hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(*b*)" (para. 36).

31 The second possible view of the City's claim is that of *maintaining an existing statutory platform*. The City frames its claim as asking the Province, once a municipal election period commences, to ensure access to whatever election platform existed at that time. In the City's view, what is otherwise political expression becomes what it calls "electoral expression" during an election period (A.F., at para. 54). Protection of this "electoral expression", it says, requires the maintenance of the particular electoral framework that was in place at the beginning of the electoral period. Framed thusly, the City's claim that the impugned provisions of the *Act* limited s. 2(b) turns squarely on the *timing* of the *Act*. Indeed, at the hearing of this appeal, the City conceded that barring any other potential issues, the Province was constitutionally permitted to enact this same legislation in the week *following* the election. Further, the City requested -- in the event that this Court finds only that the timing of the *Act* was unconstitutional -- a declaration to that effect, rather than a remedy that would restore the previous 47-ward structure.

32 The City's focus on the timing of the *Act* cannot, however, convert its positive claim into a negative one. While its claim is couched in language of non-interference -- something that superficially resembles a negative claim to be considered under the *Irwin Toy* framework -- the City does not seek protection of electoral participants' expression from restrictions tied to content or meaning (as was the case, for example, in *Greater Vancouver Transportation Authority*); rather, it seeks a particular platform (being whatever council structure existed at the outset of the campaign) by which to channel, and around which to structure, that expression.

33 So understood, the claim is akin to that rejected in *Baier*. The only point of distinction is that *Baier* involved a request for a specific type of legislative regime (i.e., one that permitted school employees to run for and serve as school board trustees), while the claim in this case is for temporary protection -- that is, for the duration of the campaign -- of whatever particular type of election structure existed at the outset of the election period. But, for the purposes of deciding constitutionality, there is no difference between the present case and a hypothetical scenario in which the Province were to scrap the ongoing election and replace it with a completely new platform with a different structure and a reasonable campaign period altogether. Here, the City is able to frame its claim only in terms of non-interference because the *Act* modified the existing structure without scrapping it. But the ultimate result is the same. The City's claim is still a claim for access to a particular statutory platform; the precise disposition requested simply depends on whatever electoral framework is in place at the outset of the election process. It is thus a positive claim. Because municipal elections are merely statutory platforms without a constitutional basis, provinces can -- subject to the elevated threshold of a substantial interference -- change the rules as they wish.

34 To hold otherwise would be to contemplate an unprecedented statutory freeze on provincial jurisdiction under s. 92(8), temporarily constitutionalizing a particular statutory platform for the duration of an election. What would normally be considered a positive claim under s. 2(b) would effectively transform into a negative claim for that period of time. This is constitutionally dubious, nonsensical, and even futile since the duration of such a freeze would depend entirely on the length of the election, over which the Province itself has ultimate authority. With respect, our colleague Abella J. ignores these concerns in holding that *Irwin Toy* ought to apply to a claim such as this. Provincial authority to legislate a change to Toronto's ward structure is accepted, but on our colleague's understanding this authority is operative only some of the time (para. 112). Combined with her broad articulation of the *Irwin Toy* threshold in this context -- whether legislation "destabiliz[es] the opportunity for meaningful reciprocal discourse" -- such an understanding would effectively freeze legislative authority to even tangentially affect a municipal election for the duration of the campaign (para. 115). Such a freeze sits awkwardly with the plenary authority that provinces enjoy under s. 92(8) of the *Constitution Act, 1867*.

35 In sum, the City advances a positive claim and the *Baier* framework applies.

(b) *Application of Baier*

36 As explained above, the *Baier* framework asks whether the claimant demonstrated that, by denying access to a statutory regime, the government has substantially interfered with freedom of expression. To repeat, this is a demanding threshold, requiring the City to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. In our view, the City cannot do so and therefore has not established a limit on s. 2(b).

37 Here, the candidates and their supporters had 69 days -- longer than most federal and provincial election campaigns -- to re-orient their messages and freely express themselves according to the new ward structure. (Our colleague Abella J. is simply incorrect to suggest, at para. 104, that only one month of the campaign remained. It was twice that.) The *Act* did not prevent candidates from engaging in further political speech under the new structure. Candidates continued to campaign vigorously, canvassing and debating about issues unrelated to the impugned provisions, the size of council or the ward boundaries. And even had they not, nothing in the *Act* prevented them from doing so. It imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression.

38 It is of course likely that some of the candidates' prior expression may have lost its relevance; pamphlets or other campaign paraphernalia with an old ward designation on them, for instance, had to be revised or discarded. But, with the new ward structure -- and larger ward populations -- came higher campaign expenditure limits, so candidates were able to raise more funds over the 69 days they had left in the campaign. This is, therefore, a complaint that the prior expression of the candidates was no longer meaningful or helpful in their project to secure election. It is, at its root, a complaint about diminished *effectiveness*.

39 While diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation -- see, for instance, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 15, per McLachlin C.J. and Major J., dissenting in part, but not on this point, and *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 -- more is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression -- for instance, instituting a two-day electoral campaign -- may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

40 Even accepting that the change in structure diminished the effectiveness of the electoral candidates' prior political speech by rendering some of their 47-ward campaign communications less relevant, this does not rise to the level of substantial interference. Again, the campaign that took place over 69 days following the imposition of the 25-ward system was vigorously contested by candidates whose freedom of expression was clearly not radically frustrated. We acknowledge that the application judge found a substantial interference with freedom of expression (para. 32). There are, however, three problems with his finding. First, this finding was made in the context of legal error, since he erroneously applied the *Irwin Toy* framework for a negative claim. Secondly, and relatedly, the reasons of the judge make clear that this finding was tied to the diminished effectiveness of the candidates' expression, something that, as explained, is simply insufficient to show a limit on freedom of expression under the *Baier* framework. Finally, given the truncated timelines of the matter at first instance, the judge was required to make this finding on a limited factual record. With the benefit of fresh evidence adduced by the Province and admitted at this Court, it is clear that the candidates were not effectively precluded from expressing themselves in the context of the campaign. They conducted vigorous, hard-fought campaigns about the issues that mattered to them.

41 The City says that the expression at issue here -- again, what it calls "electoral expression" -- is uniquely connected to, and dependent on, the framework of the election itself. Therefore, it says, the scope of s. 2(b) encompasses not only the expression itself but also the structure of the election. Put thusly, however, the claim is not dissimilar to the "unique role" of school trusteeship claimed by the appellants, and rejected by the Court, in *Baier*. Claiming a unique role or dependence on a statutory platform is not the same as claiming a fundamental freedom (*Baier*, at para. 44). Doing so is simply to seek access to that statutory platform. That is what the City seeks here.

42 In sum, the *Baier* threshold is not met here. The *Act* imposed no limit on freedom of expression.

43 Having found no limit to s. 2(b), we need not consider s. 1. We note, however, that our colleague Abella J. decides s. 1 against the Province on the basis that it "offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election" (para. 161). This ignores the Province's written and oral submissions that the newly elected government proceeded expeditiously so as to be able to implement these changes within the time constraints of its own elected mandate, rather than wait four years until the next municipal election (R.F., at para. 149; transcript, at pp. 111-12).

(c) *Effective Representation*

44 The City also says that the impugned provisions of the *Act* infringe "effective representation", an incident of the guarantee contained in s. 3 of the *Charter* which, the City says, can be imported into s. 2(b).

45 Section 3 guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it guarantees "only the right to vote in elections of representatives of the federal and the provincial legislative assemblies" (*Haig*, at p. 1031 (emphasis added)) and "does not extend to municipal elections" (p. 1031 (emphasis added), citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2). Simply put, ss. 2(b) and 3 record distinct rights which must be given independent meaning (*Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at paras. 79-80; *Harper*, at para. 67). Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different *Charter* right.

46 In any event, effective representation connotes *voter parity* which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of "prime importance" (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 184). What matters is the *relative population* of the wards, *not* their *absolute size*. To hold otherwise implies keeping the population of wards relatively constant by increasing the number of councillors to keep pace with population growth, a notion unknown to Canadian law (in s. 3 or elsewhere) and which would not be without its own difficulties, including potentially unwieldly growth in the size of Toronto City Council (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 McGill L.J. 269, at pp. 298-99; J. C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (2001), at pp. 15 and 19).

47 And *even were* effective representation to apply as a consideration here, we would not find that the principle has been violated due only to the larger population sizes of the wards created by the *Act*. It is not disputed that the 25-ward structure of the *Act* enhanced voter parity, relative to the 47-ward structure preferred by the City (which was not even designed to achieve voter parity until 2026) (A.F., at para. 150; R.F., at paras. 35, 38, 133, 143 and 148). Indeed, the Toronto Ward Boundary Review's reasoning for having rejected the 25-ward structure was criticized on this very basis (R.R. (short), vol. II, at pp. 65, 69, 72-73 and 77-78). While the principle of effective representation encompasses more than simple voter parity, those who rely upon the principle of effective representation here fail to identify any other factors -- geography, community history, community interests and minority representation -- that could conceivably justify a departure from parity (see *Reference re Prov. Electoral Boundaries (Sask.)*, at p. 184).

B. *Democracy*

48 The second issue on appeal is whether the impugned provisions of the *Act* are unconstitutional for violating the unwritten constitutional principle of democracy. Specifically, the City argues that the change in ward structure violated the unwritten principle of democracy by denying voters effective representation and disrupting the election process (A.F., at para. 105). It therefore asks the Court to use the democratic principle as a basis for invalidating otherwise valid provincial legislation. It says this is made possible by drawing from this Court's s. 3 jurisprudence and from the concept of effective representation, and by viewing the principle as limiting provincial competence under s. 92(8). Conversely, and echoing the Court of Appeal on this point, the Attorney General of Ontario says that the unwritten constitutional principle of democracy cannot be used as a device for invalidating legislation, independently of written constitutional provisions and the law governing them. For the reasons that follow, the Attorney General is correct.

(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles

49 The Constitution of Canada embodies written and unwritten norms. This Court has recognized that our Constitution describes an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 93; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 50-51). These principles, such as democracy and the rule of law, "infuse our Constitution" (*Secession Reference*, at para. 50).

Although not recorded outside of "oblique reference[s]" in the preamble to the *Constitution Act, 1867* and to the *Constitution Act, 1982* (para. 51), these principles are "foundational" (para. 49), without which "it would be impossible to conceive of our constitutional structure" (para. 51). These principles have "full legal force" and may give rise to substantive legal obligations (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at p. 845). "[L]ike all principles of political morality, [they] can guide and constrain the decision-making of the executive and legislative branches" (C.A. reasons, at para. 84, citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52).

50 Unwritten principles are therefore part of *the law* of our Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Our colleague Abella J. seizes upon a statement from a dissenting opinion in *Reference re Resolution to Amend the Constitution* to support the proposition that "full legal force" necessarily includes the power to invalidate legislation. But the complete passage in *Reference re Resolution to Amend the Constitution*, and the jurisprudence cited therein, demonstrates that Martland and Ritchie JJ. are discussing *federalism*&#8212; and, while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis. Nor does our colleague's reliance upon *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (at para. 176), support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would infringe ss. 96 to 101 and 129 of the *Constitution Act, 1867*. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*.

51 Further, the authorities she cites as "recogniz[ing] that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government" (para. 166) do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation. Indeed, it is quite the contrary -- for example, in *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that *legislation itself* ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". While courts in the United Kingdom may find primary legislation to be inconsistent with the *European Convention on Human Rights*, 213 U.N.T.S. 221, they may only issue a declaration of incompatibility (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4); they have not used unwritten constitutional principles to invalidate legislation.

52 Our colleague is concerned about the "rare case" where "legislation [that] elides the reach of any express constitutional provision ... is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and recourse must be had to unwritten constitutional principles (para. 170, quoting *Secession Reference*, at para. 50, and *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our "basic constitutional structure" would not infringe the Constitution itself. And that structure, recorded in the Constitution's text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.'s statement that unwritten principles have "full legal force in the sense of being employed to strike down legislative enactments" (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in support of their statement; Martland and Ritchie JJ. were describing the "constitutional requirements that are derived from the federal character of Canada's Constitution" (pp. 844-45 (emphasis added)). And this is precisely the point &#8212; while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

53 To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof &#8212; particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act*, *1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once "constitutional structure" is properly understood, it becomes clear that, when our colleague invokes "constitutional structure", she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.

54 Ultimately, what "full legal force" means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has "full legal force" within its proper ambit. Our colleague's position -- that because unwritten constitutional principles have "full legal force", they must necessarily be capable of invalidating legislation -- assumes the answer to the preliminary but essential question: what *is* the "full legal force" of *unwritten constitutional principles*? And in our view, *because* they are unwritten, their "full legal force" is realized *not* in *supplementing* the written text of our Constitution as "provisions of the Constitution" with which no law may be inconsistent and remain of "force or effect" under s. 52(1) of the *Constitution Act, 1982*. Unwritten constitutional principles are not "provisions of the Constitution". Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms -- its *provisions* -- are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.

55 First, they may be used in the interpretation of constitutional provisions. Indeed, that is the "full legal force" that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence and the rule of law have aided in the interpretation of ss. 96 to 100 of the *Constitution Act, 1867*, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel*, at paras. 10-11 and 27-28; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing "the character and the larger objects of the *Charter* itself, ... the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined" (*Quebec (Attorney General)*, at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also *R. v. Poulin*, 2019 SCC 47, at para. 32).

56 Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich* (1895), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

57 Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

58 First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and 64-67; J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 Queen's L.J. 389, at pp. 427-32). Our colleague's approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

59 Secondly, unwritten constitutional principles are "highly abstract" and "[u]nlike the rights enumerated in the *Charter* -- rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority -- the concep[t] of democracy ... ha[s] no canonical formulatio[n]" (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which "promotes legal certainty and predictability" in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers" (*Imperial Tobacco*, at para. 65). Accordingly, there is good reason to insist that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., "unjust or unfair" *or otherwise normatively deficient*).

60 We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at p. 232). Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" *only*. Secondly, s. 1 provides a basis for the state to justify limits on "the rights and freedoms set out" in the *Charter*. Unwritten constitutional principles, being *unwritten*, are not "set out" in the *Charter*. To find, therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

61 Our colleague says that the application of s. 33 "is not directly before us" (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33's application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.

62 We note an important caveat to the foregoing. The unwritten constitutional principle of the honour of the Crown is *sui generis*. As correctly noted in submissions of the interveners the Métis Nation of Ontario and the Métis Nation of Alberta, the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing Aboriginal societies (*Haida Nation v. British Columbia (Minister of Forests*), 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32), and from the unique relationship between the Crown and Indigenous peoples (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 385). We need not decide here whether the principle is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard.

63 In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. A careful review of the Court's jurisprudence supports this conclusion.

(a) *The Provincial Court Judges Reference*

64 In the *Provincial Court Judges Reference*, this Court considered whether judicial independence, "an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 109), restricted the extent to which a provincial government could reduce the salaries of provincial court judges. That principle, the Court held, emerged from the reading together of s. 11(d) of the *Charter*, and the preamble and ss. 96 to 100 of the *Constitution Act*, *1867* (para. 124). For the majority, Lamer C.J. was explicit in emphasizing the merely *interpretive* role of the unwritten constitutional principle of judicial independence in supplementing the text of ss. 96 and 100:

> The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself. [First and second emphasis added; third emphasis in original; para. 89.]

65 In other words, where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. This is an approach that resorts to unwritten constitutional principles where necessary in order to give meaning and effect to constitutional text. It is thus not dissimilar to this Court's approach to purposive constitutional interpretation, which begins with and is grounded in the text (*Quebec (Attorney General)*, at paras. 8-10); unwritten constitutional principles inform the purpose of the provisions of the text, thus guiding the purposive definition (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 84). To be clear, this must be a textually faithful exercise; the text remains of primordial significance to identifying the purpose of a right, being "the first indicator of purpose" (*Quebec (Attorney General)*, at para. 11), and the application of constitutional principles to the interpretive exercise may not allow a court to overshoot that purpose (paras. 4 and 10-11). More particularly, and as the Court affirmed in *Quebec (Attorney General)*, the Constitution "is not 'an empty vessel to be filled with whatever meaning we might wish from time to time'" (para. 9, quoting *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 394). Rather, constitutional interpretation "must first and foremost have reference to, and be constrained by, [its] text" (para. 9).

66 Our colleague resists this, notwithstanding the clear direction in *Quebec (Attorney General)* regarding the centrality to the interpretational exercise of constitutional text. Indeed, her approach is completely the opposite: far from being the primary element of the Constitution whose interpretation can be informed by unwritten constitutional principles, the text *itself*"emanates" from those principles, and thus it is *the principles* which are paramount (para. 168). This is entirely inconsistent with the *Provincial Court Judges Reference*, upon which she relies. Lamer C.J. applied the unwritten constitutional principle of judicial independence to guide his interpretation of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to fill a gap where provincial courts dealing with non-criminal matters were concerned (paras. 107-8). None of this supports applying unwritten constitutional principles as bases for invalidating legislation.

(b) *The Secession Reference*

67 In *Secession Reference*, this Court said:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in [*Reference re Resolution to Amend the Constitution*], *supra*, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. [para. 54]

A faithful reading of this passage must acknowledge the force ascribed to unwritten constitutional principles. Of significance, however, is that such force was conditioned by the nature of the questions posed in the reference -- the conditions for secession of a province from Confederation -- which the Court was called upon to answer. The case combined "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" (para. 1, quoting *Reference re Manitoba Language Rights*, at p. 728) to which the Court proposed an answer (being an obligation to negotiate in some circumstances) which, while constituting a "legal framework" in the form of a set of rules to legitimize secession, was enforceable only *politically* as "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101 (emphasis added); see also Elliot, at p. 97).

68 Of course, the Court made clear that it had identified "binding obligations under the Constitution of Canada" (para. 153), and that a breach of those obligations would occasion "serious legal repercussions" (para. 102). But the Court also acknowledged the "non-justiciability of [the] political issues" involved (para. 102), which meant that the Court could have "no supervisory role" over the political negotiations (para. 100). Recognizing that the "reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm" (para. 153), the Court fashioned rules in the event of whose breach the "appropriate recourse" would lie in "the workings of the political process rather than the courts" (para. 102). This is another instance of the separation of powers: courts do not supervise the legislature or the executive as to political process.

69 Nothing, therefore, in the *Secession Reference* supports the proposition that unwritten constitutional principles can serve as an independent basis to invalidate legislation. While the obligations for the respective parties in that case had legal force by way of a judicial declaration, how that declaration would be given effect -- that is, *enforced* -- was deemed a question of political process, not legal process. Here again, as in the case of constitutional interpretation, the structural gap-filling role of unwritten constitutional principles was not and, we say, could not, be applied to *invalidate* legislation in the sense of declaring it under s. 52 to be of no force or effect.

(c) *Babcock and Imperial Tobacco*

70 At issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, was the constitutionality of a provision of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that allowed for an exception to disclosure, in litigation, based on Cabinet confidence. The respondents argued that the provision was *ultra vires* Parliament due to its inconsistency with the unwritten constitutional principles of the rule of law, judicial independence, and the separation of powers (by allowing the executive to prevent disclosure of evidence of its own unconstitutional conduct). McLachlin C.J., writing for the majority, held that "[a]lthough the unwritten constitutional principles are capable of limiting government actions, ... they do not do so in this case" (para. 54 (emphasis added)). She reached this conclusion on the basis that "unwritten principles must be balanced against the principle of Parliamentary sovereignty" (para. 55), concluding:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. [para. 57]

71 McLachlin C.J.'s statement that unwritten constitutional principles are "capable of limiting government actions" was later explained by this Court in *Imperial Tobacco*. There, legislation authorizing action by the Province of British Columbia against tobacco manufacturers was challenged on the basis that it was inconsistent with, *inter alia*, the unwritten constitutional principle of the rule of law. For the Court, Major J. unequivocally rejected the appellants' proposed use of the rule of law to invalidate legislation for two reasons, only one of which is of relevance here:

> ... the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court -- most notably democracy and constitutionalism -- very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. [Emphasis added; para. 66.]

72 In other words, unwritten constitutional principles are indeterminate, such that they could be in theory deployed *not only* in service of *invalidating* legislation, but of *upholding* it. Major J. continued: the recognition of an unwritten constitutional principle such as the rule of law "is not an invitation to trivialize or supplant the Constitution's written terms", nor "is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text" (para. 67). From this, it follows that the statement in *Babcock* that unwritten constitutional principles are "capable of limiting government actions" is to be understood in a narrow and particular sense: legislative measures are restrained by the unwritten principle of the rule of law, "but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)" (*Imperial Tobacco*, at para. 60). Again, this understanding of unwritten constitutional principles precludes entirely their application to invalidate legislation under s. 52.

73 This, we would add, is a complete answer to our colleague Abella J.'s assertions that this Court has "never, to date, limited" the role of unwritten constitutional principles, and that their interpretive role is not "narrowly constrained by textualism" (paras. 171 and 179). Our colleague reads *Imperial Tobacco* as narrowing the use of one specific unwritten constitutional principle &#8212; the rule of law &#8212; and not unwritten constitutional principles generally. But the problem of indeterminacy would inevitably arise with the use of *any* unwritten constitutional principle to invalidate legislation. *Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication.

(d) *Trial Lawyers Association of British Columbia*

74 In *Trial Lawyers Association of British Columbia*, this Court was called upon to decide the constitutionality of court hearing fees imposed by British Columbia that denied some people access to the courts. For the majority, McLachlin C.J. held that those fees, enacted pursuant to s. 92(14) of the *Constitution Act, 1867*, violated s. 96 of the *Constitution Act, 1867* as they impermissibly infringed on the jurisdiction of superior courts by denying some people access to the courts (paras. 1-2). In *obiter*, she added that the connection between s. 96 and access to justice was "further supported by considerations relating to the rule of law" (para. 38), as "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (para. 38, quoting *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230). This was, she said, "consistent with the approach adopted by Major J. in *Imperial Tobacco*" (para. 37):

> The legislation here at issue -- the imposition of hearing fees -- must conform not only to the express terms of the Constitution, but to the "requirements ... that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts. [Emphasis added; para. 37.]

75 In our view, McLachlin C.J.'s invocation of Major J.'s "necessary implication" threshold from *Imperial Tobacco* signifies that, where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. We therefore see nothing in this that is inconsistent with the *Provincial Court Judges Reference* and, in particular, with the limited scope of application of unwritten constitutional principles. The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(2) Relevance of the Democratic Principle to Municipal Elections

76 Democracy is, in light of the foregoing, a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution -- including its establishment of the House of Commons and of provincial legislatures -- connotes certain freely elected, representative, and democratic political institutions(*Secession Reference*, at para. 62).

77 The democratic principle has both individual and institutional dimensions(para. 61). It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government (paras. 64-65). So understood, the democratic principle sits alongside and indeed overlaps with other unwritten constitutional principles that this Court has recognized, including federalism and the rule of law(paras. 66-67).

78 In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Switzman v. Elbling*, [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. In particular, it cannot be used as an independent basis to invalidate legislation.

(a) *Section 92(8) of the Constitution Act, 1867*

79 The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the *Charter*, the province has "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn.*, at para. 58). And this Court cannot grant constitutional status to a third order of government "where the words of the Constitution read in context do not do so" (*Baier*, at para. 39).

80 Indeed, the City's submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle (*Public School Boards' Assn. of Alberta*).

(b) *Section 3 of the Charter*

81 Nor can the democratic principle be used to make s. 3 of the *Charter* -- including its requirement of effective representation -- relevant to the current case. There is no open question of constitutional interpretation here. Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission (*Imperial Tobacco*, at para. 65). As the intervener the Federation of Canadian Municipalities argues, municipalities (or at least chartered towns) predate the *Magna Carta* (1215). Their existence and importance would have been known to the framers in 1867. The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation (*House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, at p. 10585). In the end, municipalities were not constitutionalized, either in amendments to the *Constitution Act, 1867* or by reference in the democratic rights enshrined in the *Charter*.

82 Unlike in the *Provincial Court Judges Reference*, therefore, there is no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections. The entitlement to vote in elections to bodies not mentioned in s. 3 is therefore a matter for Parliament and provincial legislatures (*Haig*, at p. 1033; *Baier*, at para. 39). Again, and like the school boards at issue in *Baier*, municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit. Were the unwritten democratic principle applied to require *all* elections to conform to the requirements of s. 3 (including municipal elections, and not just elections to the House of Commons or provincial legislatures), the text of s. 3 would be rendered substantially irrelevant and redundant (*Imperial Tobacco*, at para. 65). To repeat: the withholding of constitutional status for municipalities, and their absence from the text of s. 3, was the product of a deliberate omission, not a gap. The City's submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring "the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation"(*Quebec (Attorney General)*, at para. 4). It is not for the Court to do by "interpretation" what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.

(3) Conclusion on the Democratic Principle

83 Even had the City established that the *Act* was inconsistent with the principle of democracy, it follows from the foregoing discussion that a court could not rely on that inconsistency to find the *Act* unconstitutional. The *Act* was enacted pursuant to a valid legislative process and the Province had no obligation to consult with the City before it introduced the legislation, or to introduce the legislation at a particular time. (As the application judge correctly noted, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, does not impose an immutable obligation to consult since the Province could enact the *Act* and overrule its previous enactment. Moreover, the related *Toronto-Ontario Cooperation and Consultation Agreement* did not bind the Province in law.)

84 In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the *Constitution Act, 1867*. Nor can they be applied to judicially amend the text of s. 3 of the *Charter* to require municipal elections or particular forms thereof. The text of our Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

V. Conclusion

85 We would dismiss the appeal.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

R.S. ABELLA J. (dissenting)

86 Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

87 The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

88 The 2018 Toronto municipal election had been underway for three and a half months when the Province of Ontario enacted legislation that radically redrew the City of Toronto's electoral ward boundaries by reducing the number of wards from 47 to 25. Nominations had closed, campaigns were in full swing, and voters had been notified of who wanted to represent them and why.

89 The issue in this appeal is not whether the Province had the legal authority to change the municipal wards. It is whether the Province could do so in the middle of an ongoing municipal election, thereby destabilizing the foundations of the electoral process and interfering with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day.

90 Completely revamping the electoral process in the middle of an election was unprecedented in Canadian history. The question is whether it was also unconstitutional. In my respectful view, it was.

Background

91 In June 2013, City Council approved a Toronto Ward Boundary Review under its authority to establish, change or dissolve wards (*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 128(1)). The mandate of the Boundary Review was "to bring a recommendation to Toronto City Council on a ward boundary configuration that respects the principle of 'effective representation'" (Canadian Urban Institute, *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online), at p. 1). At the time, there were 44 wards in the City of Toronto.

92 Over the next nearly four years, the Boundary Review conducted research, held public hearings, and consulted extensively. External consultants were hired who developed recommendations, organized extensive stakeholder consultations, held meetings with City Council and the Mayor's staff, and individually interviewed members of the 2010-2014 City Council and new 2014-2018 members. Altogether, they held over 100 face-to-face meetings with City Council, school boards and other stakeholders, as well as 24 public meetings and information sessions.

93 The four year process resulted in seven reports. A draft of each report was reviewed by an outside five-person Advisory Panel. The Boundary Review's *Options Report*, in August 2015, analyzed eight options for drawing new ward boundaries, concluding that five options met the requirement of effective representation. Of particular significance to this appeal, one of the rejected options was redesigning the wards to mirror the 25 federal electoral districts.

94 The Boundary Review's *Final Report*, in May 2016, recommended *increasing* the number of wards from 44 to 47.

95 At the direction of the Executive Committee of City Council, two further reports were prepared by the Boundary Review in 2016, one in August and one in October. Among other options, the 25 federal electoral district proposal was again examined. Those reports again recommended the 47-ward structure, concluding that applying the boundaries of the 25 federal electoral districts would not achieve effective representation or resolve significant population imbalances, in part, since they were based on the 2011 census and were expected to be redrawn after the 2021 census. The Boundary Review, on the other hand, was based on population estimates for 2026 "to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required" (*Additional Information Report*, August 2016 (online), at p. 10).

96 City Council adopted the 47-ward structure in November 2016, which was enacted through By-laws Nos. 267-2017 and 464-2017 in March and April 2017. The goal was to create a stable electoral framework for multiple elections. The By-laws were intended to govern the City of Toronto's municipal elections from 2018 to 2026, and, possibly, 2030.

97 The 47-ward structure was appealed to the Ontario Municipal Board by various individuals, including those seeking to have the city divided into wards that mirrored the 25 federal electoral districts. After seven days of hearings, a majority of the Board rejected the appeals and approved the By-laws on December 15, 2017 (*Di Ciano v. Toronto (City)*, 2017 CanLII 85757). In its decision, the Board explained why it found the By-laws to be reasonable:

> The Board finds that the work undertaken by the [Boundary Review] culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a 47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council. [para. 51]

98 An application was made to the Divisional Court for leave to appeal the Board's decision by two individuals who had unsuccessfully argued before the Board that the 25 federal electoral districts should be implemented. On March 6, 2018, the motion was dismissed (*Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349). Swinton J. concluded that the Board applied the correct governing principle, namely, "effective representation":

> Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure. It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent". [Citations omitted; para. 10.]

99 On May 1, 2018, nominations opened for candidates seeking election in Toronto's 47 wards.

100 On June 7, 2018, a new provincial government was elected. On the day that nominations for City Council closed, July 27, 2018, the Premier, Doug Ford, announced that the government intended to introduce legislation that would reduce the size of Toronto's City Council from 47 to 25 councillors.

101 The Boundary Review had researched the issue of effective representation for nearly 4 years, concluding that the 25 federal electoral districts would not achieve effective representation and would have an insignificant difference in terms of voter parity. Ontario did not conduct any redistricting studies or send the proposed legislation to Committee for consultation before it was enacted.

102 The legislation was introduced for the first reading in the Legislative Assembly on July 30, 2018 and came into force on August 14, 2018, 69 days before the scheduled election date. The election had been underway for three and a half months. By then, thousands of candidates had signed up and 509 were certified and actively campaigning in Toronto's 47 wards.

103 The nomination period was extended to September 14, 2018, but the election date remained the same -- October 22, 2018. That gave candidates, all of whom would have to seek new nominations or notify the City Clerk of their intention to continue in the race by filing a change of ward notification form, just over one month to campaign in the new wards. Until nominations closed again on September 14, 2018, candidates and voters were in legal limbo awaiting the passage of regulations for the new electoral regime and the adjudication of a constitutional challenge to the mid-election changes that gave rise to this appeal. It was only after nominations closed that voters and candidates had a full picture of which candidates were running and in what wards.

104 The new one-month campaign period was also characterized by the disruptive impact of abruptly changing the number, size and boundaries of the wards. Candidates who had been canvassing, responding to local issues, incurring expenses and developing community relationships were now faced with deciding whether and where to run. The old wards were eradicated, many of the new ones were almost twice as large, the populations were different, and there was only one month left to change wards, meet the new constituencies, learn what their concerns were, and engage with them on those issues.

105 In the absence of any notice or additional time to fundraise, many previously certified candidates could no longer afford to run in these new and larger wards. Certified candidates had until September 14, 2018 to file a change of ward notification form or else their nominations would be deemed to be withdrawn (*Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), Sch. 3, s. 1; *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(8)). When the present constitutional challenge was decided only days before that deadline, only 293 of the 509 previously certified candidates had taken the necessary steps to continue in the race. In the end, more than half of the previously certified candidates dropped out of the race before voting day.

106 The City of Toronto and a number of candidates and electors applied to the Ontario Superior Court of Justice for an order declaring the legislation reducing the number of wards from 47 to 25 of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

107 On September 10, 2018, Belobaba J. held that the *Act* was unconstitutional, infringing the rights of both candidates and voters under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (2018 ONSC 5151, 142 O.R. (3d) 336). He held that the legislation violated the expressive rights of candidates by radically redrawing ward boundaries mid-election, and that it breached the rights of voters to cast a vote that could result in effective representation by doubling the population sizes of the wards.

108 On September 19, 2018, the Ontario Court of Appeal ordered an interim stay of Belobaba J.'s order, meaning that the election would take place based on the new 25-ward structure (2018 ONCA 761, 142 O.R. (3d) 481). It took place on October 22, 2018.

109 On September 19, 2019, the Court of Appeal allowed the appeal from Belobaba J.'s order (2019 ONCA 732, 146 O.R. (3d) 705). Writing for a 3-2 majority, Miller J.A. held that Belobaba J. "impermissibly extended the scope [of] s. 2(b)" to protect the effectiveness of efforts to convey political messages and to include a right to effective representation.

110 In dissent at the Court of Appeal, MacPherson J.A. held that the timing of the *Act* infringed s. 2(b), concluding that "[b]y extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters".

111 I agree with MacPherson J.A.

Analysis

112 Under s. 92(8) of the *Constitution Act, 1867*, the provinces have exclusive jurisdiction over "Municipal Institutions in the Province". The question therefore of whether the Province has the authority to legislate a change in Toronto's ward structure is not the issue in this appeal. The issue is whether this *timing* mid-way through a municipal election was in violation of s. 2(b) of the *Charter*, which states:

> **2** Everyone has the following fundamental freedoms:
>
> ...
>
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

113 The 2018 Toronto municipal election had already been underway for three and a half months when the number, size and boundaries of all the wards were changed.

114 It is entirely beside the point to observe that elected municipal councils are creatures of statute. Section 2(b) of the *Charter* applies with equal vigour to protect political discourse during a municipal election as a federal or provincial one. When a province chooses to vest certain powers in a democratic municipality, municipal elections invariably become the locus of deliberative engagement on those delegated policy issues. It is incumbent on a provincial legislature to respect the rights of its citizens to engage in meaningful dialogue on municipal issues during an election period and, in particular, the rights of candidates and voters to engage in meaningful exchanges before voting day.

115 When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. When the state enacts legislation that has the effect of destabilizing the opportunity for meaningful reciprocal discourse, it is enacting legislation that interferes with the Constitution.

116 Municipal elections have been a part of political life in Canada since before Confederation, and municipalities are a crucial level of government. The 1996 Greater Toronto Area Task Force explained their significance, emphasizing that "services should be delivered by local municipalities to ensure maximum efficiency and responsiveness to local needs and preferences" (*Greater Toronto*, at p. 174; see also D. Siegel, "Ontario", in A. Sancton and R. Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces* (2009), 20, at p. 22; A. Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019), 56 Osgoode Hall L.J. 271, at pp. 275-76). As Professor Kristin R. Good explains, municipalities are not "mere 'creatures of the provinces'", they are

> important democratic governments in their own right. The variations in multicultural policy making in Canadian cities are evidence that local choices, policies, and politics matter. Municipalities are important vehicles of the democratic will of local communities as well as important sites of multicultural democratic citizenship.

(*Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), at p. 5)

117 The democratically accountable character of municipalities is well established in our jurisprudence. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. wrote that "municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates" (para. 51). Similarly, in *Catalyst Paper*

Corp. v. North Cowichan (District), [2012] 1 S.C.R. 5, McLachlin C.J. recognized that municipal councillors "serve the people who elected them and to whom they are ultimately accountable" (para. 19).

118 The increasing significance of municipal governance has been accompanied by an increasingly generous interpretation of municipal powers. Writing for a unanimous Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, Bastarache J. observed that "[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities" (para. 6). And in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, L'Heureux-Dubé J. confirmed that "law-making and implementation are often best achieved at a level of government that is ... closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (para. 3; see also *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342).

119 These cases built on McLachlin J.'s dissent in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, which stressed the "fundamental axiom" that

> courts must accord proper respect to the *democratic responsibilities of elected municipal officials and the rights of those who elect them*. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values. [Emphasis added; p. 245.]

120 The reciprocal relationship between the democratic responsibilities of elected municipal officials and the rights of those who elected them is crucial. It requires what Duff C.J. called "the free public discussion of affairs" so that two sets of duties can be discharged -- the duties of elected members "to the electors", and of electors "in the election of their representatives" (*Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 133; see also *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 306 and 326-27; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583).

121 How then does all this relate to the rights in s. 2(b) of the *Charter*? Because in dealing with municipal elections, we are dealing with the political processes of democratic government and it is undeniable that s. 2(b) protects "the political discourse fundamental to democracy" (*R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 23; see also *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 765).

122 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, this Court held that one of the three underlying principles of the s. 2(b) right is that "participation in social and political decision-making is to be fostered and encouraged" (p. 976). Professors P. W. Hogg and W. K. Wright have referred to political expression as being "at the core of s. 2(b)", and curtailed under s. 1 "only in service of the most compelling governmental interest" (*Constitutional Law of Canada* (5th ed. Supp.), at p. 43-9).

123 This brings us to the central issue in this appeal, namely, whether the timing of the legislation, in redrawing and reducing the number of wards from 47 to 25 in the middle of an election, infringed the expressive rights protected by s. 2(b) of the *Charter*.

124 *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

125 Dealing with the first part, the "activity" at the heart of this appeal is the expression of political views and the reciprocal political discourse among electoral participants during an election period, which engages the rights of both those seeking election and those deciding whom to elect. Political discourse undoubtedly has expressive content, and therefore, *prima facie* falls within the scope of the guarantee. Dickson C.J. in *R. v. Keegstra*, [1990] 3 S.C.R. 697, noted that

> *[t]he connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to*

> *democracy.* Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. [Emphasis added; pp. 763-64.]

126 The second part of the test, namely, whether the state action interfered with the right in purpose or effect, is not, with respect, particularly complicated either. This Court's jurisprudence under s. 2(b) of the *Charter* has usually arisen in circumstances where the *purpose* of the government action was to restrict expression by regulating who can speak, what they can say or how their messages can be heard.1 The case before us, on the other hand, deals with whether the *effect* of the legislation -- redrawing the ward boundaries and cutting the number of wards nearly in half mid-election -- was to interfere with these expressive activities.

127 Freedom of expression does not simply protect the right to speak; it also protects the right to communicate with one another (R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 3-4). The words of Marshall J., in dissent, resonate with the reciprocal nature of expression:

> ... the right to speak and hear -- including the right to inform others and to be informed about public issues -- are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." [Citations omitted.]
>
> (*Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775)

128 In the electoral context, freedom of expression involves the rights of both candidates and voters to reciprocal deliberative engagement. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection (see e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, [2017] 1 S.C.R. 93; see also K. Roach and D. Schneiderman, "Freedom of Expression in Canada" (2013), 61 S.C.L.R. (2d) 429; J. Weinrib, "What is the Purpose of Freedom of Expression?" (2009), 67 U.T. Fac. L. Rev. 165).

129 Political expression during an election period is always "taking place within and being constrained by the legal and institutional framework of an election" (Y. Dawood, "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 S.C.L.R. (2d) 105, at p. 131). In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, this Court explained that elections and referendums are "procedural structure[s] allowing for public discussion of political issues essential to governing", which serve to ensure "a reasonable opportunity to speak and be heard" and "the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties" (paras. 46-47).

130 The Intervener, the David Asper Centre for Constitutional Rights, cogently explained how there are different aspects of an election, each of which requires protection:

> Election campaigns provide a special forum for voters and candidates to interact with each other. Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates' skills, policies and positions. All exercises of expression, at each and every stage of the electoral process -- not only the final act of voting -- must receive consistent and robust *Charter* protection. [Footnotes omitted.]
>
> (I.F., at para. 8)

131 The democratic dialogue that occurs throughout an election period is crucial to the formation of public opinion and the ability to cast an informed vote. The process of deliberative engagement during an election period was aptly described by Professor Saul Zipkin:

> ... the electoral process is the primary site in which the representative relationship is constructed. Indeed, "[c]ampaigns ... are a main point -- perhaps *the* main point -- of contact between officials and the populace over matters of public policy." The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern, and is shaped by political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process. [Emphasis in original; footnotes omitted.]
>
> ("The Election Period and Regulation of the Democratic Process" (2010), 18 *Wm. & Mary Bill Rts. J.* 533, at pp. 545-46; see also A. Bhagwat and J. Weinstein, "Freedom of Expression and Democracy", in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 82; N. Urbinati, "Free Speech as the Citizen's Right", in R. C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014), 125.)

132 An election is a process of allowing candidates and voters, as both speakers and listeners, to participate in reciprocal discourse so that their respective views can be fully expressed and heard. It is only through this process of free public discussion and debate that an informed vote can be cast, and ultimately, those elected can be responsive to the views of the electorate.

133 State interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including "participation in social and political decision-making" (*Irwin Toy*, at p. 976). The *Irwin Toy* test is, as a result and as discussed later in these reasons, the appropriate legal framework for adjudicating the present claim of state interference with political expression during an election period.

134 A stable election period is crucial to electoral fairness and meaningful political discourse. Redrawing the number, size and boundaries of electoral wards during this period destabilizes the process by "[i]nterrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled" (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 McGill L.J. 269, at p. 302).

135 For three and a half months, candidates and voters engaged in political dialogue within the legal and institutional structure created in advance of the 2018 municipal election after years of research, public engagement and, finally, endorsement from the Ontario Municipal Board.

136 After the *Act* came into force, candidates and voters found themselves in a suddenly altered electoral landscape. The *Act* eradicated nearly half of the active election campaigns, requiring those candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Campaign materials such as lawn signs or advertisements for abolished wards "no longer play[ed] the function of electoral expression given the change to the underlying institutional context within which that expression [was] taking place" (Dawood, at p. 132). Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance.

137 The impact on some of the candidates and voters provides illuminating metaphors. One candidate, for example, Dyanoosh Youssefi, explained that she had been canvassing, e-mailing and organizing since the beginning of the campaign for 12-15 hours per day and all of her efforts had "focused on the concerns and the needs of the approximately 55,000 residents of Ward 14" (A.R., vol. XV, at p. 80). Ward 14 was abolished by the *Act*.

138 Another candidate, Chiara Padovani, who had been campaigning in Ward 11, described the effect of combining Ward 11 and Ward 12 into a new Ward 5:

> Even before my registration as a candidate for the 2018 election, I engaged in substantial efforts to engage community members around important local issues in Ward 11 for over a one and a half year period such as flooding, road safety, and tenant rights. As a result, I ... know where residents feel there should be additional speedbumps, crosswalks, and reduction in speed limits. I do not have this type of knowledge for any other ward, including Ward 12.
>
> ...
>
> If I had notice of the change in ward boundaries prior to the commencement of the campaign, I would have been able to plan my ground strategy, and I would have attempted to gain a deeper knowledge of the local issues affecting residents in Ward 12 by actively canvassing in that ward. At this point, it will be impossible for me to carry out double the amount of canvassing that I have completed with the limited time remaining.
>
> (A.R., vol. XI, at pp. 15-16)

139 Ever since the 47-ward structure was enacted in 2017, Chris Moise, a Black and openly gay candidate, had been organizing a campaign in Ward 25. He had decided to run in Ward 25 because it encompassed the Gay Village and Yorkville. These were communities he felt he could meaningfully serve based on his experiences as a School Board Trustee for the area, an LGBTQ activist, a former police officer with an interest in police relations with the Black and LGBTQ communities in the Village, and a resident and property owner in Yorkville. When the legislation abolished Ward 25, he dropped out of the race because he could not pivot his campaign on such short notice to either the new Ward 13, which excluded Yorkville where he lived, or the new Ward 11, which had only a very small geographical overlap with the previous Ward 25 and excluded the Village where he had the most meaningful connections and policy goals.

140 Another candidate, Jennifer Hollett, explained the effect of the two week "legal limbo" (A.R., vol. XI, at p. 144) before the legislation received Royal Assent:

> Even after [the legislation] passed, my campaign team was uncertain what was going to happen to our campaign funds, and whether those funds could be transferred to a new campaign, or whether those funds could be refunded. It was only when regulations made pursuant to the Minister's powers in [the legislation] were passed that we received any direction. The effect of that uncertainty is that my team did not make any campaign expenditures after July 27.
>
> ...
>
> The voters I speak with are confused. They understand that the rules have changed, but do not understand why those rules have changed and how. Instead of discussing municipal issues in the campaign, such as transit and safer streets, residents are asking about ward boundary changes and how they affect them. [pp. 145-46]

141 Megann Wilson, another candidate and participant in the Women Win TO's training program, described the ensuing uncertainty vividly:

> Since ... the imposition of a 25-ward model, I have struggled to engage with residents on my platform, or key issues and policies in the ward. Many residents are simply tired of the changing wards, and no longer know what ward they live in -- and that is what I spend my time talking to residents about when I am canvassing. In my view, the level of confusion in my ward will make it more difficult for voters to make a good decision about what candidate to vote for since electors are not even aware of what ward they now live in let alone who the candidates are, given the sudden changes. Further, as a result of lack of communication to residents about the new ward boundaries, I have found myself having to fill that gap while canvassing residents - - a significant distraction from the municipal issues I am trying to engage residents about.

> As a result of [the legislation] I am hindered in getting to the root of municipal issues affecting electors while I am canvassing. I am now spending most of my time with voters explaining the changes to the ward boundaries, and discussing the provincial politics that led to these sudden changes. Time with prospective voters is precious for all candidates and [the legislation] has interrupted my ability to engage directly with voters about my platform and my ideas for the ward and its residents.
>
> (A.R., vol. X, at p. 132)

142 Since the *Act* did not reset campaign finance limits, new candidates entered the race with untapped campaign spending limits, while candidates who had already been campaigning lost what they had invested in now-defunct districts and continued in the race on a reduced budget. Some previously certified candidates stopped producing campaign materials entirely due to the uncertainty surrounding the transfer of campaign funds and expenditures to a new campaign. Others could not afford to compete in the new and larger wards. As one campaign volunteer described:

> We do not know whether a donor who donated the maximum amount to a Ward 23 candidacy can now make a fresh donation to a Ward 13 candidacy. This is important because funds were spent on materials for the Ward 23 candidacy that are no longer useable... . It will likely not be possible to undertake sufficient fundraising to replace all of the items that are no longer usable, particularly given the limited amount of time in the campaign. Prior donors will likely not be able or willing to donate again, and it is unlikely we will be able to find enough new donors to produce sufficient new materials for a fresh campaign for a much larger ward area, particularly compared to more well-resourced incumbents.
>
> (A.R., vol. IX, at p. 125)

143 Voters, too, were affected. One voter, Ish Aderonmu, explained the consequence of candidates dropping out of the race as "deeply disappointing ... as an elector who has been working to advance one of these campaigns, expressing myself politically for the first time" (A.R., vol. IX, at p. 124). Another voter, who had endorsed a candidate who dropped out of the race, conveyed that "his own political expression has been compromised" and that "candidates remaining in the race are dealing with making major changes to their campaigns, and are not available to discuss [important] issues with him" (A.R., vol. IX, at p. 104).

144 It is important to remember the timeline. Nominations opened on May 1, 2018, and closed on July 27, 2018. On the same day that nominations closed, the government announced that it intended to introduce new legislation, cutting the wards nearly in half and radically redrawing ward boundaries mid-election. No one knew what the impact of the new boundaries would be. Candidates did not know how the new electoral wards would affect their campaigns, and voters had no idea who their new candidates would be. All this after being in an ongoing electoral process for almost three months.

145 The new legislation came into force two weeks later on August 14, 2018. By then, candidates had been campaigning and engaging with voters for 105 days in the existing 47 wards. Candidates who had developed mandates to respond to the specific needs and interests of their wards had their campaign efforts eradicated, along with their opportunity to meaningfully engage with the right voters on those issues. Voters who had formed opinions, been persuaded on issues, refined their preferences and expressed their views to their preferred representatives had their political expression thwarted. Some candidates persevered; others dropped out of the race. Volunteers quit, campaign endorsements were rescinded and confusion ensued.

146 Nominations were extended to September 14, leaving only five weeks -- from the date that nominations closed, solidifying which candidates were running and in what wards -- for an election that was supposed to last nearly six months. More importantly, those five weeks were marred by the destabilizing impact of the timing of the legislation in the middle of an election that was technically 60 percent complete. The additional month for *new* candidates to seek nomination could not undo the damage and uncertainty that the change had created for candidates who had already been certified and voters who had already participated in three and a half months of deliberative engagement.

147 The timing of the *Act*, in the middle of an ongoing election, breathed instability into the 2018 municipal election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern. For the remaining campaign period, candidates spent more time on doorsteps discussing the confusing state of affairs with voters than the relevant political issues. The timing of the legislation, by interfering with political discourse in the middle of an election, was a clear breach of s. 2(b) of the *Charter*.

148 With respect, this leaves no role for the legal framework set out in *Baier v. Alberta*, [2007] 2 S.C.R. 673. It was designed to address underinclusive statutory regimes. The line of authority preceding *Baier* involved claims by individuals or groups seeking inclusion in an existing statutory regime, alleging that the absence of government support for them constituted a substantial interference with their exercise of a fundamental freedom.2 The *Baier* framework was originally developed for an underinclusive labour relations regime in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, and then modified for an allegedly underinclusive school board trustee election regime in *Baier*. The framework specifically refers to "claims of underinclusion", "exclusion from a statutory regime" and "underinclusive state action" (*Dunmore*, at paras. 24-26; *Baier*, at paras. 27-30). It has no relevance to the legal or factual issues in this case.

149 The *Baier* framework was, additionally, confined to its unique circumstances by this Court's subsequent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students -- British Columbia Component*, [2009] 2 S.C.R. 295. Writing for a 7-1 majority, Deschamps J. explained that *Baier*"summarized the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual" (para. 30). She also cautioned against extending *Baier* beyond these narrow confines:

> ... taken out of context, [*Baier*] could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.
>
> When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a *distinction* was drawn between *placing an obligation on government to provide individuals with a particular platform for expression* and *protecting the underlying freedom of expression of those who are free to participate in expression on a platform* (para. 42). [Emphasis added; paras. 34-35.]

150 The *Baier* test has no application to this appeal. As Deschamps J.'s full quote shows, it is clear that *Baier* only applies to claims "placing an obligation on government to provide individuals with a particular platform for expression". *Irwin Toy*, on the other hand, applies to claims that are about "protecting the underlying freedom of expression of those who are free to participate in expression on a platform", like the case before us.

151 None of the claimants involved in this case was excluded from participating in the 2018 Toronto municipal election, nor did they claim that s. 2(b) of the *Charter* requires the Province to provide them with a municipal election so that they can express themselves. The s. 2(b) claim in this case is about government interference with the expressive rights that attach to an electoral process. This is precisely the kind of claim that is governed by the *Irwin Toy* framework, not *Baier* (*Baier*, at para. 42; *Greater Vancouver Transportation Authority*, at para. 35; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at para. 31).

152 In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.3 To paraphrase Gertrude Stein, a right is a right is a right. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*.

153 All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus (S. Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] *P.L.* 498, at p. 503; J. Rawls, *Political Liberalism* (exp. ed. 2005), at pp. 361-62; A. Sen, *The Idea of Justice* (2009), at p. 228). They also have negative dimensions because they sometimes require the state *not* to intervene. The distinction "is notoriously difficult to make ... . Appropriate verbal manipulations can easily move most cases across the line" (S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 U. Pa. L. Rev. 1293, at p. 1325).

154 It is true that freedom of expression was once described by L'Heureux-Dubé J. in *Haig v. Canada*, [1993] 2 S.C.R. 995, as prohibiting "gags" but not compelling "the distribution of megaphones" (p. 1035; see also K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 173). But even in *Haig* -- a precursor to *Baier* -- L'Heureux-Dubé J. acknowledged that this was an artificial distinction that is "not always clearly made, nor ... always helpful" (p. 1039; see also *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, at pp. 666-68, per L'Heureux-Dubé J., concurring).

155 There is no reason to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes. Dividing the rights "baby" in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection.

156 The purpose of the s. 2(b) right is not merely to restrain the government from interfering with expression, but also to cultivate public discourse "as an instrument of democratic government" (Hogg and Wright, at p. 43-8; see also Weinrib). Political discourse is at the heart of s. 2(b). Protecting the integrity of reciprocal political discourse among candidates and voters during an election period is therefore integral to s. 2(b)'s purpose. Elevating the legal threshold, as the majority proposes to do by applying *Baier*, adds a gratuitous hurdle, making it harder to prove a breach of this core aspect of s. 2(b) than other expressive activities. What should be applied instead is the foundational framework in *Irwin Toy*, which simply asks whether the activity in question falls within the scope of s. 2(b) and whether the government action, in purpose or effect, interfered with that expressive activity.

157 Applying that framework, it is clear that the timing of the legislation violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries *during* an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse.

158 This brings us to s. 1 of the *Charter*. The purpose of the s. 1 analysis is to determine whether the state can justify the *limitation* as "demonstrably justified in a free and democratic society" (*Charter*, s. 1; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 125). The limitation on s. 2(b) rights in this case was the timing of the legislative changes.

159 But rather than explaining the purpose and justification for the *timing* of the changes, Ontario relied on the pressing and substantial objectives of the changes themselves as the basis for the s. 1 analysis, saying they were to achieve voter parity, improve efficiency and save costs. This was set out in the press release announcing the proposed legislation, which stated: "We ran on a commitment to restore accountability and trust, to reduce the size and cost of government, including an end to the culture of waste and mismanagement" (Office of the Premier, *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online)). And at the second reading of the legislation, the Minister of Municipal Affairs and Housing, the Hon. Steve Clark, declared:

> During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers' dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers' dollars, and that is exactly what we're doing with this bill.
>
> So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first.
>
> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, at p. 605)

160 Leaving aside that voter parity was hardly mentioned in the legislative debates, this Court has never found voter parity to be the electoral lodestar, asserting, on the contrary, that the values of a free and democratic society "are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity" (*Reference re Prov. Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, at p. 188).

161 But of overriding significance, the government offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. There was no hint of urgency, nor any overwhelming immediate policy need.

162 In the absence of any evidence or explanation for the *timing* of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society. The legislation is, as a result, an unjustified breach of s. 2(b).

163 While this dispenses with the merits of the appeal, the majority's observations circumscribing the scope and power of unwritten constitutional principles in a way that reads down this Court's binding jurisprudence warrants a response.

164 In the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), the Court identified the unwritten constitutional principles of democracy, judicial independence, federalism, constitutionalism and the rule of law, and the protection of minorities. These principles are derived from the preamble to the *Constitution Act, 1867*, which describes our Constitution as "a Constitution similar in Principle to that of the United Kingdom" (*Secession Reference*, at paras. 44-49; see also P. C. Oliver, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 McGill L.J. 207).

165 The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources (Oliver, at p. 216; M. Rowe and N. Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 *Can. Bar Rev.* 430, at p. 438). Our Constitution, as a result, "embraces unwritte[n] as well as written rules" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 92, per Lamer C.J.).

166 It is notable that many Parliamentary systems, notwithstanding their different constitutional arrangements, have also recognized that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government.4

167 Unwritten constitutional principles have been held to be the "lifeblood" of our Constitution (*Secession Reference*, at para. 51) and the "vital unstated assumptions upon which the text is based" (para. 49). They are so foundational that including them in the written text "might have appeared redundant, even silly, to the framers" (para. 62).

168 Unwritten constitutional principles are not, as the majority suggests, merely "context" or "backdrop" to the text. On the contrary, unwritten principles are our Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*" (*Provincial Judges Reference*, at para. 107; see also *Switzman*, at p. 306, per Rand J.). Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles. In other words, the text is not exhaustive of our Constitution (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 378, per McLachlin J.).

169 Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions (see e.g. *Reference re Alberta Statutes*, per Duff C.J.; *Switzman*, at pp. 327-28, per Abbott J.; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 57, per Beetz J.). As Beetz J. wrote for the majority in *OPSEU*, at p. 57, "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them":

> There is no doubt in my mind that the basic structure of our Constitution, as established by the *Constitution Act, 1867,* contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels. In the words of Duff C.J. in *Reference re Alberta Statutes,* at p. 133, "such institutions derive their efficacy from the free public discussion of affairs ... ." and, in those of Abbott J. in *Switzman v. Elbling,* at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. [p. 57]

170 This leads inescapably to the conclusion -- supported by this Court's jurisprudence until today -- that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure" (*Secession Reference*, at para. 50; *OPSEU*, at p. 57). This would undoubtedly be a rare case. But with respect, the majority's decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it. Otherwise, there is no point to reviewing it.

171 In the *Secession Reference*, a unanimous Court confirmed that "[u]nderlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have 'full legal force', as we described it in the *Patriation Reference*, *supra*, at p. 845), which constitute substantive limitations upon government action" (para. 54, quoting *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 ("*Patriation Reference*"); see also *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 54, per McLachlin C.J.). That means they can be used to assess state action for constitutional compliance, which in turn can lead to endorsing, rejecting, limiting or expanding the acts of the executive or legislative branches of government. Again, with respect, we have never, to date, limited their role in the manner the majority proposes.

172 The Court's reference to *Patriation Reference* dispels any doubt as to what it meant when it said that these principles have "full legal force". In the passage cited approvingly from the *Patriation Reference*, Martland and Ritchie JJ., dissenting in part, explained that unwritten constitutional principles "*have been* accorded full legal force in the sense of *being employed to strike down legislative enactments*" (p. 845 (emphasis added)). While Martland and Ritchie JJ. dissented in the result in the *Patriation Reference*, they cited judgments in support of the principle of federalism that remain good law and were viewed as necessary to "preserving the integrity of the federal structure" (p. 821), notably *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326 (P.C.), and *Attorney*

General of Nova Scotia v. Attorney General of Canada, [1951] S.C.R. 31 (see also *Secession Reference*, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54, at p. 71). In other words, structural doctrine helps identify what the unwritten principles *are*, it does not limit their role.

173 This Court expressly endorsed the unwritten principles of democracy as the "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated" (*Secession Reference*, at para. 62); the rule of law as "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 142, per Rand J.), "the very foundation of the *Charter*" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 229, per Dickson C.J.), and the source of judicial authority to override legislative intent "where giving effect to that intent is precluded by the rule of law" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 23); federalism as "a foundational principle of the Canadian Constitution" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 3, per Wagner C.J.); and judicial independence as a "constitutional imperative" in light of "the central place that courts hold within the Canadian system of government" (*Provincial Judges Reference*, at para. 108). And of course, the unwritten constitutional principle of the honour of the Crown has been affirmed by this Court and accorded full legal force (*Beckman v. Little Salmon/Carmacks First Nation*, [2010] 3 S.C.R. 103, at para. 42, per Binnie J.; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 16, per McLachlin C.J.).

174 In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

> [j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

175 In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy -- the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the *Constitution Act, 1982* states that unconstitutional laws are "of no force or effect" suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) "does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts 'may have regard to unwritten postulates which form the very foundation of the Constitution of Canada'" (para. 120, quoting *Manitoba Language Rights*, at p. 752).

176 Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

177 And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

178 The majority's emphasis on the "primordial significance" of constitutional text is utterly inconsistent with this

Court's repeated declarations that *unwritten* constitutional principles are the foundational organizing principles of our Constitution and have full legal force. Being unwritten means there is no text. They serve to give effect to the structure of our Constitution and "function as independent bases upon which to attack the validity of legislation ... since they have the same legal status as the text" (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 95; see also H.-R. Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019), 67 Am. J. Comp. L. 889, at p. 924). By definition, an emphasis on the words of the Constitution demotes unwritten principles to a diluted role. "Full legal force" means full legal force, independent of the written text.

179 Unwritten constitutional principles do not only "give meaning and effect to constitutional text" and inform "the language chosen to articulate the specific right or freedom", they also assist in developing an evolutionary understanding of the rights and freedoms guaranteed in our Constitution, which this Court has long described as "a living tree capable of growth and expansion" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156, quoting *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.), at p. 136). Unwritten constitutional principles are a key part of what makes the tree grow (*Secession Reference*, at para. 52; *Provincial Judges Reference*, at para. 106). This Court has never held that the interpretive role of unwritten constitutional principles is narrowly constrained by textualism.

180 Unwritten constitutional principles are, additionally, substantive legal rules in their own right. As Lamer C.J. wrote in the *Provincial Judges Reference*:

> [The preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, *the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme*. It is the means by which the underlying logic of the Act can be given *the force of law*. [Emphasis added; para. 95.]

181 Professor Mark D. Walters effectively explained why the role of unwritten constitutional principles has not been limited as the majority suggests:

> The relationship between unwritten and written constitutional law in Canada may be conceived in different ways. At one point, Chief Justice Antonio Lamer observed that the role of unwritten principles is "to fill out gaps in the express terms of the constitutional scheme." This statement might suggest that judges are just reading between the lines in order to make the text complete. Or, to use another metaphor, judges are constructing bridges over the waters that separate islands of constitutional text, creating a unified and useable surface.
>
> *But the gap-filling and bridge metaphors do not capture fully the theory of unwritten constitutionalism as it has developed in the Canadian cases*... . We must alter the bridge metaphor accordingly: The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from this single underlying foundation. *The constitutional text is not just supplemented by unwritten principles; it rests upon them.* [Emphasis added; footnote omitted.]
>
> ("Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008 (reprinted 2010)), 245, at pp. 264-65)

182 It is also difficult to understand the need for the majority's conclusion that using unwritten constitutional principles to strike down legislation would circumvent the legislative override power in s. 33 of the *Charter*. This question is not directly before us.

183 Finally, I see no merit to the majority's argument that courts cannot declare legislation invalid on the basis of unwritten constitutional principles because s. 52(1) of the *Constitution Act, 1982* only applies to written text. This argument extinguishes the entire jurisprudence establishing that unwritten principles have full legal force. Section 52(1) provides that "any law that is inconsistent with the *provisions* of the Constitution is ... of no force or effect".

The majority's reading of s. 52(1), like much of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority establishing that unwritten constitutional principles are a full constitutional partner with the text, including for the purposes of s. 52 (*New Brunswick Broadcasting Co.*, at pp. 375-78; *Manitoba Language Rights*, at p. 752; *Ontario (Attorney General) v. G*, at para. 120).

184 It is true that in *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, the Court questioned whether the rule of law could be used to invalidate legislation based on its content, but this was based on the specific contours of one unwritten principle, not unwritten principles in general. The Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in that case. As Major J. explained in describing the limits of the content of the rule of law:

> ... it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15. [para. 59]

Never, however, has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles ever invalidating legislation.

185 The inevitable consequence of this Court's decades-long recognition that unwritten constitutional principles have "full legal force" and "constitute substantive limitations" on all branches of government is that, in an appropriate case, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional (*Secession Reference*, at para. 54; see also Elliot, at p. 95; (A.) J. Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 Alta. L. Rev. 1077, at p. 1082; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982)). There is no need, as a result, to constrain the role of unwritten constitutional principles and newly declare that their full legal force does not include the ability, in appropriate circumstances, to declare legislation to be constitutionally invalid.

186 I would allow the appeal and restore Belobaba J.'s declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter*.

Appeal dismissed, ABELLA, KARAKATSANIS, MARTIN *and* KASIRER JJ. *dissenting.*

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Solicitors for the interveners the Métis Nation of Ontario and the Métis Nation of Alberta: Pape Salter Teillet, Toronto.

Solicitor for the intervener Fair Voting British Columbia: Nicolas M. Rouleau, Toronto.

1 This Court's jurisprudence has involved, for example, restrictions on: **publication** (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *R. v. Bryan*, [2007] 1 S.C.R. 527); **obscene content** (*R. v. Butler*, [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120); **advertising** (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, [2009] 2 S.C.R. 295); **language** (*Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790); **harmful content** (*R. v. Sharpe*, [2001] 1 S.C.R. 45; *R. v. Keegstra*, [1990] 3 S.C.R. 697); **manner or place of expression** (*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141); **who can participate in a statutory platform for expression** (*Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Baier v. Alberta*, [2007] 2 S.C.R. 673); **voluntary expression** (such as mandatory letters of reference or public health warnings) (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610); **expenditures on expression** (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827); or **access to information** (such as court proceedings or government documents) (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815). This case does not fall into any of these categories.

2 *Haig v. Canada*, [1993] 2 S.C.R. 995 (s. 2(b) challenge to exclusion of Quebec resident from federal referendum); *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 (s. 2(b) challenge to exclusion of Native Women's Association of Canada from federal funding to present on Charlottetown Accord); *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, overruled by *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (s. 2(d) challenge to exclusion of RCMP members from labour relations legislation); *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016 (s. 2(d) challenge to exclusion of agricultural workers from labour relations legislation).

3 The same legal standard has applied to claims with respect to: **freedom of association under s. 2(d)** (*Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (right to collective

bargaining); *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (right to good faith bargaining); *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 S.C.R. 3 (right to statutory protections for collective bargaining)); the **right to life, liberty and security of the person under s. 7** (*Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331 (physician-assisted dying); *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (abortion); *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134 (safe injection facility)); and **equality under s. 15** (*Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (interpretation services for deaf hospital patients); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (legislative protection against discrimination on the basis of sexual orientation)), to name a few examples.

4 See also other jurisdictions in which unwritten constitutional principles have been accorded full legal force in the sense of being employed to invalidate legislative or executive action: **United Kingdom** (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373 (parliamentary sovereignty and accountability); *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 102, per Lord Steyn (judicial independence); *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 100 and 144, per Lord Carnwath (judicial independence and rule of law); *AXA General Insurance Ltd. v. HM Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868, at para. 51, per Lord Hope (judicial independence and rule of law)); **Australia** (*Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245 (H.C.) (judicial independence); *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51 (H.C.) (federalism); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410 (H.C.) (federalism); *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520 (H.C.) (freedom of political communication); *Roach v. Electoral Commissioner*, [2007] HCA 43, 233 C.L.R. 162 (the right to vote)); **South Africa** (*South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883 (separation of powers); *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374, at para. 58 (legality)); **Germany** (*Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (rule of law and social welfare state)); and **India** (*Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, at pp. 1899-1900 (secularism, democracy and individual freedom)).

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Willow v. Chong, [2013] B.C.J. No. 1310

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

B. Fisher J.

Heard: April 29 and May 3, 2013.

Judgment: June 19, 2013.

Docket: S-110618

Registry: Vancouver

[2013] B.C.J. No. 1310 | 2013 BCSC 1083

Between Sky Willow, Shanghai TCM College of BC Canada Ltd. and Council of Natural Medicine College of Canada, Plaintiffs, and The Honourable Ida Chong, Minister of Regional, Economic and Skills Development, The Honourable, Colin Hansen, Minister of Health Services, Her Majesty the Queen in right of the Province of British Columbia, Private Career Training Institutions Agency of British Columbia, College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia, Mary S. Watterson, Steven Harvey and Jim Wright, Defendants

(119 paras.)

Case Summary

Administrative law — Natural justice — Procedural fairness — Motion by defendants to strike claims against them allowed — Plaintiff sought damages related to closure of plaintiffs' college — Plaintiffs' claims related to fairness of regulatory process and ought to have been subject to statutory appeal or judicial review — Fact that damages were not available on judicial review was not sufficient to ground action — None of plaintiffs' claims established reasonable cause of action — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Supreme Court Civil Rules, Rule 9-5(1).

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Motion by defendants to strike claims against them allowed — Plaintiff sought damages related to closure of plaintiffs' college — Plaintiffs' claims related to fairness of regulatory process and ought to have been subject to statutory appeal or judicial review — Fact that damages were not available on judicial review was not sufficient to ground action — None of plaintiffs' claims established reasonable cause of action — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Supreme Court Civil Rules, Rule 9-5(1).

Constitutional law — Canadian Charter of Rights and Freedoms — Mobility rights — To reside or earn a livelihood in any province — Legal rights — Protection against unreasonable search and seizure — Motion by defendants to strike claims against them allowed — Plaintiff alleged closure of college violated Charter rights — None of plaintiffs' claims established reasonable cause of action — Plaintiff did not have Charter right to pursue livelihood so as to override applicable provincial legislation — Claim of unreasonable search and seizure was essentially allegation of breach of rules of natural justice and procedural fairness, which was properly subject of judicial review proceedings — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Canadian Charter of Rights and Freedoms, 1982, ss. 6(2)(b), 8.

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out a claim — Motion by defendants to strike claims against them allowed — Plaintiff alleged misfeasance in public office, conspiracy, abuse of process and intentional inference with economic relations — Plaintiffs' claims related to fairness of regulatory process and ought to have been subject to statutory appeal or judicial review — Fact that damages were not available on judicial review was not sufficient to ground action — None of plaintiffs' claims established reasonable cause of action — Plaintiffs' claims struck as abuse of process and as disclosing no reasonable claim — Supreme Court Civil Rules, Rule 9-5(1).

Motion by defendants to strike claims against them. Following a complaint by a former student of the plaintiffs' college, the defendant regulatory agency cancelled the college's accreditation and the defendant ministers obtained an interlocutory injunction restraining the college from issuing certificates. The plaintiff alleged misfeasance in public office, conspiracy, abuse of process, intentional inference with economic relations and Charter violations. The regulatory agency sought to strike the claims against it on the grounds that the claims were an impermissible collateral attack on its administrative process, which should have been subject to statutory appeal or judicial review. The crown defendants argued that the claim disclosed no cause of action against them. The minister defendants argued that the action was a collateral attack on the injunction proceedings. The plaintiffs argued that its action was not an abuse of process because its claim for damages was not available in judicial review.
HELD: Motions allowed.

To the extent that the plaintiffs' claims against the regulatory agency related to the fairness of the administrative process, they ought to have pursued the remedies available under the legislation. The fact that damages are not available in an application for judicial review was not sufficient to ground the action where the essential complaint stemmed from dissatisfaction with the conduct and decisions of an administrative agency. The claim for damages was struck as an abuse of process. The pleadings did not support the claims of misfeasance in public office or abuse of process. The claim of intentional interference with economic relations was certain to fail. The pleadings were insufficient to ground the claim of conspiracy. The claim based on the right to earn a livelihood in any provide was certain to fail. The plaintiff did not have an independent Charter right to pursue a livelihood so as to override applicable provincial legislation. The claim of unreasonable search and seizure was essentially an allegation of a breach of the rules of natural justice and procedural fairness, which was properly the subject of judicial review proceedings. The claims against the registrar of the regulatory agency were certain to fail. The plaintiffs pleaded nothing to suggest that the registrar conducted himself in a manner that was separate from the agency or that he was acting outside the scope of his employment. The claims against the agency and the registrar constituted an impermissible collateral attack and were struck as an abuse of process. There was nothing in the claim that asserted any cause of action against the crown. The claim against the ministers made the same allegations as in the injunction proceedings. In the circumstances, it would be contrary to the interests of justice to permit the plaintiffs to make the same claim in two extant proceedings. The ministers named in the proceedings were no longer in those positions, and allegations of abuse of process could not succeed against nominal defendants. The claim against the ministers based on vicarious liability could not possibly succeed. The plaintiffs were denied leave to amend their pleadings, as it was apparent that the plaintiffs' primary issues were with the other defendants.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 6(2)(b), s. 7, s. 8

Degree Authorization Act, SBC 2002, c 24, s. 8

Health Professions Act, RSBC 1996, c 183,

Judicial Review Procedure Act, RSBC 1996, c 241,

Private Career Training Institutions Act, SBC 2003 c 79, s. 3, s. 6, s. 8, s. 9, s. 10, s. 12, s. 12(2), s. 13, s. 15, s. 16(3), s. 16(4), s. 16(5)

Supreme Court Civil Rules, Rule 9-5, Rule 9-5(1), Rule 9-5(1) (a), Rule 9-5(1)(b), Rule 9-5(1)(d), Rule 9-6, Rule 9-6(4), Rule 9-6(5)

Travel Agents Act, RSBC 1996, c 459,

Counsel

Counsel for the Plaintiffs: G. Pyper.

Counsel for the Defendants: Minister of Regional Economic and Skills Development, HMTQ of B.C., C. Hansen, I. Chong, Attorney General of B.C.: A.K. Fraser, P. Manhas.

Counsel for the Defendants: Private Career Training Institutions Agency and Jim Wright: N.T. Mitha.

Reasons for Judgment

B. FISHER J.

1 The applications before the court are by some of the defendants in this proceeding who seek to have the claims against them struck under Rule 9-5 or dismissed by way of summary judgment under Rule 9-6 of the *Supreme Court Civil Rules*.

2 The defendants Private Career Training Institutions Agency of British Columbia (PCTIA) and its Registrar, Jim Wright, seek to strike portions of the Notice of Civil Claim pertaining to them. I will refer to these defendants as the Agency defendants.

3 The defendants the Honourable Ida Chong, Minister of Regional Economic and Skills Development, the Honourable Colin Hansen, Minister of Health Services, Her Majesty the Queen in Right of the Province of British Columbia, and the Attorney General of British Columbia apply for orders striking portions of the Notice of Civil Claim and dismissing the claims against them, or alternatively staying the proceedings. These defendants also apply in the alternative for an order that the two named ministers cease to be defendants. I will refer to these defendants as the Crown defendants and to the named ministers as the Ministers.

Background

4 The plaintiff, Sky Willow, is a Ph.D. of Traditional Chinese Medicine, the principal of the plaintiff Shanghai TCM College of BC Canada Ltd. (Shanghai College) and board member of the plaintiff Council of Natural Medicine College of Canada (Council of Natural Medicine). These plaintiffs have brought claims against numerous defendants which relate to issues surrounding the closure of Shanghai College in Vancouver. They seek damages for losses associated with this closure.

5 Until October 25, 2010, Shanghai College was registered and accredited to provide career training under the *Private Career Training Institutions Act*, SBC 2003 c 79 (*PCTI Act* or the *Act*). It provided training in acupuncture and traditional Chinese medicine and was entitled to award qualifications to its students on completion of their training. The defendant PCTIA is the regulatory agency for private training institutions and it acts under the authority of the *PCTI Act.*

6 In 2009, the defendant Stephen Harvey made a complaint about Shanghai College to PCTIA after learning that he would not be able to practice acupuncture and traditional Chinese medicine by any professional title, and he sought a refund of the tuition he had paid to the College. After an investigation, PCTIA refunded the amount of the tuition fees to Mr. Harvey from a fund established under the *PCTI Act.* On September 22, 2010, PCTIA demanded that Shanghai College pay it the amount of the fees that had been refunded to Mr. Harvey. On October 25, 2010, PCTIA searched Shanghai College's premises, seized documents, and cancelled Shanghai College's registration and accreditation under the *Act.*

7 In December 2010, the Ministers commenced an action against Shanghai College and the Council of Natural Medicine seeking an interlocutory and permanent injunction restraining them from issuing or offering to issue certificates for doctoral degrees and certificates indicating or implying that the holder is a doctor entitled to practice as a doctor (I will refer to this as the Ministers' Action). The Ministers alleged that Shanghai College was not authorized by the Minister of Regional Economic and Skills Development under the *Degree Authorization Act,* SBC 2002, c 24 to confer degrees on persons, or to sell, offer or advertise for sale degree certificates, and was not a college authorized under the *Health Professions Act*, RSBC 1996, c 183, to register a person as a member of the college entitled to use the title "doctor" in his or her work.

8 Shanghai College and the Council of Natural Medicine defended the Ministers' Action by alleging that it was commenced and continued primarily for a collateral or improper purpose that amounted to an abuse of process.

9 On February 7, 2011, an interlocutory injunction was granted in the Ministers' Action against Shanghai College and the Council of Natural Medicine. No steps have been taken in the Ministers' Action since then.

The Claims

10 This action was commenced in January 2011.

1. As against the Agency defendants

11 The claims against the Agency defendants stem from PCTIA's September 22, 2010 decision that Shanghai College pay the amount of the fees that had been refunded to Mr. Harvey and its search of Shanghai College's premises on October 25, 2010 and seizure of documents.

12 The plaintiffs allege that Jim Wright, the Registrar of PCTIA, authorized staff "to break into" Shanghai College's premises and remove documents and materials and that PCTIA and Jim Wright "acted with malice and without reasonable or probable cause or a primary purpose other than that of carrying the law into effect". They allege that the Agency defendants, with knowledge of the contractual relationship between Shanghai College and its students, "and with intent to prevent performance of the contract, wrongfully and without lawful right to do so", caused Shanghai College to be closed down after removing documents and cancelling its registration and accreditation. They say that this was done with malice and intent to injure them and that it caused them to lose the benefit of tutoring students and earning an income, resulting in a loss of profits.

13 The plaintiffs also allege that the Agency defendants, along with the Ministers, breached the principles of natural justice "motivated by malice, bad faith and wrongful interference with the economic and contractual relations" and violated s. 6(2)(b) of the *Charter*; and "the Trespass, Search and Seizure" committed by both the Ministers and the Agency defendants were unreasonable and violated s. 8 of the *Charter*.

2. As against the Crown defendants

14 The claims against the Crown defendants are primarily for abuse of process stemming from the Ministers' Action. The plaintiffs make the same allegations as in their response to the Ministers' Action. They allege that the Ministers' Action was commenced and continued by the Ministers "primarily for a collateral or improper purpose that was unrelated to the ostensible purpose" of the Action.

15 They also allege that (1) the injunctive relief sought by the Ministers is *res judicata* due to similar relief having been sought by the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia in Federal Court; (2) the Ministers caused them damages that include "(a) financial hardship; (b) anxiety; (c) frustration, confusion and insecurity; (d) despondency; and (e) emotional trauma"; (3) the Ministers' conduct in instituting the Ministers' Action "amounts to an abuse of process which amounts to a collateral and improper purpose other than to carry the law into effect"; and (4) the Ministers "committed a tortious act of abuse of process which amounts to a wilful misuse or perversion of the court's process for a purpose extraneous or ulterior to that which the process was designed to serve".

16 The plaintiffs make some claims against the Ministers together with PCTIA and Jim Wright on the basis that the Ministers control the training and issuing of certificates. These claims include alleged breaches of the principles of natural justice "motivated by malice, bad faith and wrongful interference with the economic and contractual relations" between the plaintiffs and their students, which violated s. 6(2)(b) of the *Charter*. They also say that PCTIA and Jim Wright acted on instructions or under the authority of the Ministers and the Ministers are vicariously liable for the conduct of the Agency defendants. Finally, they allege that "the Trespass, Search and Seizure" committed by both the Ministers and the Agency defendants were unreasonable and violated s. 8 of the *Charter*.

Applications to strike pleadings - Rule 9-5

17 Rule 9-5(1) provides:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> ... or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

18 The test for striking a claim as disclosing no reasonable claim under Rule 9-5(1)(a), set out in *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and reiterated more recently in *R. v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, is whether it is "plain and obvious," assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success, or if the action is "certain to fail." If there is a chance that the plaintiffs might succeed, then they should not be "driven from the judgment seat." No evidence is admissible on an application under Rule 9-5(1)(a).

19 The rule that material facts in a notice of civil claim must be taken as true does not mean that allegations based on assumption and speculation must be taken as true. This was discussed in *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, where Dickson J. (as he then was) stated that "[n]o violence is done to the rule where allegations, incapable of proof, are not taken as proven". In *Young v Borzoni*, 2007 BCCA 16, the court stated (at paras. 30-31) that great caution must be taken in relying on *Operation Dismantle* as a general authority that allegations in pleadings should be weighed as to their truth, but it is not fundamentally wrong to look behind allegations in some cases, and it may be appropriate to subject the allegations in the pleadings to a sceptical analysis. It was considered appropriate in *Young*, where the plaintiff made sweeping allegations of things like intolerance, deceit, harassment, intimidation and falsifying documents against the defendants, which the court concluded could only be viewed as speculation.

20 Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC); *Skender v Farley*, 2007 BCCA 629. If a pleading is so confusing that it is difficult to understand what is pleaded, it may also be unnecessary, frivolous or vexatious. An application under this sub-rule may be supported by evidence.

21 Abuse of process under Rule 9-5(1)(d) or the court's inherent discretion is a flexible doctrine. It allows the court to prevent a claim from proceeding where to do so would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. A claim may be struck where it is a collateral attack on an administrative decision that is subject to appeal or judicial review: *Cimaco International Sales Inc. v British Columbia*, 2010 BCCA 342; *Stephen v HMTQ*, 2008 BCSC 1656; *Varzeliotis v British Columbia*, 2007 BCSC 620; *Gemex Developments Corp. v City of Coquitlam*, 2002 BCSC 412; *Berscheid v Ensign*, [1999] BCJ No. 1172 (SC). A claim may also be struck as an abuse of process where it is an attempt to re-litigate an issue that has already been decided: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63.

22 The plaintiffs have an obligation to clearly plead the material facts upon which they rely in making their claim. A material fact is a fact that is essential in formulating a complete cause of action: see *Young* at para. 20.

23 In considering an application to strike under Rule 9-5, the court should consider whether defective pleadings can be corrected by way of an amendment and whether it would be appropriate to give leave to do so: see *Greville v Convoy Supply Ltd.* (14 January 2004), Vancouver S033090 (BCSC).

Summary judgment - Rule 9-6

24 Rule 9-6(4) permits a party to apply for judgment dismissing all or part of a claim. Rule 9-6(5) provides that on hearing such an application, the court

> (a) if satisfied that there is no genuine issue for trial with respect to a claim ..., must ... dismiss the claim accordingly,
>
> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
>
> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
>
> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

25 The test to be applied for summary judgment is whether there is a *bona fide* triable issue to be determined: see *Pitt v Holt*, 2007 BCSC 1555 at para. 10, citing *Serup v Board of School Trustees* (1989), 54 BCLR (2d) 258 (CA), and *Skybridge Investments Ltd. v Metro Motors Ltd.*, 2006 BCCA 500. The court must be satisfied that it is "plain and obvious" or "beyond a doubt" the action will not succeed: *Saxton v Credit Union Deposit Guarantee Corporation*, 2006 ABCA 175. The application should be dismissed if the court is left in doubt as to whether there is a triable issue: *Progressive Construction Ltd. v Newton* (1980), 25 BCLR 330 (SC).

26 In *Skybridge*, Thackray J.A. held (at para. 10) that a judge hearing an application under this rule must "examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action."

27 In determining whether there is a *bona fide* issue, the judge is to assume that uncontested material facts as pleaded by the plaintiff are true: *Van Den Akker v Naudi*, [1997] BCJ No. 1649 (CA).

The application of the Agency defendants

28 The Agency defendants seek to strike out the portions of the Notice of Civil Claim as it relates to them, pursuant to Rule 9-5(1).

29 Their primary submission is that the claims against them are an impermissible collateral attack on the decisions of PCTIA to order Shanghai College to pay $51,200 for the fees that had been refunded to Mr. Harvey, to search its premises and seize documents, and to cancel its registration and accreditation under the *PCTI Act.* They say that all of the allegations arise from the plaintiffs' dissatisfaction with these decisions and actions, all of which are subject to statutory appeal or judicial review. They submit that this action is a collateral attack on the administrative process under the *PCTI Act* and should be struck in its entirety as an abuse of process under Rule 9-5(1)(d).

30 The Agency defendants also submit that the plaintiffs have based their pleadings on broad statements and allegations of unlawful conduct with insufficient material facts, and the pleadings are prolix and confusing, and as such the claims against them should be struck as disclosing no reasonable cause of action under Rule 9-5(1)(a) or as unnecessary and vexatious under Rule 9-5(1)(b).

31 The plaintiffs submit that this action is not an abuse of process because their claim for damages is not available in judicial review. They also submit that they have properly pleaded causes of action of malice in relation to misfeasance in public office, intentional interference with contractual relations, conspiracy, and violations of the *Charter*.

Abuse of process

32 I agree with the Agency defendants that the plaintiffs' claims against them stem from their dissatisfaction with how and what PCTIA decided against Shanghai College. The essence of their claim is that PCTIA breached the rules of natural justice and due process. They allege that (1) PCTIA failed to hold a hearing and breached the principle of *audi alteram partem* in deciding that Shanghai College was required to pay Mr. Harvey's tuition fees; (2) Mr. Wright improperly authorized PCTIA staff to search Shanghai College's premises and seize documents; and (3) PCTIA and Mr. Wright wrongfully caused Shanghai College to close down.

33 To these essential complaints the plaintiffs add allegations of malice, intent to interfere with contractual relations, and intent to injure. Despite these allegations, I have concluded that substantively, the plaintiffs' claims against the Agency defendants are based on alleged errors that were either appealable under the *PCTI Act* or judicially reviewable under the *Judicial Review Procedure Act,* RSBC 1996, c 241.

The role of PCTIA under the legislation

34 To view the plaintiffs' claims in the proper context, I will review the role of PCTIA and the registrar under the *PCTI Act.* Section 3 establishes that PCTIA has three objectives:

(a) to establish basic education standards for registered institutions and to provide consumer protection to the students and prospective students of registered institutions;

(b) to establish standards of quality that must be met by accredited institutions;

(c) to carry out, in the public interest, its powers, duties and functions under this Act.

35 PCTIA is operated by a board of up to 10 members. The board has authority under s. 6 to make bylaws in relation to numerous matters, including (h) requirements for registration of institutions; (k) establishing the standards of quality to be met by accredited institutions; (l) establishing requirements for renewal, suspension, cancellation or reinstatement of registration or accreditation of institutions; and (m) regulating and prohibiting advertising or types of advertising by registered or accredited institutions.

36 An institution providing career training must be registered under the *Act*. An institution may also be accredited. Accreditation, which is voluntary, permits an institution to represent itself as such and requires it to demonstrate continuous compliance with PCTIA's standards of quality. The registrar grants registration under s. 8 and accreditation under s. 9 of the *Act.* Under s. 12, the registrar may appoint inspectors for the purpose of determining whether it is appropriate to suspend or cancel a registration or accreditation or change the terms and conditions of a suspension, or whether a person has failed to comply with the *Act*, regulations, bylaws or terms and conditions of a suspension. Under s. 12(2), an inspector conducting an investigation has the authority, without warrant, to:

(a) enter business premises,

(b) examine a record or any other thing,

(c) demand that a document or any other thing be produced for inspection,

(d) remove a record or any other thing for review and copying, after providing a receipt,

(e) use data storage, information processing or retrieval devices or systems that are normally used in carrying on business in the premises to produce a record in readable form, or

(f) question a person.

37 Section 10 provides that a person who is affected by a cancellation of registration or accreditation may request a reconsideration of the decision by the registrar, who may confirm or vary the decision, and a further right of appeal to the board of PCTIA. The board may dismiss the appeal, allow the appeal and give any directions it considers appropriate, vary the decision, and set terms and conditions. If a person remains dissatisfied with the decision of the board, he or she may seek judicial review under the *Judicial Review Procedure Act*.

38 A Student Training Compensation Fund is established in s. 13 of the *Act*. This fund is administered by the board, which, under s. 15, may authorize payments to be made for a number of purposes, including:

(a.1) refunding a portion of the tuition fees a student has paid to a registered institution that, in the opinion of the board, has misled a student regarding the institution or any aspect of its operations;

39 Section 16(3) and (4) provide that the board has exclusive jurisdiction to hear and decide claims against the Fund, subject to judicial review on a question of law or excess of jurisdiction. The board also has the authority, under s. 16(5), to reconsider its own decisions.

Collateral attack

40 Neither Shanghai College nor the other plaintiffs pursued this matter by launching an appeal to the board or seeking judicial review.1 To the extent that the plaintiffs' claims relate to the fairness of the process and the basis for the decisions and actions taken by the registrar and PCTIA, they ought to have pursued the remedies available to them under the legislation. In my opinion, it is improper to pursue such claims in an action for damages. This issue had been the subject of several decisions in this court and the Court of Appeal that have many similarities with this case.

41 In *Cimaco*, the plaintiff alleged several causes of action, including misfeasance in public office against the Business Practices and Consumer Protection Authority when the Authority suspended its licence under the *Travel Agents Act,* RSBC 1996, c 459. It alleged that the Authority acted with malice and the intention to deliberately injure the plaintiff, and for an improper purpose, contrary to the duty of fairness. The plaintiff sought damages and constitutional declarations. It did not seek an order setting aside the suspension because the business had been lost.

42 The claims were struck by the Chambers judge, [2009] B.C.J. No. 1394, and this was upheld on appeal. Kirkpatrick J.A. for the court described *Cimaco's* pleadings as "prolix and unfocussed" at para. 46:

> There are many interlaced claims that make it difficult to extract discrete claims. There is an element of abuse of process throughout the claims, since Cimaco's essential complaint concerns the revocation of its license following its failure to provide security, a claim properly the subject of judicial review. When reduced to their essence, all of the claims fundamentally rest on the assertion that the Authority was wrong in its conclusion that the Regulation applied to Cimaco. However, instead of commencing judicial review proceedings, Cimaco commenced this action.
>
> [emphasis added]

43 The court went on to analyze the various causes of action set out in the plaintiff's claim and concluded that each of them was bound to fail. With respect to the claim that the Authority acted with improper purpose, without authority and contrary to the duty of fairness, the court held that this constituted an impermissible collateral attack of the Authority's decision, reasoning as follows at paras. 58 and 59:

> Clearly, this claim is properly a matter for judicial review, not a tort claim. A civil claim is not the appropriate forum for a court to consider the process of an administrative decision maker. Therefore this pleading is clearly an abuse of process.
>
> It is plain that Cimaco's core allegation is that the Authority misinterpreted the Regulation and knew it had no basis on which to suspend Cimaco's license. All of its allegations are linked to this central allegation.

44 Similar issues were addressed by this court in *Stephen*, where the plaintiff alleged various causes of action against a number of defendants, including the Human Rights Tribunal and its members. Joyce J. concluded that the plaintiff's claims stemmed from alleged errors in decisions made by the Tribunal that were all judicially reviewable and as such, a collateral attack. At para. 72 he explained:

> I agree with counsel for the Tribunal Defendants that the claims against them are an abuse of process in that the plaintiff is attempting to collaterally attack the Tribunal's decisions. The essence of the plaintiff's claims against the Tribunal Defendants is that due to some bias favouring the respondents, unfairness or breaches of natural justice in the handling of the plaintiff's human rights complaints, or errors in decision-making, or both, the Tribunal's decisions and the exercise of statutory powers and duties by the individual Tribunal members produced outcomes that were wrong.

45 In *Varzeliotis*, the plaintiff made claims against the Information and Privacy Commissioner seeking relief that was generally available under the *Judicial Review Procedure Act*, as well as special and punitive damages. Macauley J. held that a claim for damages is not available as an alternative where a party has available administrative law remedies on judicial review. He struck these claims as an abuse of process.

46 The plaintiffs submit that this case is distinguishable from *Cimaco*, *Stephen* and *Varzeliotis* because they have viable claims for damages for misfeasance in public office, intentional interference with contractual relations, conspiracy and *Charter* violations. Because damages are not available in judicial review, they say that this action against the Agency defendants is not an abuse of process.

47 It is well known that damages are not available in applications for judicial review: see, for example, *McLean v British Columbia*, 2004 BCSC 285 at paras. 47-49; *Clubb v Saanich (District)* (1995), 35 Admin LR (2d) 309 (BCSC); *Stoneman v Denman Island Local Trust Committee*, 2010 BCSC 636 at para. 86. However, that principal alone is not sufficient to ground an action for damages where the essential complaint stems from dissatisfaction with the conduct and the decisions of an administrative agency. The plaintiffs must have viable causes of action in and of themselves.

48 As I explain below, the plaintiffs' pleadings are prolix and confusing in that it is difficult to ascertain what causes of action are alleged. They make broad allegations of unlawful conduct with insufficient material facts. As pleaded, none of these claims establishes a reasonable cause of action and all of them are bound to fail. Therefore, I have concluded that the addition of a claim for damages in these circumstances constitutes an impermissible collateral attack of the decisions of PCTIA and must be struck as an abuse of process.

No reasonable causes of action

Misfeasance of public office

49 The plaintiffs' claim of misfeasance in public office is based on their allegations that PCTIA and Mr. Wright unlawfully searched Shanghai College premises and seized documents. The pleadings related to this are in paragraphs 24 to 26 of the Notice of Civil Claim, under the heading "Principle of Natural Justice - Due Process":

> 24. On or about October 25, 2010 the Defendant, Jim Wright, in a tortious act of malfeasance authorized staff of the PCTIA to break into the premises of the Plaintiff, Shanghai, and remove documents, lecturing material, personal property of the Plaintiff Sky Willow and signage of the College from the Plaintiff, Shanghai's, business premises ... (the "Trespass, Search and Seizure").
> 25. The Plaintiffs, Shanghai and Sky Willow, state that the Defendants, the PCTIA and Jim Wright, acted with malice and without reasonable or probable cause or a primary purpose other than that of carrying

> the law into effect. The conduct of the Defendants, the PCTIA and Jim Wright, further amount to an abuse of process or malfeasance.
>
> 26. Particulars of the malice and malfeasance are *inter alia* as follows:
>
> (a) Attempted to gain a private collateral advantage;
>
> (b) Acted with spite, ill-will or vengeance;
>
> (c) Violated the Plaintiffs, Shanghai and Sky Willow's, autonomy and respect and status in the community;
>
> (d) Violated the Plaintiffs, Shanghai and Sky Willow's, right to receive a fair hearing in accordance with the principles of natural justice;
>
> (e) Pursuing the Plaintiff, Sky Willow, for alleged misconduct, which prosecution is clearly motivated by malice, bad faith and wrongful interference with respect to the Plaintiff, Sky Willow's, right to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

50 The tort of misfeasance in public office was described in *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para. 32, as an intentional tort with two distinguishing elements: (1) deliberate unlawful conduct in the exercise of public functions; and (2) awareness that the conduct is unlawful and likely to injure the plaintiff. A plaintiff must also prove the other requirements common to all torts, including causation and compensable damages.

51 The plaintiffs' pleadings confuse misfeasance in public office with abuse of process. They say nothing of deliberate conduct by these defendants or an awareness of unlawful conduct that is likely to injure the plaintiffs, nor do they provide material facts related to each of these two elements of the tort. There is simply a bare allegation of "a tortious act of malfeasance" by Mr. Wright in authorizing the search of Shanghai College and seizure of documents, and a bare allegation that the Agency defendants "acted with malice and without reasonable or probable cause or a primary purpose other than carrying the law into effect". While this latter allegation could be interpreted as deliberate unlawful conduct, none of the particulars provided constitute material facts supporting either required element of the tort. They are simply bare allegations that can only be viewed as speculation.

52 In my view, the pleadings do not adequately make out a claim for misfeasance in public office and such a claim has no reasonable prospect of success.

The tort of abuse of process

53 It is not clear if the plaintiffs allege the tort of abuse of process. Paragraph 25 of the Notice of Civil Claim states that the conduct of PCTIA and Mr. Wright, in acting with "malice and without reasonable or probable cause or a primary purpose other than carrying the law into effect", is also an abuse of process. In the legal basis for the claim, the plaintiffs claim "general damages for abuse of process and violation of the principles of natural justice".

54 The tort of abuse of process requires the following elements to be established: (1) a willful misuse or perversion of a court process for an extraneous or improper purpose; and (2) some damage resulting: *Border Enterprises Ltd. v Beazer East Inc.*, 2002 BCCA 449 at para. 51. An additional element, that some act or threat has been made in furtherance of the process, may also be required, although this is not clear in British Columbia: see *Smith v Rusk*, 2009 BCCA 96 at para. 34; *Bajwa v British Columbia Veterinary Medical Association*, 2012 BCSC 878 at paras. 178-181; and *Home Equity Development Inc. v Crow*, 2002 BCSC 1747 at para. 19. In *Home Equity*, it was held that some definite conduct in furtherance of an illegitimate purpose is essential, as there is no liability where the defendant is employing its regular process, even if it does so with bad intentions: see para. 20, citing *Guilford Industries Ltd. v Hankinson Management Services Ltd.*, [1974] 1 WWR 141.

55 The plaintiffs' pleadings appear to allege a collateral purpose but this is confusingly stated as "a primary purpose other than carrying the law into effect". Importantly, they do not provide any material facts to support this allegation, nor do they plead what act was done in furtherance of the process. It is possible that the pleading in para. 24 regarding the search and seizure authorized by Mr. Wright could be interpreted as the act made in furtherance of the process, but nothing is pleaded clearly or in relation to PCTIA. Here again, there are only bare allegations and there is nothing to support any allegation that the Agency defendants were not acting within the authority of the *PCTI Act*.

56 The pleadings do not make out a claim in the tort of abuse of process. It appears to me that the plaintiffs have confused abuse of process with procedural fairness issues. This is exemplified in part in the particulars of the "malice and malfeasance" in paragraph 26, which include the allegation that the Agency defendants violated Shanghai College and Sky Willow's right to receive "a fair hearing in accordance with the principles of natural justice".

57 In my opinion, the plaintiffs' real complaint here relates to the fairness of the process employed by PCTIA and is not properly the subject of an action for damages. Any claim for abuse of process has no reasonable prospect of success.

Intentional interference with contractual and economic relations

58 The claims for intentional interference with contractual and economic relations are set out in paras. 27, 28 and 29 of the Notice of Civil Claim:

> 27. The conduct of the Defendants, the PCTIA and Jim Wright, further amounts to intentional interference with the contractual and economic relations between the Plaintiff, Shanghai, and its students.
>
> 28. The Defendants, the PCTIA and Jim Wright, with knowledge of the contractual relationship between the Plaintiff, Shanghai, and its students and with the intent to prevent performance of the contract, wrongfully and without lawful right to do so, caused the Plaintiffs, Shanghai and Sky Willow, to close down the Plaintiff, Shanghai's, business after the said Defendants removed the Plaintiff Shanghai's material and assets from its business premises and after cancelling the registration and accreditation as of October 25, 2010.
>
> 29. The conduct of the Defendants, the PCTIA and Jim Wright, was done with malice and with the intent to injure the Plaintiffs which conduct has the result that the Plaintiffs are losing the benefit of tutoring students and earning an income and has lost profit the Plaintiffs would otherwise have made and have been greatly injured in the Plaintiff, Shanghai's, business and have suffered and continue to suffer loss and damage.

59 The intentional tort of interference with contractual relations has five elements: (1) the existence of a valid and enforceable contract; (2) awareness of the defendants of the existence of the contract; (3) breach of the contract procured by the defendants; (4) wrongful interference; and (5) damages: *Potter v Rowe*, [1990] B.C.J. No. 2912 at para. 54. Wrongful interference was described in *D.C. Thomson & Co. Ltd. v Deakin*, [1952] Ch. 646 (CA) at 702, cited in *Potter* at para. 55:

> The tort is committed if a person without justification knowingly and intentionally interferes with a contract between two other persons. There must, therefore, be knowledge of the existence of contractual relations between others and the intentional commission, without justification, of some act which interferes with those contractual relations so as to bring about or procure or induce a breach resulting in damage.

60 The tort of unlawful interference with economic relations is similar. It has these elements:

> (1) the existence of a valid business relationship or business expectancy between the plaintiff and another party; (2) knowledge by the defendant of that business relationship or expectancy; (3) intentional interference which induces or causes a termination of the business relationship or expectancy; (4) the interference is by way of unlawful means; (5) the interference by the defendant must be the proximate cause of the termination of the business relationship or expectancy; and (6) there is a resultant loss to the plaintiff:

> *671122 Ontario Ltd. v Sagaz Industries Canada Inc*. (1998), 40 OR (3d) 229; varied (2000), 46 OR (3d) 760, aff'd 2001 SCC 59, cited in *Reid v British Columbia (Egg Marketing Board),* 2007 BCSC 155 at para. 150.

61 In *Reid*, it was noted by H. Holmes J. that courts take a fairly broad view of the required element of "unlawful means" as an act that is not legally justified. She held that a regulatory body may act by unlawful means if it uses its powers for purposes incompatible with the purposes contemplated in its authorizing legislation: see para. 152.

62 The basis of the Agency defendants' submission is that the plaintiffs have not pleaded that they were acting by unlawful means. I do not interpret their pleadings that way. While awkwardly drafted, they do allege in paragraph 25 that the Agency defendants acted with "a primary purpose other than that of carrying the law into effect" (my emphasis). Paragraphs 27 to 29 refer to the conduct of these defendants (as described in the previous paragraphs) as constituting intentional interference with contractual and economic relations between Shanghai College and its students. All of these paragraphs, when considered together, set out the elements of these torts.

63 However, these causes of action suffer from the same problem as the others, as there are again mainly bare allegations and no material facts pleaded which support each element of these torts. The only material facts that can be discerned appear in paragraph 28, which alleges that the Agency defendants caused Shanghai College to close after they removed Shanghai College's "material and assets" from its business premises and after cancelling the registration and accreditation. This demonstrates, in my view, that the plaintiffs' complaints against the Agency defendants stem only from the actions they took and the decisions they made under the *PCTI Act*. The essential element of unlawful means is supported with only a bare allegation of "a primary purpose other than that of carrying the law into effect", which again, is speculation.

64 This is an insufficient pleading that discloses no reasonable claim and is certain to fail.

Conspiracy

65 The plaintiffs make a claim of conspiracy in paragraph 43 of the Notice of Civil Claim:

> 43. The Defendants, the CTCMA [the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia], Mary S. Watterson, the PCTIA and Stephen Harvey (the "Conspirator Defendants") conspired with each other and with the intent to injure the Plaintiff, Shanghai, to change or amend the Bylaws of the PCTIA to enable the PCTIA to demand a refund to be paid by the Plaintiff, Shanghai, an amount of $51,200.00 to the Defendant, Stephen Harvey. The Defendant, the PCTIA, in fact amended its Bylaws to give themselves the authority to claim that the Plaintiff, Shanghai, refund the tuition fees of the Defendant, Stephen Harvey, in the amount of $51,200.00.

66 Paragraph 47 adds that the CTCMA "used the authority and power" of PCTIA to close down Shanghai College.

67 The tort of conspiracy requires three essential elements, all of which must be pleaded: (1) an agreement, including a joint plan or common intention by the defendant, to do the act which is the object of the conspiracy; (2) an overt act consequent on the agreement; and (3) resulting damage: *Kuhn v American Credit Indemnity Co.*, [1992] B.C.J. No. 953 (SC). In *Kuhn*, the court added:

> The defendants must intend to be a party to the combination. Mere knowledge of or approval of or acquiescence in the act is not sufficient to establish the existence of a common plan or design. The defendants must have intentionally participated in the act with a view to furtherance of the common design and purpose.

68 The pleadings do not contain all of the elements of a conspiracy. As against PCTIA, they allege only that it amended its bylaws to give itself authority to make the order to refund tuition fees. They say nothing about any intentional participation by PCTIA in an agreement or joint plan. This is insufficient on which to ground a claim in conspiracy and as pleaded it is certain to fail.

Charter violations

69 The plaintiffs allege causes of action arising from breaches of s. 6(2)(b) and s. 8 of the *Charter*.

70 Section 6(2)(b) addresses rights to move and gain livelihood:

> Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right ...
>
> (b) to pursue the gaining of a livelihood in any province.

71 Section 8 provides that "[e]veryone has the right to be secure against unreasonable search or seizure".

72 The plaintiffs' refer to s. 6(2)(b) of the *Charter* in paras. 30 and 51 of the Notice of Civil Claim.

> 30. The Plaintiffs state that the Defendants ... the PCTIA and Jim Wright, are in breach of the principles of natural justice, motivated by malice, bad faith and wrongful interference with the economic and contractual relations the Plaintiffs had with students to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.
>
> ...
>
> 51. The Defendants ... the PCTIA ... further violated the Plaintiffs' rights protected under Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

73 They also refer to s. 6(2)(b) in the particulars of malice and misfeasance set out in para. 26(e):

> (e) Pursuing the Plaintiff, Sky Willow, for alleged misconduct, which prosecution is clearly motivated by malice, bad faith and wrongful interference with respect to the Plaintiff, Sky Willow's, right to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

74 The alleged breach of s. 8 of the *Charter* is found in para. 50:

> 50. The Plaintiffs state that the Trespass, Search and Seizure committed by the Defendants, the PCTIA, Jim Wright ... were unreasonable and violated Section 8 of the *Canadian Charter of Rights and Freedoms*.

75 The plaintiffs claim general damages "for wrongful interference with the Plaintiffs' constitutional right to earn a livelihood and unreasonable search and seizure".

76 The Agency defendants submit that s. 6 of the *Charter* does not override provincial regulatory legislation to provide a right to work in a particular profession or occupation in any province. They also submit that s. 8 of the *Charter* does not apply to purely economic interests.

77 The plaintiffs submit that the court should not consider these arguments because there is nothing in the Response to Civil Claim filed by these defendants that challenges these *Charter* actions.

78 I cannot accept the submission of the plaintiffs. While the Agency defendants' Response challenges many specifics of the claims, it states generally that the entire Notice of Civil Claim discloses no reasonable cause of action against them. In bringing this application, it is open to these defendants to challenge all aspects of the legal basis for the claims, particularly in the circumstances here, where the claim is confusing and it is difficult to discern precisely what causes of action are pleaded.

79 In *Bajwa*, Armstrong J. struck out a similar claim based on a breach of s. 6(2)(b) of the *Charter* because the plaintiff had not pleaded any facts to suggest that his interprovincial mobility had been restricted in any way. He referred to *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357, which held that s. 6(2)(b) does not establish a separate and distinct right to work divorced from the mobility provisions in the *Charter*; the two rights in

s. 6(2)(a) and (b) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence.

80 The plaintiffs' claim based on a breach of s. 6(2)(b) of the *Charter* is certain to fail, as these cases establish that this section does not give the plaintiffs an independent constitutional right to pursue a livelihood in British Columbia so as to override any applicable provincial legislation, such as the *PCTI Act*.

81 With respect to s. 8, the Agency defendants referred me to *British Columbia Teachers' Federation v Vancouver School District No. 39*, 2003 BCCA 100, where the majority held that purely economic interests, which include matters related to employment, are not interests that engage the provisions of the right to life, liberty and the security of the person under s. 7 of the *Charter*. They submit that the same principle applies to the more specific deprivations of this general right such as the right to be free from unreasonable search and seizure under s. 8. In *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 SCR 486, it was held that sections 8 to 14 of the *Charter* are illustrative of instances in which the right to life, liberty and security of the person would be violated in a manner that is not in accordance with the principles of fundamental justice.

82 The plaintiffs challenge this submission, noting that there was no risk of any penal sanction in the *BC Teachers' Federation* case. They submit that the underlying issue here is that PCTIA relied on s. 12 of the *PCTI Act* to authorize the search and seizure and that this was in breach of s. 8, as "it was all taken away without a hearing."

83 It is not necessary to decide this interesting issue. Whether or not the economic interests at stake in this case engage s. 8 of the *Charter*, this claim falls along with the other claims. Its essence is an allegation of a breach of the rules of natural justice and procedural fairness, which is properly the subject of judicial review proceedings. It relates primarily to paras. 24 and 25 of the Notice of Civil Claim, which contain only bare allegations of "malfeasance" by Mr. Wright in authorizing the search of Shanghai College and seizure of documents, and of the Agency defendants acting with "malice and without reasonable or probable cause or a primary purpose other than carrying the law into effect". A claim of a breach of s. 8 of the *Charter* is certain to fail because there are no material facts pleaded to support it and the complaint is one that ought to have been made in a judicial review.

Claims against Mr. Wright personally

84 Mr. Wright submits that to establish a cause of action against him personally, the plaintiffs must establish that he committed a tortious act which demonstrated an identity or interest separate from PCTIA. There is no factual basis to suggest that Mr. Wright was acting outside the scope or course of his employment and there is nothing in the pleading that alleges that he committed an act separate from those alleged against PCTIA, and on this basis Mr. Wright says that the claims against him in his personal capacity should be struck as disclosing no reasonable claim.

85 The plaintiffs submit that the claims of misfeasance and bad faith are appropriately made against Mr. Wright.

86 It is a well-accepted principle, expressed in cases such as *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 OR (3d) 481 (SCJ), that officers and employees of corporations are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the corporation so as to make the act or conduct complained of their own: see also *Morriss v HMTQ*, 2001 BCSC 281; *Rafiki Properties Ltd. v Integrated Housing Development Ltd.* (1999), 45 BLR (2d) 316 (BCSC); *Greville v Convoy Supply Ltd.*.

87 I agree with Mr. Wright that the plaintiffs have pleaded nothing which suggests that he conducted himself in a manner that was separate from PCTIA or that he was acting outside the scope of his employment. The allegations against PCTIA and Mr. Wright are essentially the same.

88 However, in this case, s. 21 of the *PCTI Act* provides personal liability protection to Mr. Wright as an employee of PCTIA, but not where he acts in bad faith:

> (1) Subject to subsection (2), no legal proceeding for damages lies or may be commenced or maintained against a board member or an officer or employee of the agency because of anything done or omitted
>
> (a) in the performance or intended performance of any duty under this Act, or
>
> (b) in the exercise or intended exercise of any power under this Act.
>
> (2) Subsection (1) does not apply to a person referred to in that subsection in relation to anything done or omitted by that person in bad faith.

89 While the allegations of malice and "malfeasance" as against Mr. Wright would not be protected by s. 21, given my conclusions about these causes of action, the claims against Mr. Wright are certain to fail in any event.

Conclusion

90 For all of these reasons, it is my opinion that the pleadings do not disclose reasonable claims against either PCTIA or Mr. Wright in misfeasance of public office, abuse of process, intentional interference with contractual and economic relations, conspiracy, or violations of the *Charter*, and the plaintiffs' essential complaints against these defendants stem from alleged errors in procedure and substance within their role in a statutory, administrative process. Consequently, the plaintiffs' claim for damages cannot found a proper action sufficient to take these claims outside of the administrative law context. The essential claims constitute an impermissible collateral attack of the decisions of Mr. Wright as registrar and PCTIA, and must be struck as an abuse of process.

The applications of the Crown defendants and the Ministers (Rule 9-5(1)

91 The Ministers and the Crown defendants seek to strike out the portions of the Notice of Civil Claim as it relates to them, pursuant to Rule 9-5(1).

92 The Crown defendants say that the claim discloses no cause of action against them and should be struck on that basis.

93 The Ministers say that their only involvement in the claim arises as a result of the Ministers' Action. They submit that launching a fresh action is a collateral attack on that Action, which itself is an abuse of process, as the correct response to proceedings that are alleged to be an abuse of process is to apply to dismiss or stay those proceedings. The Ministers also say that the claim does not properly plead the elements of the tort of abuse of process.

94 The plaintiffs submit that launching this action against these defendants is not an abuse of process because they simply defended the Ministers' Action and opposed the application for an interlocutory injunction, and in this action they claim damages. They say that the claims should not be struck and that they have properly pleaded a cause of action against the Ministers and the Crown defendants.

95 I have considerable difficulty with the plaintiffs' submissions.

Crown defendants

96 I will deal with the Crown defendants first. There is nothing in the claim that asserts any cause of action against them. Mr. Fraser submitted that "presumably" they have been added because it might be alleged that the Province is liable as employer for the conduct of the Ministers but the need for the involvement of the Attorney General is unclear.

97 In my view, whatever can be presumed, the claim makes no allegations against the Crown defendants, discloses no cause of action against them, and must be struck under Rule 9-5(1)(a).

The Ministers - abuse of process (Rule 9-5(1)(b) and (d))

98 With respect to the Ministers, the claim makes the very same allegations as are contained in the plaintiffs'

Response to the Ministers' Action. Paragraphs 16, 20 and 21 of the claim make the same allegations of abuse of process as paras. 6, 7 and 8 of the Response. Paragraphs 22 to 25 and 27 to 31 of the claim make the same allegations of breaches of natural justice and due process as paragraphs 9 to 17 of the Response. Paragraph 50 of the claim makes the same allegation of a breach of s. 8 of the *Charter* as para. 18 of the Response. Paragraph 51 of the claim makes the same allegation of a breach of s. 6(2)(b) of the *Charter* as para. 19 of the Response. Paragraph 52 challenges s. 12 of the *PCTIA Act* and the same challenge appears in para. 20 of the Response.

99 Had a final decision been made in the Ministers' Action, the doctrine of issue estoppel would preclude this proceeding. As the Supreme Court of Canada held in *Toronto (City)* at para. 23, issue estoppel, which precludes the re-litigation of issues previously decided in another proceeding, has three preconditions: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same (or their privies).

100 However, on February 7, 2011, an interlocutory injunction was granted in the Ministers' Action on the same terms as those sought for a final order. This order was granted after a hearing where both sides appeared and made submissions. No steps have been taken by either side since this order was made. The Ministers submit that it would absurd to allow injunction proceedings to continue on their merits, accepting an interlocutory injunction made in those proceedings, while at the same time in another action to claim damages or injunctive relief in respect of the injunction proceedings. This, they say, is an abuse of process.

101 I agree with the Ministers. In my opinion, it is unfair and contrary to the interests of justice to permit a party to make the same claims in two extant proceedings, particularly where there is a binding interlocutory order in place in the first proceeding that, at least on a *prima facie* basis, is completely inconsistent with these claims, and where the claims in the second proceeding arise from the existence of the first one. The addition of a claim for damages in this action does not change the fact that the claims stem from the Ministers' Action itself and are based on the very same allegations that have been put in issue in the Ministers' Action.

102 In this regard, I refer to the principles expressed in *Toronto (City)* at paras. 35 and 37:

> [35] Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
>> . . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency ... But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.
>
> ...
>
> [37] ... the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" ... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice ...

103 It is my view that to allow the claims against the Ministers to proceed in the rather unique circumstances here would violate the principles of judicial economy, consistency and the integrity of the judicial process. I consider the proceedings against the Ministers in this action to be vexatious and as such, an abuse of process, justifying an order to strike the pleadings under Rule 9-5(1)(b) and (d).

The Ministers - no reasonable claim (Rule 9-5(1)(a))

104 The Ministers also submit that the claims against them should be struck as disclosing no reasonable claim, under Rule 9-5(1)(a).

The tort of abuse of process

105 The plaintiffs' primary claim against the Ministers is for the tort of abuse of process. The allegations are found at paragraphs 16 to 21 of the Notice of Civil Claim. I will reproduce the salient portions of those paragraphs:

> 16. The [Ministers' Action] was commenced by the Defendants [the Ministers] and continued by the said Defendants primarily for a collateral or improper purpose that was unrelated to the ostensible purpose of the [Ministers' Action]. Particulars of the Defendants' ... collateral or improper purpose are as follows:
>
> (a) To ruin the Plaintiffs financially;
>
> (b) To harass, victimize and traumatize the Plaintiffs;
>
> (c) To eliminate the Plaintiffs as competition for the Defendants Mary S. Watterson and the CTCMA .
>
> 17. The Defendants ... control the training and issuing of any Certificate indicating or implying that the holder has been awarded a degree in Traditional Chinese Medicine through the Defendants, the CTCMA and the PCTIA, through the *Health Professions Act* and the *Private Career Training Institutions Act.*
>
> 18. The Plaintiffs state that the injunctive relief sought against the Plaintiff [Council of Natural Medicine] is *res judicata* in that the Plaintiff in the Federal Court case, the CTCMA, requested the following relief: [a permanent injunction restraining the use of various titles associated with the practice of acupuncture and traditional Chinese medicine, and other orders] ...
>
> 19. The Defendants ... by commencing the [Ministers' Action] and engaging in the conduct described in this Notice of Civil Claim caused the Plaintiff, [Council of Natural Medicine], actual damage and thereby committed the tort of abuse of process. The damage caused in this regard are *inter alia* as follows:
>
> (a) Financial hardship;
>
> (b) Anxiety;
>
> (c) Frustration, confusion and insecurity;
>
> (d) Despondency; and
>
> (e) Emotional trauma.
>
> 20. The Plaintiffs state that the Defendants, the CTCMA and [the Ministers] conduct to institute the [Ministers' Action] amounts to an abuse of process which amounts to a collateral and improper process other than to carry the law into effect.
>
> 21. The Plaintiffs further state that the Defendants, the CTCMA, and [the Ministers], committed a tortious act of abuse of process which amounts to a willful misuse or perversion of the court's process for a purpose extraneous or ulterior to that which the process was designed to serve.

106 The Ministers submit that the plaintiffs have not pleaded sufficient material facts to support the elements of the tort of abuse of process. They say that the damages alleged may be the result of the proper enforcement of legislation, and only where such enforcement is undertaken without any genuine belief in the merits of the claim will a case of abuse of process be made out. In the absence of a pleading to this effect, the claim has no reasonable prospect of success.

107 I have already reviewed the elements of this tort. There must be a wilful misuse or perversion of a court process for an extraneous or improper purpose, and some damage resulting. The plaintiffs have pleaded these essential elements but again, provide no material facts to support their bare allegations.

108 The closest they come is in para. 18, where they allege that the injunctive relief sought against the plaintiff, Council of Natural Medicine, is *res judicata* because of Federal Court proceedings initiated by the defendant, College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia. This allegation is certain to fail as against the Ministers, as the conditions for issue estoppel (a branch of *res judicata*) requires that the parties to both proceedings must be the same. The Ministers were not parties to the Federal Court proceedings.

109 It is of some significance, in my view, that the Ministers named in this proceeding are no longer in those positions. This is because the Ministers' Action was commenced under the *Degree Authorization Act* and the *Health Professions Act* at a time when these individuals were the Ministers. Section 8 of the *Degree Authorization Act* requires an application by the minister to seek injunctive relief. The same is not required under the *Health Professions Act* (where any person may make such an application), but I am advised by counsel that the same practice is employed for consistency. Accordingly, the Ministers are nominal defendants only. None of this is disputed by the plaintiffs, who are content to amend the pleadings to include the individuals who currently hold the Ministers' positions.

110 It is difficult to conceive how allegations of abuse of process could succeed against nominal defendants in these circumstances, as the tort requires wilful acts and wilful acts require knowledge and intention.

111 Accordingly, I am of the view that the plaintiffs' claim against the Ministers for abuse of process has no reasonable chance of success and should also be struck under Rule 9-5(1)(a).

Charter violations

112 The plaintiffs also make the same claims against the Ministers as they do against PCTIA and Mr. Wright in respect of breaches of natural justice and violations of s. 6(2)(b) and s. 8 of the *Charter*. These are found in paragraphs 30, 50 and 51:

> 30. The Plaintiffs state that the Defendants [the Ministers], the PCTIA and Jim Wright, are in breach of the principles of natural justice, motivated by malice, bad faith and wrongful interference with the economic and contractual relations the Plaintiffs had with students to pursue a livelihood as stated in Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.
>
> ...
>
> 50. The Plaintiffs state that the Trespass, Search and Seizure committed by the Defendants, the PCTIA, Jim Wright, and [the Ministers] were unreasonable and violated Section 8 of the *Canadian Charter of Rights and Freedoms*.
>
> 51. The Defendants, the CTCMA, the PCTIA, and [the Ministers], further violated the Plaintiffs' rights protected under Section 6(2)(b) of the *Canadian Charter of Rights and Freedoms*.

113 These claims should be struck as disclosing no reasonable claim for the same reasons I have expressed in relation to the Agency defendants.

Vicarious liability

114 There is one other claim against the Ministers in paragraph 31 of the Notice of Civil Claim, which asserts that they are vicariously liable for the conduct of PCTIA and Mr. Wright:

> 31. The Defendants, the PCTIA and Jim Wright, at all material times acted on instructions and/or under the authority or auspices of the Defendants [the Ministers], and the said Defendants [the Ministers] are as such vicariously liable for the conduct of the Defendants, the PCTIA and Jim Wright.

115 This claim cannot possibly succeed. It is nothing more than speculation to allege that an administrative agency, established by legislation, and its registrar, acted on instructions from Ministers who are nominal defendants, nor is there any basis to allege vicarious liability in such circumstances.

Conclusion

116 For these reasons, I have concluded that the plaintiffs' claims against the Crown defendants must be struck as disclosing no reasonable claim under Rule 9-5(1)(a) and the claims against the Ministers must be struck as both an abuse of process under Rule 9-5(1)(b) and (d) and as disclosing no reasonable claim under Rule 9-5(1)(a).

117 Given these conclusions, it is not necessary to address the Ministers' alternative application for summary judgment under Rule 9-6 or their further alternative application that they cease to be defendants.

Concluding remarks

118 I do not consider it appropriate to grant leave to the plaintiffs to amend their pleadings as they pertain to any of these defendants, due to the nature of the issues that have been raised in these applications and the breadth of the omissions of material facts. It became apparent after two days of submissions that the plaintiffs' primary issues are with the other defendants, particularly the College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia, and they pertain to a perception of unequal treatment as between Shanghai College and another College that has remained in operation.

119 The applicants will have their costs of the applications at the usual scale.

B. FISHER J.

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1 Mr. Pyper advised me that Shanghai College did seek a reconsideration by the registrar in respect of PCTIA's decision to pay Mr. Harvey's tuition fees.

Young v. Borzoni, [2007] B.C.J. No. 105

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

Thackray, Lowry and Chiasson JJ.A.

Heard: December 5, 2006 (Victoria).

Judgment: January 23, 2007.

Vancouver Registry No. CA32841

[2007] B.C.J. No. 105 | 2007 BCCA 16 | 277 D.L.R. (4th) 685 | 235 B.C.A.C. 220 | 64 B.C.L.R. (4th) 157 | 154 A.C.W.S. (3d) 1060 | 2007 CarswellBC 119

Between Marlene Young and Eric Young, Appellants (Plaintiffs), and Anthony R. Borzoni, The Capital Regional District, The Region Housing Corporation, Amy Jaarsma, Kate Joy, David Weeks, The Corporation of the District of Saanich, The Saanich Police Department, Chief Constable Derek Egan, Constable Philip Richmond, Constable Paul Luhowy, Constable S. Edwards (nee Taylor), and Constable Trevor Dyck, Respondents (Defendants)

(68 paras.)

Case Summary

Civil procedure — Disposition without trial — Dismissal of action — Action unfounded in law — Frivolous, vexatious or abuse of process — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Pleadings did not disclose any new evidence other than that ruled on in previous actions — Action was merely attempt to re-litigate termination of Youngs' tenancy.

Legal profession — Barristers and solicitors — Liability — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Lawyer acting for landlord and others in proceedings involving Youngs, tenants, did not have duty of care to Youngs.

Professional responsibility — Professional duties — Duties of care and negligence — Legal profession — Barristers and solicitors — Liability — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Lawyer acting for landlord and others in proceedings involving Youngs, tenants, did not have duty of care to Youngs.

Professions — Legal — Lawyers — Legal profession — Barristers and solicitors — Liability — Appeal by Youngs from dismissal of action against lawyer acting for opponents in other litigation dismissed — Lawyer acting for landlord and others in proceedings involving Youngs, tenants, did not have duty of care to Youngs.

Appeal by the Youngs from an order dismissing their action against Borzoni, a solicitor who had represented their opponents in related proceedings, on grounds that the Youngs' statement of claim disclosed no cause of action, that the action was unnecessary, frivolous, and vexatious, and that the action was an abuse of the court's process. The Youngs entered into a tenancy agreement with Capital Region to rent an apartment, and moved in on August 31, 2001. Their neighbours complained about an odour of marijuana emanating from the Youngs' apartment. Mr. Young was legally entitled to smoke marijuana because of a medical condition. The Youngs complained that their neighbours, Capital Region, and the police were harassing them. The Youngs were served with a notice terminating

their tenancy on July 10, 2002, effective August 31, 2002. The Youngs applied for arbitration by the Residential Tenancy Board. Borzoni represented Capital Region at the hearing before Arbitrator Gilbert. Gilbert held Capital Region established sufficient cause for ending the Youngs' tenancy. The Youngs applied for review of Gilbert's decision. Capital Region applied for an order of possession, which was adjourned pending the review. The review was denied by Arbitrator Katz on October 4, 2002. The Youngs commenced a court action seeking judicial review of the decisions by Gilbert and Katz. Borzoni was retained to represent Capital Region in the review. The Youngs commenced another action, naming Capital Region and the police as respondents, alleging breaches of their rights to grow and use marijuana. The actions were ordered heard together. Borzoni represented the police as well as Capital Region in the resulting action, which was dismissed June 13, 2003. In her reasons, the judge noted there was no evidence to support the Youngs' allegations of wrongdoing on the part of Borzoni. The Youngs unsuccessfully appealed from the dismissal of their Charter proceeding. Following a hearing, Capital Region was granted an order of possession for the Youngs' apartment, effective August 31, 2003. The Youngs unsuccessfully applied for an order prohibiting Capital Region from proceeding with possession. Their appeal from this decision was dismissed, and they consented to vacate the apartment by October 31, 2003. The Youngs then commenced a defamation action naming several former tenants from their apartment building who had testified in the hearing before Gilbert. They also commenced an action against Borzoni, claiming he owed them a duty of care as non-client third persons. The Youngs claimed Borzoni influenced their neighbours to intimidate them, who then engaged in a pattern of harassment under Borzoni's advice. The Youngs also alleged Borzoni wrote and commissioned affidavits he knew were false, made statements to tribunals and courts that were false, and advised Capital Region and the police to falsify documents placed before the court. They sought damages of $1 million for conduct in bad faith and with malice, $70,000 for intentional infliction of mental suffering, and $40,000 for costs. Mr. Young wrote to Borzoni, informing him the Youngs intended to have him removed as counsel of record for Capital Region and the police due to a conflict of interest. Borzoni replied he would be applying to have the Youngs' action against him dismissed. Borzoni's motion was heard first, with the Youngs' consent. The result was a decision dismissing the Youngs' action against Borzoni. The judge concluded the Youngs' action was merely an attempt to re-litigate the eviction issue, rendering the action unnecessary, scandalous, vexatious, and frivolous. He did not find the facts as alleged supported the Youngs' contention Borzoni owed them a duty of care. He found the Youngs' statement of claim did not disclose any action by Borzoni that would give rise to liability for intentionally inflicting nervous shock on the Youngs.
HELD: Appeal dismissed.

The direct allegations against Borzoni regarding false statements and affidavits were dismissed, as they had already been dealt with by the judge. As there was no way the Youngs could obtain evidence showing Borzoni had influenced his clients to place false documents before the court, these allegations were dismissed as pure speculation. The pleaded facts did not support the Youngs' position that they sustained emotional injuries caused by the alleged actions of Borzoni, since no evidence of actual psychiatric damage was provided. No material facts were pleaded which could establish there was a relationship of sufficient proximity between Borzoni and the Youngs to give rise to a duty of care. As the Youngs' action against Borzoni contained no new relevant evidence or evidence not considered in previous proceedings, it was correctly found to be unnecessary, scandalous, frivolous, and vexatious. It was also fitting for the judge to find the action was an abuse of process, where it was clearly commenced for the purpose of having Borzoni removed as counsel in the related proceeding.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982,

Rules of the Supreme Court of British Columbia, Rule 19(1), Rule 19(9.1), Rule 19(24)(a), Rule 19(24)(b), Rule 19(24)(d)

Counsel

Eric Young: In person for the Appellants

P.C. Freeman, Q.C.: Counsel for the Respondents

The judgment of the Court was delivered by

THACKRAY J.A.

1 Marlene Young and Eric Young appeal the order entered upon the judgment of Mr. Justice Bouck dismissing the action against Anthony Borzoni, a solicitor who represented the other named defendants in related proceedings, on the grounds that the statement of claim alleged no cause of action, that the action was unnecessary, frivolous, vexatious, and that the action was an abuse of the court's process. The judgment was delivered orally (10 March 2005, Victoria Registry No. 04-2367).

Background

2 The appellants entered into a tenancy agreement with the Capital Region Housing Corporation for the rental of apartment #106, Beechwood Park, 3936 Gordon Head Road, Victoria, British Columbia. They moved into the suite on or about 31 August 2001. The Corporation received complaints from other tenants regarding the odour of marijuana smoke emanating from the appellants' apartment. Mr. Young can legally smoke marijuana due to a medical condition from which he suffers.

3 The appellants also laid complaints. They alleged harassment and misconduct by their neighbours, the Corporation and the Saanich Police Department. On 10 July 2002 the appellants were served with a notice terminating the tenancy effective 31 August 2002. On 16 July 2002 the appellants filed an application for arbitration by the Residential Tenancy Board. The respondent, Mr. Borzoni, represented the Corporation at the hearing before Arbitrator Gilbert. In extensive reasons dated 29 August 2002 Mr. Gilbert held that the Corporation had established sufficient cause for ending the tenancy and dismissed the appellants' application to set aside the notice terminating the tenancy.

4 The appellants filed an application for a review of the arbitrator's decision with the Board. On 4 September 2002 the Corporation applied to the Residential Tenancy Branch for an order of possession, which was adjourned pending the Board's review decision. In written reasons dated 4 October 2002 the application for review was denied by Arbitrator Katz.

5 On 7 October 2002 the appellants commenced a court action seeking a judicial review of the decisions of Arbitrators Gilbert and Katz: ***Young v. Capital Region Housing Corporation,*** Action No. 02-4528. Mr. Borzoni was retained to represent the Corporation. On 15 November 2002 the appellants commenced Action No. 02-5145, naming The Capital Regional District and The Saanich Police Department as respondents. It alleged ***Charter*** breaches based on interference with the rights of the petitioners to grow and use marijuana. Madam Justice Dorgan ordered that the two actions be heard together commencing on 18 February 2003. Mr. Borzoni was retained to represent both respondents. Mr. Justice Macaulay dismissed the proceedings brought under both actions in reasons dated 13 June 2003, [2003] B.C.J. No. 1464.

6 Mr. Justice Macaulay said as follows regarding Mr. Borzoni:

> [114] ... During his submission Mr. Young referred several times to his concern that Mr. Borzoni, who acted as counsel for all the respondents, performed some improper function related to this allegation. There was simply no evidence to support any allegation of wrongdoing on the part of counsel.

7 Mr. Justice Macaulay held at paragraph 80 that the appellants "completely failed to offer any evidentiary foundation capable of supporting the allegations against the police and it is unnecessary for me to analyze them." He concluded as follows:

> [131] As none of the alleged *Charter* breaches were made out, the petition filed under Action 02/5145 is dismissed as against both the [Saanich Police Department] and [The Capital Region District].

8 On 10 July 2003 the appellants filed a Notice of Appeal in the ***Charter*** proceeding. The appeal was heard in April 2004. In reasons for judgment, cited as [2004] B.C.J. No. 779, 2004 BCCA 224, the appeal was dismissed. The Supreme Court of Canada dismissed an application for leave to appeal: [2004] S.C.C.A. No. 255.

9 On 15 July 2003 the Corporation applied to the Residential Tenancy Branch for an order of possession. A hearing took place in June and July 2003, before Arbitrator Pyne. He issued reasons in which he granted an order of possession effective 31 August 2003. On 21 July 2003 the appellants filed a petition for judicial review of Mr. Pyne's order: Action No. 03-3026.

10 On 19 August 2003 the appellants applied for an order prohibiting the Corporation from proceeding with possession. In oral reasons for judgment Mr. Justice Bauman dismissed the application. On 2 September 2003 the Corporation obtained a writ of possession: Action No. 03-3574. On 5 September 2003 the appellants filed a Notice of Appeal from the decision granting the writ of possession and for a stay of the order for possession. This was dismissed on 12 September 2003. The appellants consented to vacate the premises by 31 October 2003.

11 The appellants commenced defamation Action No. 04-0304 in the Supreme Court on 23 January 2004. That action named several former tenants in the Beechwood complex, some of whom had testified before Arbitrator Gilbert.

12 On 28 May 2004 the appellants commenced this action alleging that Mr. Borzoni owed a duty to care to the plaintiffs as "non-client third persons." The specifics included allegations that Mr. Borzoni influenced neighbours to intimidate the plaintiffs and that other defendants, "with and/or under advice of Defendant Mr. Borzoni" engaged in a pattern of harassment. The relief claimed against Mr. Borzoni is for aggravated and punitive damages in the amount of $1 million for acting with malice and in bad faith"; and damages in the amount of $70,000 for intentional infliction of mental suffering causing "pain and suffering", "emotional stress and mental anxiety", and "loss of enjoyment of life"; and $40,000 for "costs to trial."

13 On 13 October 2004 Mr. Young wrote to Mr. Borzoni and asked if he was "continuing to act as Counsel in [Action No. 04-0304] in light of the conflict of interest between you and your clients." On 8 November 2004 he told Mr. Borzoni that "given the nature of the scandalous allegations" made against him in Action No. 04-2366 "which amount to breaches of your professional ethics and to violations of the law, it is inappropriate for you to act as Counsel in these matters." He added that he would be seeking to have Mr. Borzoni "removed as Solicitor of Record." In a subsequent letter of the same date Mr. Young purported to delete the word "scandalous."

14 On 4 November 2004 counsel for Mr. Borzoni informed Mr. Young that she would be applying for an order dismissing the action against her client. On 5 November 2004 Mr. Young served a notice of motion to have Mr. Borzoni removed as solicitor of record in Action No. 04-0304. Agreement was reached that Mr. Young's motion would await the hearing of Mr. Borzoni's motion. Mr. Borzoni's motion was heard by Mr. Justice Bouck and it is his decision that is appealed herein.

Reasons for Judgment of Mr. Justice Bouck

15 Mr. Justice Bouck noted that Mr. Borzoni was applying for dismissal of the action as against him pursuant to Rule 19(24)(a), (b) and (d) of the Rules of the Supreme Court of British Columbia. They provide as follows:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim ... ,
>
> (b) it is unnecessary, scandalous, frivolous, or vexatious,
>
> (c) it is otherwise an abuse of the process of the court,

> and the court may grant judgment or order the proceedings to be stayed or dismissed and may order the costs of the application to be paid as special costs.

16 Mr. Justice Bouck said Mr. Young was a tenant on the premises "during a period of about November 2001 to April 2002" and he noted they had been evicted, resulting in litigation. The full balance of his reasons are as follows:

> [5] The plaintiffs allege Mr. Borzoni breached his professional ethics while acting for the defendants in the earlier proceedings. They also say Mr. Borzoni owed them a duty of care, his conduct was malicious, it caused them nervous shock, and severe psychological harm. They claim compensatory, aggravated, and punitive damages of $1,000,000 for Mr. Borzoni's alleged bad faith conduct while acting for the other defendants in this case.
>
> [6] I agree with the written argument advanced by counsel for Mr. Borzoni presented to me at the hearing. The plaintiffs seek to try the eviction issue all over again. While acting for the defendants in the other proceedings, the alleged facts do not support the Youngs' contention that he owed the Youngs a duty of care. A lawyer owes an ethical duty to the court to be candid and fair, but the only party to whom a lawyer owes an actionable duty is to his or her client, *Lawrence v. Sandilands*, [2003] B.C.J. No. 343 (B.C.S.C.), at paragraph 79, Wedge J..
>
> [7] If lawyers owed a duty of care to their opponents' clients then, before taking any steps in an action, lawyers on both sides would have to consult with the other lawyers' clients. They would have to ensure they would not breach their duty of care to those adversarial parties. If the effect of the proposed proceeding was adverse to those opponents, the action could not proceed, even though it was a necessary procedure to protect their own clients' interests. Our adversarial system of justice could not function in these circumstances.
>
> [8] The Youngs' statement of claim fails to plead the necessary elements of the tort of intentional infliction of nervous shock or that Mr. Borzoni acted without legal justification. The statement of claim does not establish any overt act of a flagrant and extreme nature done by Mr. Borzoni without legal justification that would give rise to his liability for intentionally inflicting nervous shock, *Linden and Klar, Remedies in Tort*, at pages 10-7 and 10-11.
>
> [9] A statement of claim can be vexatious or abusive when the grounds raised tend to be rolled forward into subsequent actions repeated and supplemented with actions brought against the lawyers who have acted against the litigants in earlier proceedings.
>
> [10] Many of the facts and issues underlying the Youngs' claim against Mr. Borzoni were previously determined in other proceedings arising out of the same set of facts. That makes the claim against Mr. Borzoni unnecessary, scandalous, vexatious, and frivolous as well as an abuse of the court's process, *Lawrence v. Sandilands, supra*, at paragraphs 95 and 96.
>
> [11] One must have deep sympathy for Mr. Young and his fight to ward off the devastating effects of multiple sclerosis. On the other hand, he seems to believe he is a person who has all the rights. In his eyes, everyone else only has responsibilities and those responsibilities are to him. Happily, most other Canadians do not possess similar selfish qualities.
>
> [12] The plaintiffs have become professional litigants. They are using the court system as a play thing to harass others they do not like. Instead of getting on with their lives, they choose to alienate others who might choose to help them.
>
> Judgment
>
> [13] For these reasons, I grant Mr. Borzoni's application to dismiss the plaintiffs' claim against him. Costs follow the event.

Analysis

17 I will analyze this case using, in altered wording, the errors that are alleged by the appellants.

1. No reasonable cause of action against Mr. Borzoni is disclosed in the statement of claim

18 Rule 19(24)(a) provides that the court may strike out the whole or any part of a pleading on the ground that it discloses no reasonable claim and may order the proceedings to be dismissed. The appellants argue that Bouck J. erred when he dismissed their claims in tort against Mr. Borzoni.

19 The Supreme Court of Canada set out in ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263 the test for striking out a statement of claim on the basis that it disclosed no reasonable claim:

> [14] ... a court may strike out a statement of claim that discloses no reasonable cause of action. The rules with respect to striking out a statement of claim are much the same in other provinces. In British Columbia, for example, Rule 19(24)(a) of the *Rules of Court*, B.C. Reg. 221/90, states that a court may strike out a pleading on the ground that it discloses no reasonable claim.
>
> [15] An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, at p. 980:
>
> > ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ... .
>
> The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether ... it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment.

20 The Rules of the Supreme Court of British Columbia provide as follows:

> 19(1) A pleading should be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.
>
> 19(9.1) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.

"Material fact" is defined in ***Delaney & Friends Cartoon Productions Ltd. v. Radical Entertainment Inc.***, [2005] B.C.J. No. 573, 2005 BCSC 371 at paragraph 9 as, "one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded."

21 Those portions of the statement of claim that directly involve Mr. Borzoni are as follows:

> 1. This claim arises out of the actions of the Defendants and their parts in the events which took place, from July 2001 to April 2004, surrounding the Plaintiffs residency in apartment #106 at Beechwood Park, 3936 Gordon Head Road, Victoria, B.C.
>
> 18. Defendant Anthony R. Borzoni, partner at Randall & Company and now working at Jones Emery Hargreaves Swan, Victoria, B.C. was counsel for the Defendants CRD, CRHC, and SPD, in this matter, at the material times.
>
> 34. Defendant Mr. Borzoni owes a duty to care to the Plaintiffs as non-client third persons.
>
> 40. The Defendants were intolerant of Plaintiff Mr. Young's consumption and the Plaintiffs cultivating of cannabis for medicinal purpose and intended, in bad faith, to eradicate what they perceived to be a problem in a social housing complex managed by Defendant CRHC.

41. The Defendants knew that there was no secondhand smoke in the hallway from Plaintiff Mr. Young's medicinal consumption of cannabis.

45. The Defendants received many written and oral complaints from the Plaintiffs about the harassment the Plaintiffs were suffering at the hands of some of their neighbours while living at Beechwood Park, the conduct of the officers of Defendant SPD, and employees and/or officers of the CRD and/or CRHC.

46. The Defendants failed to stop, allowed, influenced, encouraged, coordinated, and/or supported the efforts of some of the Plaintiffs' neighbours to intimidate and disrupt the life of the Plaintiffs, over a period of more than 2 years with the intention to drive the Plaintiffs out of their subsidized home, including but not limited to, attempts to collide with the Plaintiffs' moving car, vandalism to the Plaintiffs' property, uttering threats, trespassing, and watching of the Plaintiffs and their home.

47. Employees and/or officers of Defendants CRD and/or CRHC, including but not limited to, Defendants Ms. Jaarsma, Ms. Joy, and Mr. Weeks, with and /or under advice of Defendant Mr. Borzoni, engaged in a pattern of harassment, including but not limited to, malicious written correspondence, attempts to inspect, trespassing, taking of pictures, and watching of the Plaintiffs and their home.

59. Defendants Mr. Borzoni, CRD and CRHC have not respected the Plaintiffs' right to appeal by taking legal steps without allowing for the Plaintiffs to follow the legal process.

63. The Defendants CRD, CRHC, and SPD, with and/or under advice of Defendant Mr. Borzoni, fabricated and falsified documents, including but not limited to, documents destined for RTB and for the Supreme Court of British Columbia.

64. Defendant Mr. Borzoni wrote and commissioned affidavits, in connection to litigation related to the Plaintiffs' tenancy at Beechwood Park, knowing them to be false and/or reckless to their veracity.

65. Defendant Mr. Borzoni knowingly and/or reckless to their veracity made false statements in regards to the Plaintiffs in his opening statements at the RTB, in the Supreme Court of British Columbia, and in the Court of Appeal for British Columbia.

67. Defendant Mr. Borzoni, the Officers of Defendant SPD, including but not limited to, Defendant Chief Constable Egan and the Defendant Constables, and employees and/or officers of Defendants CRD and/or CRHC, including but not limited to, Defendants Ms. Jaarsma, Ms. Joy, and Mr. Weeks, through their malicious conduct, as set out above, intended to inflict nervous shock.

83. Defendant Borzoni was negligent in his duty to care owed to the Plaintiffs as non-client third persons when he made false statements, ignored and/or assisted his clients in fabricating documents and harassing the Plaintiffs, as set out above.

84. As a consequence of the Defendants' conduct, as set out above, the Plaintiffs have lost trust in government, police forces, landlords, and communities.

85. As a result of the Defendants' conduct, as set out above, the Plaintiffs lost their sense of security, their peace and quiet enjoyment of their home, including their patio, while living at Beechwood Park and eventually lost their affordable home with all the ensuing economic and quality of life benefits.

87. The Defendants' conduct, as set out above, has caused severe emotional stress and mental anguish, and extreme despair.

Relief

The Plaintiffs claim as follows:

(c) compensatory damages against all Defendants for intent to inflict nervous shock causing severe psychological harm:

$10,000 for pain and suffering;

$40,000 for legal costs to trial;

$20,000 for emotional stress and mental anxiety;

$40,000 for loss of enjoyment of life; and general damages;

(g) aggravated and punitive damages against Defendant Mr. Borzoni for acting with malice and in bad faith:

$1,000,000 for negligence of duty to care to non-client third persons.

(o) costs

22 The appellants submit that these pleadings disclose the material facts essential in order to formulate two complete causes of action in tort against Mr. Borzoni: a) intentional infliction of nervous shock and b) breach of duty of care.

a) Intentional infliction of nervous shock/mental suffering

23 In ***Frame v. Smith***, [1987] 2 S.C.R. 99 at 127, Wilson J. (dissenting) wrote:

> ... The requirements of this cause of action [the tort of intentional infliction of mental suffering] were set out in the case of *Wilkinson v. Downton*, [1897] 2 Q.B.D. 57. In that case the defendant as a "practical joke" told the plaintiff that her husband had been involved in an accident and had broken his legs. The plaintiff believed the defendant and as a result suffered nervous shock and a number of physical consequences. In granting recovery, Wright J. stated (at p. 59):
>
>> One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable.

24 In ***Prinzo v. Baycrest Centre for Geriatric Care*** (2002), 60 O.R. (3d) 474 (C.A.), Weiler J.A. wrote:

> [48] A review of the case-law and the commentators confirms the existence of the tort of the intentional infliction of mental suffering, the elements of which may be summarized as: (1) flagrant or outrageous conduct; (2) calculated to produce harm; and (3) resulting in a visible and provable illness.

The appellants agree with this and with Mr. Justice Bouck's finding that a pleading of intentional infliction of nervous shock must include an allegation of "an overt act of a flagrant and extreme nature done by Mr. Borzoni without legal justification."

25 The appellants assert that the statement of claim contains the required material facts and that they must be taken to be true and are thus beyond scrutiny. The authority usually cited in support of this proposition is ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959 at 978 where Madam Justice Wilson referred to ***Minnes v. Minnes*** (1962), 39 W.W.R. 112 (B.C.C.A.) wherein Norris J.A. said at page 116 that what was required of the plaintiff on a motion to strike out a claim was to "show that on the statement of claim, accepting the allegations therein made as true, there was disclosed ... a proper case to be tried." Wilson J. concluded at page 991 that "on a motion to strike we are required to assume that the facts as pleaded are true."

26 A consideration of that premise was discussed in ***Operation Dismantle Inc. v. The Queen***, [1985] 1 S.C.R. 441, often referred to as the "Cruise Missile" case. Dickson J. at page 447, said the causal link between the defendant and the alleged violation of the appellants' rights was "simply too uncertain, speculative and hypothetical to sustain a cause of action." At page 449 he cited ***Attorney General of Canada v. Inuit Tapirisat of Canada***, [1980] 2 S.C.R. 735 at 740, where Estey J. said:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff

> only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 47 O.L.R. 308 (App. Div.).

However, Dickson J. went on to say at page 455:

> 27. We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat, supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.
>
> [Emphasis added.]

27 In Madam Justice Wilson's concurring minority reasons, she agreed that the statement of claim should be struck out. However, she wrote at pages 477 to 479 that several of the allegations in the statement of claim were "statements of intangible fact" inviting inferences and anticipating probable consequences, and that those allegations might "be susceptible to proof by inference from real facts or by expert testimony or through the application of common sense principles'." She added:

> We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage to prejudge that question. I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

28 In ***Rogers v. Bank of Montreal*** (1985), 64 B.C.L.R. 63 (S.C.) the defendants applied to strike out the writ and statement of claim as disclosing no cause of action. Mr. Justice McKenzie said, at page 101:

> I cannot accept the allegations in the statement of claim "as true" in the sense of there being any actions of the defendants which were truly directed against the target separate from Abacus. It is true that the statement of claim says the allegations have a separate target but the reality is that they do not. I see only language, not reality. It is the same story with a different title.

29 On appeal, (1986), 9 B.C.L.R. (2d) 190 (C.A.), Mr. Justice Esson, referring to that paragraph, said at page 192:

> Insofar as that passage reflects the process which was carried out at great length by Mr. Justice McKenzie of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure.

Esson J.A. added that there was a necessity to go "behind the form of the proceeding in order to get at its true nature, and that must be done even when the matter is dealt with on the pleadings." However, he said at page 193 that "it was not right to go so far as to consider the intrinsic improbability that these defendants would do what they were alleged to have done. This is an application on the pleadings and essentially must be decided upon what is alleged there." He continued:

> The approach taken by the chambers judge appears to have resulted from some of the language used by the Supreme Court of Canada in the *Cruise Missile* case [*Operation Dismantle*] and in particular certain observations to the effect that the court was not required to accept as true certain allegations that were made by the plaintiffs there. But those were allegations of a special nature; they were allegations to the effect that to allow testing of the Cruise missile would increase the likelihood of nuclear war. It was in relation to that that Chief Justice Dickson said [p. 455]:

> > The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.
>
> When regard is had to the special nature of the allegations, I think it is clear that that case must be viewed with great caution as a general authority touching on the extent to which allegations in pleadings should be taken as true in proceedings of this kind.

30 It is clear that great caution must be taken in relying on ***Operation Dismantle*** as a "general authority" that allegations in pleadings should be weighed as to their truth in proceedings of this kind. However, my consideration of the above authorities leads me to the conclusion that it is not fundamentally wrong to look behind the allegations in some cases. This can be taken from the statement of Estey J. in ***Operation Dismantle*** that the "rule ... does not require that allegations based on assumptions and speculation be taken as true. ... No violence is done to the rule where allegations, incapable of proof, are not taken as proven." This is also supported by the comment of Esson J.A. in ***Rogers*** that, "the process ... of subjecting the allegations in the pleadings to sceptical analysis in order to determine their true character, I consider that to have been an entirely appropriate procedure."

31 Therefore, in my opinion, considering the circumstances, litigation history and allegations in the case at bar it is appropriate to subject them to a sceptical analysis. Paragraphs 40, 41, 45, 46 and 47 of the statement of claim allege, against all of the defendants, intolerance, deceit, harassment, intimidation, writing malicious letters, falsifying documents and, in general, in disrupting the appellants' lives. They include an allegation that all of the defendants allowed, encouraged and influenced some of the Youngs' neighbours in "attempts to collide with the Plaintiffs' moving car, vandalism to the Plaintiff's property, uttering threats, trespassing, and watching of the Plaintiffs and their home." Paragraph 63 alleges that the "corporate" defendants, "under advice of Defendant Mr. Borzoni, fabricated and falsified documents destined" for the Tribunal and the Supreme Court.

32 Most of these wide and sweeping allegations would not, even if true, ground an action for intentional infliction of nervous shock or for negligence by way of a breach of duty. However, particularly in that they are directed at all defendants, which includes a police department, a Regional District, corporations and individuals, the allegations can only be viewed as wild speculation. As said by Mr. Justice McKenzie, they are "only language, not reality." More substantively it can be said, paraphrasing from ***Operation Dismantle***, that they are but speculation and it is not required that they be taken as true.

33 Only paragraphs 64 and 65 single out Mr. Borzoni. They assert that he participated in writing and commissioning affidavits that he knew were false and that he knowingly made false statements to the Tribunal, the Supreme Court and to this Court. There was no such finding by the Tribunal, the allegations were specifically rejected by Mr. Justice Macaulay of the Supreme Court and, for my part, I reject them with respect to this Court.

34 In ***Operation Dismantle*** Madam Justice Wilson suggested at paragraph 79 that when "statements of intangible fact" are pleaded, some "invite inferences" while "others anticipate probable consequences." She said that these "may be susceptible to proof by inference from real facts or by expert testimony or through the application of common sense principles." However, the case at bar has the unique concession by Mr. Young, given at the oral hearing, that the appellants have no evidence that Mr. Borzoni counselled any inappropriate conduct on the part of his clients or participated in the events alleged. Mr. Young said that all they have is that Mr. Borzoni was seen at Beechwood Gardens. There is no possibility, particularly in that client privilege stands in the way, of the appellants ever obtaining any evidence in support of such allegations - allegations based purely on assumptions and speculation.

35 However, even if the facts are taken as pleaded to be true, I am of the opinion that the statement of claim still fails to plead the material facts necessary to complete the cause of action in the tort of intentional infliction of nervous shock. While intentional infliction of mental suffering may arise from a deliberate course of conduct over time (see ***Clark v. Canada***, [1994] 3 F.C. 323 (T.D.)), the conduct must not only be flagrant, outrageous and extreme, but also of a type calculated to cause a recognizable psychiatric illness in the plaintiff.

36 The statement of claim alleges that Mr. Borzoni's conduct resulted in a visible and provable illness and that through his alleged malicious conduct he intended to inflict nervous shock, anguish, and extreme despair. In ***Guay v. Sun Publishing Co***., [1953] 2 S.C.R. 216 at 238, Estey J., in his majority concurring judgment, set out what must be proved on the latter element in order that damages may be recovered citing the following from *Pollock on Torts*, 15th ed. at p. 37:

> A state of mind such as fear or acute grief is not in itself capable of assessment as measurable temporal damage. But visible and provable illness may be the natural consequence of violent emotion, and may furnish a ground of action against a person whose wrongful act or want of due care produced that emotion. In every case the question is whether the shock and the illness were in fact natural or direct consequences of the wrongful act or default; if they were, the illness, not the shock, furnishes the measurable damage, and there is no more difficulty in assessing it than in assessing damages for bodily injuries of any kind.

37 In my opinion the pleaded material facts do not support the proposition that the suggested injuries were caused by the alleged actions of Mr. Borzoni. Recognizable psychiatric illnesses, such as are defined in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV) for example, amount to visible and provable illnesses for the purposes of the tort of the intentional infliction of mental suffering. However, emotional stress, mental anguish and despair, the emotional states pleaded by the appellants, are not generally accepted as amounting to "visible and provable illness" for the purposes of the tort of the intentional infliction of mental suffering. In ***Mustapha v. Culligan of Canada Ltd.***, [2006] O.J. No. 4964 (C.A.), the Ontario Court of Appeal reaffirmed its earlier position with respect to liability in cases of psychiatric harm:

> In Canadian law, a plaintiff can recover for the negligent infliction of psychiatric damage if he or she establishes two propositions - first, that the psychiatric damage suffered was a foreseeable consequence of the negligent conduct; second, that the psychiatric damage was so serious that it resulted in a recognizable psychiatric illness: see Linden, *Canadian Tort Law, supra*, at pp. 389-92.

38 The principle that the psychiatric damage must be so serious that it results in a recognizable psychiatric illness is not novel: See for example: ***Topgro Greenhouses Ltd. v. Houweling***, [2006] B.C.J. No. 831, 2006 BCCA 183 at para. 62; Mackenzie J.A.'s minority concurring judgment in ***Devji v. Burnaby (District)***, [1999] B.C.J. No. 2320, 1999 BCCA 599 at paras. 79-113; ***Kalaman v. Singer Valve Co****.* (1997), 93 B.C.A.C. 93 at para. 63.

39 The appellants have not, in my opinion, demonstrated any error on the part of Bouck J. in his conclusion that the "statement of claim fails to plead the necessary elements of the tort of intentional infliction of nervous shock."

40 While this aspect of the appeal is complete with the above analysis, Mr. Young spent considerable effort in the oral hearing arguing that Bouck J. "overlooked, neglected, or misapprehended" paragraphs 1, 41, 45-47 of the appellants' statement of claim. The reference to paragraph 1 is to Bouck J.'s comment that the appellants were tenants from "about November 2001", whereas they apparently moved in about 31 August 2001. At the oral hearing Mr. Young said "the main events occurred before we moved in." However, as noted by Mr. Justice Macaulay at paragraph 16 of his reasons, the appellants' difficulties commenced with the receipt of an anonymous letter on 7 October 2001. That letter was but a courteous suggestion that the appellants allow smoke to disperse outside through windows or doors, rather than into the common hallways of the building. The appellants replied with a spiteful letter. Mr. Young reported the letter he had received to the Corporation which, to that point, had not received any complaints. It was not until 20 October 2001 that complaints surfaced regarding marijuana smoke. On about 26 October 2001 a lawyer for the Youngs sent a letter to the Corporation.

41 Paragraph 46 states that the intimidation of the appellants and the disruption of their lives took place "over a period of two years." No alleged intimidation or harassment could have commenced before 7 October 2001, the date the Youngs received the anonymous letter. There is nothing to substantiate that the "main events" occurred before that date. In any event, there is no suggestion that the judge was not aware of the factual events, regardless of the dates. Nothing turns on the date of occupancy relied on by the judge.

42 Paragraph 41 states that all of the defendants "knew there was no second hand smoke in the hallway." The appellants rely on this to say the "actions" of Mr. Borzoni "were based on known falsehoods" - namely, allegations that the appellants were "unreasonably disturbing some neighbours" - and the allegations "were without legal justification." That pleading is not capable of supporting the claim of intentional infliction of nervous shock. Even on its face it is but an innuendo of unprofessional conduct by Mr. Borzoni.

43 With respect to paragraphs 45, 46 and 47, the appellants' factum reads as follows:

> Further, the learned Chambers Judge overlooked, neglected, or misapprehended paras. 45, 46 and 47 of the Statement of Claim which plead[ed] that Respondent Mr. Borzoni gave advice to Defendants CRHC, and SPD to allow, influence, encourage, coordinate, and/or support the efforts of some of the Appellants' neighbours and staff of Defendant CRHC to intimidate and disrupt the lives of the Appellants with the intention to drive the Appellants out of their subsidized home and gave advice to ignore the Appellants' plea for assistance.

The appellants expand on this by submitting that "a reasonable person in the position of Respondent Mr. Borzoni would reasonably foresee an emotional upset on the part of the appellants who ... were being harassed by some neighbours and staff of [the Corporation]."

44 Paragraph 47 does not allege that Mr. Borzoni advised anybody to trespass, write malicious letters or engage in harassment of the appellants. It does not make an allegation that Mr. Borzoni gave advice "to drive the Appellants out of their subsidized home and [give] advice to ignore the Appellants' plea for assistance." In that Mr. Borzoni was legal counsel to defendants it follows that they were "under advice of Defendant Borzoni." That plea is not material to the claim of intentional infliction of nervous shock.

45 Bouck J. did not err in concluding that the statement of claim fails to plead the necessary elements of the tort of intentional infliction of nervous shock.

b) Breach of duty of care (negligence)

46 Writing for the Court in ***Odhavji***, Iacobucci J. stated at paragraph 44 that:

> In order for an action in negligence to succeed, a plaintiff must be able to establish three things: (i) that the defendant owed the plaintiff a duty of care; (ii) that the defendant breached that duty of care; and (iii) that damages resulted from that breach. The primary question that arises on this appeal is in respect of the first element, namely, whether the defendants owed to the appellants a duty to take reasonable care.

The same primary question arises on this appeal.

47 The appellants submit that Mr. Borzoni owed them a duty of care, that he breached that duty and that the breach inflicted loss and damage to them. They say that Bouck J. erred when he found that there was no such duty owed by Mr. Borzoni to the appellants. To merely plead that there is a duty of care is a conclusion of law which Rule 19(9.1) provides must be supported by material facts. The appellants pleaded this conclusion of law in paragraph 13 of their statement of claim, but not the material facts supporting that conclusion.

48 The following statement from ***Odhavji***is instructive:

> [45] It is a well-established principle that a defendant is not liable in negligence unless the law exacts an obligation in the circumstances to take reasonable care. As Lord Esher concluded in *Le Lievre v. Gould*, [1893] 1 Q.B. 491 (C.A.), at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Duty may therefore be defined as an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others.
>
> [46] It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at pp. 751-52:
>
>> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable

> contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

49 There are no material facts pleaded in the appellants' statement of claim which could establish that as between Mr. Borzoni and the Youngs there is a sufficient relationship of proximity such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter.

50 Mr. Justice Bouck stated that "the only party to whom a lawyer owes an actionable duty is to his or her client." In support he referenced ***Lawrence v. Sandilands***, [2003] B.C.J. No. 343, 2003 BCSC 211:

> [79] While a solicitor may owe an ethical duty to the court to be candid and fair, the only party to whom a solicitor owes an actionable duty is his or her client (*Jensen v. MacGregor* (1992), 65 B.C.L.R. (2d) 224 at p. 228 (B.C.S.C.)).

I raise this because I do not accept that statement of law as being absolute. In ***Garrant v. Cawood*** (1984), 40 Sask.R. 162 (Q.B.), aff'd (1985) 40 Sask.R. 155 (C.A.), Matheson J. said at paragraph 10 that "a professional person can be liable in tort to other persons than his client for breach of a duty to use reasonable care in the performance of professional activities." Matheson J. was citing ***Haig v. Bamford***, [1977] 1 S.C.R. 466, where the Supreme Court considered whether accountants might be found to owe a duty of care to third-parties not their employer or client. The majority held that a duty of care could arise in such circumstances when the accountant had actual knowledge of the limited class of persons that would use and rely on the accountant's financial statement and the auditor's report thereon. A direct analogy between accountants as discussed in ***Haig*** and lawyers as in the present case is not possible in that lawyers do not generally produce statements or reports intended to be relied on by third-parties.

51 The circumstances in ***Crooks v. Manolescu***, [1995] B.C.J. No. 17 (S.C.) are closely analogous to the case at bar. Solicitor A was alleged to have assisted a client to falsely shield assets from execution. In an action brought on behalf of persons said to have been defrauded, solicitor A was named as a defendant. Solicitor B acted for solicitor A and it was submitted that she owed to the plaintiffs "a fiduciary duty and a duty to take care in respect of the plaintiffs' interests." The allegations against her included failing to warn the plaintiffs of fraudulent acts by her client and continuing to act in circumstances where she ought to have known of fraudulent activity.

52 An application was brought to strike out portions of the statement of claim as disclosing no reasonable claim. In a well written judgment Master Bolton said:

> [8] ... The existence of a fiduciary duty or duty of care is not an allegation of fact, however, but a conclusion of law which must depend on proof (or for present purposes, allegations) of fact. And particulars of the breach of a duty are not relevant to the question of the existence of the duty. Thus, while I accept as a fact, for example, for the purposes of this hearing, that [solicitor B] filed affidavits which she ought to have known were false, that fact is of absolutely no significance to the question of the existence of a duty of care to the plaintiffs.
>
> . . .
>
> [10] ... the plaintiff's position is tantamount to an assertion that all counsel who represent litigants owe a fiduciary duty or a duty of care to the other party to the litigation. This is patently absurd, as in the course of counsel's representation of her own client, much may be done that is intentionally and necessarily directed toward injuring the opposing party's interests. On the facts as pleaded here, it is, to borrow the emphatic language of Taylor J.A. in *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd*. (1990), 40 B.C.L.R. (2d) 288, impossible that [solicitor B] could owe a duty of care to Ms. Crooks.
>
> [11] The impossibility arises out of the very nature of a solicitor's duty to her own client. ...

> [12] The impossibility of the existence of a duty of care that I referred to in paragraph 10 above is an impossibility on these pleadings. Clearly, a solicitor will in some circumstances be held to owe a duty to persons other than her own client, and so may be a barrister. I do not intend to say that [solicitor B] could in no circumstances be held to owe a duty of care to Ms. Crooks. But I do say that before such a duty can be found to exist, facts must be proved in evidence - and alleged in pleadings - which describe the relationship and the circumstances from which the duty arose.

Master Bolton then cited case authorities as to the basis for the imposition of a duty of care. He concluded as follows:

> [15] It is not for me to speculate about what additional facts would support the existence of a duty of care in the case now before me. All that I can say is that on the facts as presently pleaded, no such duty could possibly be held to exist; the impugned paragraphs disclose no reasonable cause of action.

53 Those comments apply equally to the case at bar. The pleadings as presented fail to present any material fact that supports either that Mr. Borzoni had a duty of care towards the appellants or, if he did have such a duty, that he was in breach thereof. Bouck J. did not err in dismissing the appellants' claim in the tort of negligence against Mr. Borzoni.

2. The action is unnecessary, scandalous, frivolous and vexatious

54 The appellants assert that "this is a whole new case", therefore it is not unnecessary. The basis for this contention is that the earlier proceedings were based "on fraudulent evidence and [that] there is new, previously unavailable, conclusive evidence thus the claim is not unnecessary, scandalous, vexatious and frivolous." The "new evidence" advanced by the appellants is, in summary, as follows:

> Mr. Borzoni knew before the appellants took occupancy that Mr. Young had an exemption to use marijuana.
>
> Mr. Borzoni knew there was no second hand marijuana smoke in the building.
>
> Mr. Borzoni, and the other defendants, fabricated evidence for submission to the Residential Tenancy Office or to the Supreme Court of British Columbia.
>
> The appellants have suffered personal harm.

55 At paragraph 10 of his reasons Bouck J. found the action to be unnecessary, scandalous, vexatious and frivolous because "the facts and issues underlying the Youngs' claim against Mr. Borzoni were previously determined in other proceedings arising out of the same set of facts." That finding is, in my opinion, beyond denial. The reasons emanating from the various proceedings are extensive so I will only note some of the findings in the most summary way.

56 In his reasons for judgment of 13 June 2003 Mr. Justice Macaulay, at paragraph 40, commenced a review of the hearing before Arbitrator Gilbert. He noted that Arbitrator Gilbert said that the Corporation received approximately 38 complaints from residents regarding marijuana odour and identified the premises of origin as that of the appellants. The appellants filed a complaint about harassment and discrimination which was heard by Human Rights Officer Down. Macaulay J. noted at paragraph 51 that Ms. Down concluded that "the Complainant's unit is the source of marijuana smoke" and that she dismissed the appellants' complaint because there was no reasonable basis to justify referring it to the tribunal.

57 Commencing at paragraph 64 Mr. Justice Macaulay detailed the ***Charter*** issues raised in Action No. 02-5145. He said that the appellants had "taken a string of relatively benign unconnected events and forced them into a conspiracy theory." He held, at paragraph 69, that the Corporation "attempted to take reasonable steps to accommodate the petitioners, but the petitioners refused to cooperate. The [Corporation] was entitled to rely on the statute and did so in seeking to evict."

58 Macaulay J. held, at paragraph 72, that the appellants' "claims cannot possibly succeed." He then drew a number of assumptions in favour of the appellants, but said, at paragraph 78: "one key assumption that I cannot make in the petitioners' favour is that the neighbours' complaints of marihuana smell were unfounded. The arbitrator came to the opposite conclusion based on the evidence before him, as he was entitled to do." The judge then dealt with the issues raised by the appellants against the Saanich Police Department and The Capital Regional District, during which he noted as follows:

> [114] ... During his submission, Mr. Young referred several times to his concern that Mr. Borzoni, who acted as counsel for all the respondents, performed some improper function related to this allegation. There was simply no evidence to support any allegation of wrongdoing on the part of counsel.

59 Mr. Justice Macaulay noted that the appellants contended that the decisions of Arbitrators Gilbert and Katz should be set aside. They submitted that Arbitrator Gilbert committed numerous procedural errors, misapprehended the evidence before him and was biased. Macaulay J. said, at paragraph 159, that he had reviewed the finding of Arbitrator Gilbert to determine whether there was evidence on which he could reasonably conclude that there were smells associated with the appellants' use of marijuana that adversely affected other tenants in the complex. He held that there was such evidence and concluded:

> [160] I decline to set aside the order of Arbitrator Gilbert. It follows from the foregoing that I agree with the result obtained before Arbitrator Katz on review. I also decline to set aside that order.
>
> [161] I dismiss the proceedings brought under both actions.

60 On appeal this Court, in reasons delivered orally, noted that the appellants alleged seven errors on the part of Mr. Justice Macaulay. The appeal was dismissed: ***Young et al v. Saanich Police Department***, 2004 BCCA 224.

61 The appellants further submitted that the judge "overlooked, neglected or misapprehended" paragraphs 37, 38, 63-65 of the statement of claim. Those paragraphs state that the respondents became aware on specific dates that Mr. Young legally used marijuana and that Mr. Borzoni made false statements and fabricated documents. There is no evidence that Bouck J. was unaware of those paragraphs, and an inference that he was unaware of them cannot be drawn.

62 Issues of *res judicata* and *issue estoppel* were dealt with in some detail by the respondent in his factum. I do not find it necessary in the circumstances of this case to delve into those complex legal areas. There is nothing in the proposed "new evidence" that is either relevant or was not considered in the earlier proceedings.

63 I am of the opinion that no error has been demonstrated in Bouck J.'s finding that this action against Mr. Borzoni is unnecessary, scandalous, frivolous and vexatious.

3. Abuse of process

64 Mr. Justice Bouck held that the claim was an abuse of the court's process. He stated that the appellants were "using the court system as a plaything to harass others they do not like." The appellants submit that in doing so he overlooked a significant number of paragraphs in the statement of claim. There is no substance in that submission. They also contend that they have new evidence. The "new evidence" is of no more value under this heading than it was under the previous one.

65 Bouck J. cited ***Lawrence v. Sandilands*** at paragraphs 95 and 96 in support of his finding of abuse of process. Paragraph 95 reads as follows:

> [95] When determining whether proceedings constitute an abuse of process, the court may consider whether the court process is being used dishonestly or unfairly, or for some ulterior or improper purpose. It may also consider whether there have been multiple or successive related proceedings that are likely to cause vexation or oppression (*Babavic v. Babowech*, [1993] B.C.J. No. 1802 (B.C.S.C.)).

66 I am of the opinion that in view of the multiple and successive proceedings instigated by the appellants arising out of the same facts, that it was fitting to find an abuse of process. This is supported by the submission of Mr. Freeman that the appellants' motivation for joining Mr. Borzoni as a defendant is to have him removed as counsel in

Action No. 04-0304. A series of letters from Mr. Young to Mr. Borzoni, mentioned earlier in these reasons, gives credence to that submission.

67 I would dismiss the appeal.

Costs

68 Mr. Freeman asked for special costs if this appeal is dismissed. I am of the opinion that his client is clearly so entitled. While the appellants' frivolous and vexatious litigiousness may not amount to "scandalous or outrageous" conduct, it is certainly "reprehensible," being "misconduct deserving of reproof or rebuke." ***Garcia v. Crestbrook Forest Industries Ltd.*** (1994), 45 B.C.A.C. 222 at paragraph 17 states:

> [17] ... the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, [1993] B.C.J. No. 2909, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

THACKRAY J.A.
LOWRY J.A.:— I agree.
CHIASSON J.A.:— I agree.

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BRITISH
COLUMBIA

Court Rules Act

SUPREME COURT CIVIL RULES

B.C. Reg. 168/2009

Deposited July 7, 2009 and effective July 1, 2010
Last amended April 4, 2022 by B.C. Reg. 321/2021
and includes amendments by B.C. Reg. 8/2022

Consolidated Regulations of British Columbia

This is an unofficial consolidation.

Part 3 — Proceedings Started by Filing a Notice of Civil Claim

Rule 3-1 — Notice of Civil Claim

Notice of civil claim

(1) To start a proceeding under this Part, a person must file a notice of civil claim in Form 1.

Contents of notice of civil claim

(2) A notice of civil claim must do the following:

(a) set out a concise statement of the material facts giving rise to the claim;

(b) set out the relief sought by the plaintiff against each named defendant;

(c) set out a concise summary of the legal basis for the relief sought;

(d) set out the proposed place of trial;

(e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is sued;

(f) provide the data collection information required in the appendix to the form;

(g) otherwise comply with Rule 3-7.

Rule 3-7 — Pleadings Generally

Content of Pleadings

Pleading must not contain evidence

(1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.

Documents and conversations

(2) The effect of any document or the purport of any conversation referred to in a pleading, if material, must be stated briefly and the precise words of the documents or conversation must not be stated, except insofar as those words are themselves material.

When presumed facts need not be pleaded

(3) A party need not plead a fact if

(a) the fact is presumed by law to be true, or

(b) the burden of disproving the fact lies on the other party.

When performance of a condition precedent need not be pleaded

(4) A party need not plead the performance of a condition precedent necessary for the party's case unless the other party has specifically denied it in the other party's pleadings.

Matters arising since start of proceeding

(5) A party may plead a matter that has arisen since the start of the proceeding.

Inconsistent allegations

(6) A party must not plead an allegation of fact or a new ground or claim inconsistent with the party's previous pleading.

Alternative allegations

(7) Subrule (6) does not affect the right of a party to make allegations in the alternative or to amend or apply for leave to amend a pleading.

Objection in point of law

(8) A party may raise in a pleading an objection in point of law.

Pleading conclusions of law

(9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.

Status admitted

(10) Unless the incorporation of a corporate party or the office or status of a party is specifically denied, it is deemed to be admitted.

Set-off or counterclaim

(11) A defendant in an action may set off or set up by way of counterclaim any right or claim, whether the set-off or counterclaim is for damages or not, so as to enable the court to pronounce a final judgment on all claims in the same action.

Pleading after the notice of civil claim

(12) In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that

(a) the party alleges makes a claim or defence of the opposite party not maintainable,

(b) if not specifically pleaded, might take the other party by surprise, or

(c) raises issues of fact not arising out of the preceding pleading.

General relief

(13) A pleading need not ask for general or other relief.

General damages must not be pleaded

(14) If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading.

Substance to be answered

(15) If a party in a pleading denies an allegation of fact in the previous pleading of the opposite party, the party must not do so evasively but must answer the point of substance.

Denial of contract

(16) If a contract, promise or agreement is alleged in a pleading, a bare denial of it by the opposite party is to be construed only as a denial of fact of the express contract, promise or agreement alleged, or of the matters of fact from which it may be implied by law, and not as a denial of the legality or sufficiency in law of that contract, promise or agreement.

Allegation of malice

(17) It is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred.

Particulars

When particulars necessary

(18) If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

Lengthy particulars

(19) If the particulars required under subrule (18) of debt, expenses or damages are lengthy, the party pleading may refer to this fact and, instead of pleading the particulars, must serve the particulars in a separate document either before or with the pleading.

Further particulars

(20) Particulars need only be pleaded to the extent that they are known at the date of pleading, but further particulars

(a) may be served after they become known, and

(b) must be served within 10 days after a demand is made in writing.

Particulars in libel or slander

(21) In an action for libel or slander,

(a) if the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff must give particulars of the facts and matters on which the plaintiff relies in support of that sense, and

(b) if the defendant alleges that, insofar as the words complained of consist of statements of fact, they are true in substance and in fact, and that insofar as they consist of expressions of opinion, they are fair comment on a matter of public interest, the defendant must give particulars stating which of the words complained of the defendant alleges are statements of fact and of the facts and matters relied on in support of the allegation that the words are true.

Order for particulars

(22) The court may order a party to serve further and better particulars of a matter stated in a pleading.

Demand for particulars

(23) Before applying to the court for particulars, a party must demand them in writing from the other party.

Demand for particulars not a stay of proceedings

(24) A demand for particulars does not operate as a stay of proceedings or give an extension of time, but a party may apply for an extension of time for serving a responding pleading on the ground that the party cannot answer the originating pleading until particulars are provided.

Rule 9-5 — Striking Pleadings

Scandalous, frivolous or vexatious matters

(1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

- (a) it discloses no reasonable claim or defence, as the case may be,
- (b) it is unnecessary, scandalous, frivolous or vexatious,
- (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
- (d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[am. B.C. Reg. 119/2010, Sch. A, s. 22.]

Admissibility of evidence

(2) No evidence is admissible on an application under subrule (1) (a).

Powers of registrar

(3) If, on the filing of a document, a registrar considers that the whole or any part of the document could be the subject of an order under subrule (1),

- (a) the registrar may, despite any other provision of these Supreme Court Civil Rules,
  - (i) retain the document and all filed copies of it, and
  - (ii) refer the document to the court, and
- (b) the court may, after a summary hearing, make an order under subrule (1).

Reconsideration of order

(4) If the court makes an order referred to in subrule (3) (b),

- (a) the registrar must give notification of the order, in the manner directed by the court, to the person who filed the document,
- (b) the person who filed the document may, within 7 days after being notified, apply to the court, and
- (c) the court may confirm, vary or rescind the order.

Rule 14-1 — Costs

How costs assessed generally

(1) If costs are payable to a party under these Supreme Court Civil Rules or by order, those costs must be assessed as party and party costs in accordance with Appendix B unless any of the following circumstances exist:

- (a) the parties consent to the amount of costs and file a certificate of costs setting out that amount;
- (b) the court orders that
  - (i) the costs of the proceeding be assessed as special costs, or
  - (ii) the costs of an application, a step or any other matter in the proceeding be assessed as special costs in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
- (c) the court awards lump sum costs for the proceeding and fixes those costs under subrule (15) in an amount the court considers appropriate;
- (d) the court awards lump sum costs in relation to an application, a step or any other matter in the proceeding and fixes those costs under subrule (15), in which event, subject to subrule (10), costs in relation to all other applications, steps and matters in the proceeding must be determined and assessed under this rule in accordance with this subrule;
- (e) a notice of fast track action in Form 61 has been filed in relation to the action under Rule 15-1, in which event Rule 15-1 (15) to (17) applies;
- (f) subject to subrule (10) of this rule,
  - (i) the only relief granted in the action is one or more of money, real property, a builder's lien and personal property and the plaintiff recovers a judgment in which the total value of the relief granted is $100 000 or less, exclusive of interest and costs, or
  - (ii) the trial of the action was completed within 3 days or less,

  in which event, Rule 15-1 (15) to (17) applies to the action unless the court orders otherwise.

Assessment of party and party costs

(2) On an assessment of party and party costs under Appendix B, a registrar must

- (a) allow those fees under Appendix B that were proper or reasonably necessary to conduct the proceeding, and
- (b) consider Rule 1-3 and any case plan order.

Assessment of special costs

(3) On an assessment of special costs, a registrar must

- (a) allow those fees that were proper or reasonably necessary to conduct the proceeding, and
- (b) consider all of the circumstances, including the following:
  - (i) the complexity of the proceeding and the difficulty or the novelty of the issues involved;

(ii) the skill, specialized knowledge and responsibility required of the lawyer;

(iii) the amount involved in the proceeding;

(iv) the time reasonably spent in conducting the proceeding;

(v) the conduct of any party that tended to shorten, or to unnecessarily lengthen, the duration of the proceeding;

(vi) the importance of the proceeding to the party whose bill is being assessed, and the result obtained;

(vii) the benefit to the party whose bill is being assessed of the services rendered by the lawyer;

(viii) Rule 1-3 and any case plan order.

Assessment officer

(4) The officer before whom costs are assessed is a registrar.

Disbursements

(5) When assessing costs under subrule (2) or (3) of this rule, a registrar must

(a) determine which disbursements have been necessarily or properly incurred in the conduct of the proceeding, and

(b) allow a reasonable amount for those disbursements.

Repealed

(6) Repealed. [B.C. Reg. 44/2014, Sch. 2, s. 2.]

Directions

(7) If the court has made an order for costs,

(a) any party may, at any time before a registrar issues a certificate under subrule (27), apply for directions to the judge or master who made the order for costs,

(b) the judge or master may direct that any item of costs, including any item of disbursements, be allowed or disallowed, and

(c) the registrar is bound by any direction given by the judge or master.

Tax in respect of legal services and disbursements

(8) If tax is payable by a party in respect of legal services or disbursements, a registrar must, on an assessment under subrule (2) or (3), allow an additional amount to compensate for that tax as follows:

(a) if the tax is payable in respect of legal services, the additional amount to compensate for the tax must be determined by multiplying the percentage rate of the tax by,

(i) in the case of a judgment entered on default of response to civil claim, the costs allowed under Item 1 or 2, as the case may be, of Schedule 1 of Appendix B,

(ii) in the case of a writ of execution, a garnishing order, a subpoena to debtor in Form 56, a notice of application for committal in Form 58 or an order of committal in Form 59, the costs allowed under Item 1 or 2, as the case may be, of Schedule 2 of Appendix B, or

(iii) in any other case, the monetary value of the units assessed;

(b) if the tax is payable in respect of disbursements, the additional amount to compensate for the tax must be determined by multiplying the percentage rate of the tax by the monetary value of the disbursements as assessed.

Costs to follow event

(9) Subject to subrule (12), costs of a proceeding must be awarded to the successful party unless the court otherwise orders.

Costs in cases within small claims jurisdiction

(10) A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the *Small Claims Act* is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.

Costs where party represented by an employee

(11) A party is not disentitled to costs merely because the party's lawyer is an employee of the party.

Costs of applications

(12) Unless the court hearing an application otherwise orders,

(a) if the application is granted, the party who brought the application is entitled to costs of the application if that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is not entitled to costs even though that party is awarded costs at trial or at the hearing of the petition, and

(b) if the application is refused, the party who brought the application is not entitled to costs of the application even though that party is awarded costs at trial or at the hearing of the petition, but the party opposing the application, if any, is entitled to costs if that party is awarded costs at trial or at the hearing of the petition.

When costs payable

(13) If an entitlement to costs arises during a proceeding, whether as a result of an order or otherwise, those costs are payable on the conclusion of the proceeding unless the court otherwise orders.

Costs arising from improper act or omission

(14) If anything is done or omitted improperly or unnecessarily, by or on behalf of a party, the court or a registrar may order

(a) that any costs arising from or associated with any matter related to the act or omission not be allowed to the party, or

(b) that the party pay the costs incurred by any other party by reason of the act or omission.

Costs of whole or part of proceeding

(15) The court may award costs

(a) of a proceeding,

(b) that relate to some particular application, step or matter in or related to the proceeding, or

(c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

Costs payable from estate or property

(16) If it is ordered that any costs are to be paid out of an estate or property, the court may direct out of what portion of the estate or property the costs are to be paid.

Set-off of costs

(17) If a party entitled to receive costs is liable to pay costs to another party, a registrar may assess the costs the party is liable to pay and may adjust them by way of deduction or set-off or may delay the allowance of the costs the party is entitled to receive until the party has paid or tendered the costs the party is liable to pay.

Costs of one defendant payable by another

(18) If the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

Unnecessary expense after judgment

(19) If after pronouncement of judgment a party puts another party to unnecessary proceedings or expense, a registrar may award costs as the registrar considers appropriate against the offending party.

Form of bill of costs

(20) A bill of costs must be in Form 62 or, if the bill of costs pertains to a judgment under Rule 3-8, Form 63.

Appointment to review a bill, examine an agreement or assess costs

(21) Except as provided in subrule (26), a person who seeks a review of a bill or an examination of an agreement under the *Legal Profession Act* or who seeks to have costs assessed must

(a) obtain a date for an appointment before a registrar,

(b) file an appointment in Form 49 to which is attached

(i) the bill to be reviewed,

(ii) the agreement to be examined, or

(iii) the bill of costs to be assessed, and

(c) at least 5 days before the date of the appointment, serve a copy of the filed Form 49 appointment and any affidavit in support,

(i) in the case of a bill to be reviewed, on the lawyer whose bill is to be reviewed, on the person who is charged with the bill or on the person who has agreed to indemnify the person charged, as the case may be,

(ii) in the case of an agreement to be examined, on the lawyer who is a party to the agreement to be examined, or

(iii) in the case of a bill of costs to be assessed, in accordance with subrule (25).

Place for review or examination

(22) An appointment for review of a bill, examination of an agreement or assessment of costs must be taken out,

(a) in the case of a bill to be reviewed or an agreement to be examined,

(i) if the bill or agreement relates to a court proceeding, at the registry at which the proceeding is being conducted, or

(ii) if the bill or agreement does not relate to a court proceeding, at the registry nearest to the place of business of the lawyer concerned,

(b) in the case of a bill of costs to be assessed, at the registry at which the proceeding is being conducted, or

(c) at any other registry to which the parties to the appointment may agree.

Further particulars

(23) A registrar may order further particulars or details of

(a) a bill under review,

(b) an agreement under examination, or

(c) a bill of costs being assessed.

Assessment of sheriff's fees

(24) If a sheriff who has charged fees for services set out in Schedule 2 of Appendix C or a person affected by those fees wishes to have those fees assessed, the person seeking the assessment must

(a) obtain an appointment from a registrar in Form 49 and attach to that appointment a copy of the bill to be assessed, if available, and

(b) at least 5 days before the assessment, serve a copy of the filed appointment and any filed affidavit in support on all persons affected by the fees.

Service of appointment

(25) A person seeking an assessment of costs must serve an appointment in Form 49, to which is attached the bill of costs, and any affidavit in support on

(a) the person against whom costs are to be assessed, and

(b) every other person whose interest, whether in a fund or estate or otherwise, may be affected.

Costs on default judgment

(26) On signing a default judgment, a registrar may, without an appointment, fix the costs to which the plaintiff is entitled against the defendant in default, and set out the amount allowed in

(a) the judgment, or

(b) a separate certificate.

Certificate of costs

(27) On the conclusion of an assessment of costs, or if the party charged has consented to the amount, a registrar must, either by endorsing the original bill or by issuing a certificate of costs in Form 64, certify the amount of costs awarded, and the party assessing costs must file the certificate.

Certificate of fees

(28) On the conclusion of a review of a bill under the *Legal Profession Act*, or if the parties to the review have consented to the amount due under the bill, a registrar must, by issuing a certificate of fees in Form 65, certify the amount due, and either party to the review may file the certificate.

Review of an assessment

(29) A party who is dissatisfied with a decision of a registrar on an assessment of costs may, within 14 days after the registrar has certified the costs, apply to the court for a review of the assessment.

Form of bill in certain cases

(30) A bill for special costs or a bill under the *Legal Profession Act* may be rendered on a lump sum basis.

Description of services

(31) A lump sum bill must contain a description of the nature of the services and of the matter involved as would, in the opinion of a registrar, afford any lawyer sufficient information to advise a client on the reasonableness of the charge made.

Evidence of lawyer

(32) A party to an assessment of costs or a review of a lump sum bill may put in evidence the opinion of a lawyer as to the nature and importance of the services rendered and of the matter involved and the reasonableness of the charges made, but a party must not put in evidence the opinions of more than 2 lawyers, and a lawyer giving an opinion may be required to attend for examination and cross-examination.

Disallowance of fees and costs

(33) If the court considers that a party's lawyer has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:

- (a) disallow any fees and disbursements between the lawyer and the lawyer's client or, if those fees or disbursements have been paid, order that the lawyer repay some or all of them to the client;
- (b) order that the lawyer indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
- (c) order that the lawyer be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
- (d) make any other order that the court considers will further the object of these Supreme Court Civil Rules.

Costs may be ordered without assessment

(34) If the court makes an order under subrule (33), the court may

(a) direct a registrar to conduct an inquiry and file a report with recommendations as to the amount of costs, or

(b) subject to subrule (37), fix the costs with or without reference to the tariff in Appendix B.

Notice

(35) An order against a lawyer under subrule (33) or (34) must not be made unless the lawyer is present or has been given notice.

Order to be served

(36) A lawyer against whom an order under subrule (33) or (34) has been made must promptly serve a copy of the entered order on his or her client.

Limitation

(37) An order by the court under subrule (34) (b) in respect of the costs of an application must not exceed $1 000.

Refusal or neglect to procure assessment

(38) If a party entitled to costs fails to assess costs and prejudices another party by failing to do so, a registrar may certify the costs of the other party and certify the failure and disallow all costs of the party in default.

Referrals

(39) Unless the court otherwise orders, fees to lawyers, accountants, engineers, actuaries, valuators, merchants and other scientific persons to whom any matter or question is referred by the court must be determined by a registrar, subject to an appeal to the court.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25,2020]

PER CURIAM.

The application for injunctive relief presented to JUSTICE BREYER and by him referred to the Court is granted. Respondent is enjoined from enforcing Executive Order 202.68's 10- and 25-person occupancy limits on applicant pending disposition of the appeal in the United States Court of Appeals for the Second Circuit and disposition of the petition for a writ of certiorari, if such writ is timely sought. Should the petition for a writ of certiorari be denied, this order shall terminate automatically. In the event the petition for a writ of certiorari is granted, the order shall terminate upon the sending down of the judgment of this Court.

* * * * * *

This emergency application and another, Agudath Israel of America, et al. v. Cuomo, No. 20A90, present the same issue, and this opinion addresses both cases.

Both applications seek relief from an Executive Order issued by the Governor of New York that imposes very severe restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, no more than 10 persons may attend each religious service, and in orange zones, attendance is capped at 25. The two applications, one filed by the Roman Catholic Diocese of Brooklyn and the other by Agudath Israel of America and affiliated entities, contend that these restrictions violate the Free Exercise Clause of the First Amendment, and they ask us to enjoin enforcement of the restrictions while they pursue appellate review. Citing a variety of remarks made by the Governor, Agudath Israel argues that the Governor specifically targeted the Orthodox Jewish community and gerrymandered the boundaries of red and orange zones to ensure that heavily Orthodox areas were included. Both the Diocese and Agudath Israel maintain that the regulations treat houses of worship much more harshly than comparable secular facilities. And they tell us without contradiction that they have complied with all public health guidance, have implemented additional precautionary measures, and have operated at 25% or 33% capacity for months without a single outbreak.

The applicants have clearly established their entitlement to relief pending appellate review. They have shown that their First Amendment claims are likely to prevail, that denying them relief would lead to irreparable injury, and that granting relief would not harm the public interest. See *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008). Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential.

Likelihood of success on the merits. The applicants have made a strong showing that the challenged restrictions violate "the minimum requirement of neutrality" to religion. *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 533 (1993). As noted by the dissent in the court below, statements made in connection with the challenged rules can be viewed as targeting the "'ultra-Orthodox [Jewish] community.'" ___ F. 3d ___, ___, 2020 WL 6750495, *5 (CA2, Nov. 9, 2020) (Park, J., dissenting). But even if we put those comments aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment.[1]

In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. See New York State, Empire State Development, Guidance for Determining Whether a Business Enterprise is Subject to a Workforce Reduction Under Recent Executive Orders, https://esd.ny.gov/guidance-executive-order-2026. The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.

These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could "literally have hundreds of people shopping there on any given day." App. to Application in No. 20A87, Exh. D, p. 83. Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID–19, *id.*, Exh. H, at 3; App. to Application in No. 20A90, pp. 98, 100, but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Because the challenged restrictions are not "neutral" and of "general applicability," they must satisfy "strict scrutiny," and this means that they must be "narrowly tailored" to serve a "compelling" state interest. *Church of Lukumi*, 508 U. S., at 546. Stemming the spread of COVID–19 is unquestionably a compelling interest, but it is hard to see how the challenged regulations can be regarded as "narrowly tailored." They are far more restrictive than any COVID–related regulations that have previously come before the Court,[2] much tighter than those adopted by many other jurisdictions hard-hit by the pandemic, and far more severe than has been shown to be required to prevent the spread of the virus at the applicants' services. The District Court noted that "there ha[d] not been any COVID–19 outbreak in any of the Diocese's churches since they reopened," and it praised the Diocese's record in combatting the spread of the disease. ___ F. Supp. 3d ___, ___, 2020 WL 6120167, *2 (EDNY, Oct. 16, 2020). It found that the Diocese had been constantly "ahead of the curve, enforcing stricter safety protocols than the State required." *Ibid.* Similarly, Agudath Israel notes that "[t]he Governor does not dispute that [it] ha[s] rigorously implemented and adhered to all health protocols and that there has been no outbreak of COVID–19 in [its] congregations." Application in No. 20A90, at 36.

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[1] Compare *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 29) (directive "neutral on its face").

Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services. Among other things, the maximum attendance at a religious service could be tied to the size of the church or synagogue. Almost all of the 26 Diocese churches immediately affected by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000. Similarly, Agudath Israel of Kew Garden Hills can seat up to 400. It is hard to believe that admitting more than 10 people to a 1,000–seat church or 400–seat synagogue would create a more serious health risk than the many other activities that the State allows.

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[2] See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020) (directive limiting in-person worship services to 50 people); *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020) (Executive Order limiting in-person worship to 25% capacity or 100 people, whichever was lower).

Irreparable harm. There can be no question that the challenged restrictions, if enforced, will cause irreparable harm. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion). If only 10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance. App. to Application in No. 20A90, at 26–27.

Public interest. Finally, it has not been shown that granting the applications will harm the public. As noted, the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease. And the State has not shown that public health would be imperiled if less restrictive measures were imposed.

Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

The dissenting opinions argue that we should withhold relief because the relevant circumstances have now changed. After the applicants asked this Court for relief, the Governor reclassified the areas in question from orange to yellow, and this change means that the applicants may hold services at 50% of their maximum occupancy. The dissents would deny relief at this time but allow the Diocese and Agudath Israel to renew their requests if this recent reclassification is reversed.

There is no justification for that proposed course of action. It is clear that this matter is not moot. See *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U. S. 449, 462 (2007); *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189 (2000). And injunctive relief is still called for because the applicants remain under a constant threat that the area in question will be reclassified as red or orange. See, *e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 158 (2014). The Governor regularly changes the classification of particular areas without prior notice.[3] If that occurs again, the reclassification will almost certainly bar individuals in the affected area from attending services before judicial relief can be obtained. At most Catholic churches, Mass is celebrated daily, and "Orthodox Jews pray in [Agudath Israel's] synagogues every day." Application in No. 20A90, at 4. Moreover, if reclassification occurs late in a week, as has happened in the past, there may not be time for applicants to seek and obtain relief from this Court before another Sabbath passes. Thirteen days have gone by since the Diocese filed its application, and Agudath Israel's application was filed over a week ago. While we could presumably act more swiftly in the future, there is no guarantee that we could provide relief before another weekend passes. The applicants have made the showing needed to obtain relief, and there is no reason why they should bear the risk of suffering further irreparable harm in the event of another reclassification.

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[3] Recent changes were made on the following dates: Monday, November 23; Thursday, November 19; Wednesday, November 18; Wednesday, November 11; Monday, November 9; Friday, November 6; Wednesday, October 28; Wednesday, October 21.

For these reasons, we hold that enforcement of the Governor's severe restrictions on the applicants' religious services must be enjoined.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN,
NEW YORK *v.* ANDREW M. CUOMO,
GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE GORSUCH, concurring.

Government is not free to disregard the First Amendment in times of crisis. At a minimum, that Amendment prohibits government officials from treating religious exercises worse than comparable secular activities, unless they are pursuing a compelling interest and using the least restrictive means available. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 546 (1993). Yet recently, during the COVID pandemic, certain States seem to have ignored these long-settled principles.

Today's case supplies just the latest example. New York's Governor has asserted the power to assign different color codes to different parts of the State and govern each by executive decree. In "red zones," houses of worship are all but closed—limited to a maximum of 10 people. In the Orthodox Jewish community that limit might operate to exclude all women, considering 10 men are necessary to establish a *minyan*, or a quorum. In "orange zones," it's not much different. Churches and synagogues are limited to a maximum of 25 people. These restrictions apply even to the largest cathedrals and synagogues, which ordinarily hold hundreds. And the restrictions apply no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services.

At the same time, the Governor has chosen to impose *no* capacity restrictions on certain businesses he considers "essential." And it turns out the businesses the Governor considers essential include hardware stores, acupuncturists, and liquor stores. Bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents are all essential too. So, at least according to the Governor, it may be unsafe to go to church, but it is always fine to pick up another bottle of wine, shop for a new bike, or spend the afternoon exploring your distal points and meridians. Who knew public health would so perfectly align with secular convenience?

As almost everyone on the Court today recognizes, squaring the Governor's edicts with our traditional First Amendment rules is no easy task. People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of "essential" businesses and perhaps more besides. The only explanation for treating religious places differently seems to be a judgment that what happens there just isn't as "essential" as what happens in secular spaces. Indeed, the Governor is remarkably frank about this: In his judgment laundry and liquor, travel and tools, are all "essential" while traditional religious exercises are not. *That* is exactly the kind of discrimination the First Amendment forbids.

Nor is the problem an isolated one. In recent months, certain other Governors have issued similar edicts. At the flick of a pen, they have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples. See *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___, ___ (2020) (GORSUCH, J., dissenting). In far too many places, for far too long, our first freedom has fallen on deaf ears.

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What could justify so radical a departure from the First Amendment's terms and long-settled rules about its application? Our colleagues offer two possible answers. Initially, some point to a solo concurrence in *South Bay Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), in which THE CHIEF JUSTICE expressed willingness to defer to executive orders in the pandemic's early stages based on the newness of the emergency and how little was then known about the disease. *Post*, at 5 (opinion of BREYER, J.). At that time, COVID had been with us, in earnest, for just three months. Now, as we round out 2020 and face the prospect of entering a second calendar year living in the pandemic's shadow, that rationale has expired according to its own terms. Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical. Rather than apply a nonbinding and expired concurrence from *South Bay*, courts must resume applying the Free Exercise Clause. Today, a majority of the Court makes this plain.

Not only did the *South Bay* concurrence address different circumstances than we now face, that opinion was mistaken from the start. To justify its result, the concurrence reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905). But *Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction.

Start with the mode of analysis. Although *Jacobson* predated the modern tiers of scrutiny, this Court essentially applied rational basis review to Henning Jacobson's challenge to a state law that, in light of an ongoing smallpox pandemic, required individuals to take a vaccine, pay a $5 fine, or establish that they qualified for an exemption. *Id.*, at 25 (asking whether the State's scheme was "reasonable"); *id.*, at 27 (same); *id.*, at 28 (same). Rational basis review is the test this Court *normally* applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right. Put differently, *Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so. Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue—exactly what the Court does today. Here, that means strict scrutiny: The First Amendment traditionally requires a State to treat religious exercises at least as well as comparable secular activities unless it can meet the demands of strict scrutiny—showing it has employed the most narrowly tailored means available to satisfy a compelling state interest. *Church of Lukumi*, 508 U. S., at 546.

Next, consider the right asserted. Mr. Jacobson claimed that he possessed an implied "substantive due process" right to "bodily integrity" that emanated from the Fourteenth Amendment and allowed him to avoid not only the vaccine but *also* the $5 fine (about $140 today) *and* the need to show he qualified for an exemption. 197 U. S., at 13–14. This Court disagreed. But what does that have to do with our circumstances? Even if judges may impose emergency restrictions on rights that some of them have found hiding in the Constitution's penumbras, it does not follow that the same fate should befall the textually explicit right to religious exercise.

Finally, consider the different nature of the restriction. In *Jacobson*, individuals could accept the vaccine, pay the fine, or identify a basis for exemption. *Id.*, at 12, 14. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the opt-outs available to certain objectors. *Id.*, at 36, 38–39. Here, by contrast, the State has effectively sought to ban all traditional forms of worship in affected "zones" whenever the Governor decrees and for as long as he chooses. Nothing in *Jacobson* purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights. In fact, *Jacobson* explained that the challenged law survived only because it did not "contravene the Constitution of the United States" or "infringe any right granted or secured by that instrument." *Id.*, at 25.

Tellingly no Justice now disputes any of these points. Nor does any Justice seek to explain why anything other than our usual constitutional standards should apply during the current pandemic. In fact, today the author of the *South Bay* concurrence even downplays the relevance of *Jacobson* for cases like the one before us. *Post*, at 2 (opinion of ROBERTS, C. J.). All this is surely a welcome development. But it would require a serious rewriting of history to suggest, as THE CHIEF JUSTICE does, that the *South Bay* concurrence never really relied in significant measure on *Jacobson*. That was the first case *South Bay* cited on the substantive legal question before the Court, it was the only case cited involving a pandemic, and many lower courts quite understandably read its invocation as inviting them to slacken their enforcement of constitutional liberties while COVID lingers. See, *e.g., Elim Romanian Pentecostal Church* v. *Pritzker*, 962 F. 3d 341, 347 (CA7 2020); *Legacy Church, Inc.* v. *Kunkel*, ___ F. Supp. 3d ___, ___ (NM 2020).

Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? In the end, I can only surmise that much of the answer lies in a particular judicial impulse to stay out of the way in times of crisis. But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do.

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That leaves my colleagues to their second line of argument. Maybe precedent does not support the Governor's actions. Maybe those actions do violate the Constitution. But, they say, we should stay our hand all the same. Even if the churches and synagogues before us have been subject to unconstitutional restrictions for months, it is no matter because, just the other day, the Governor changed his color code for Brooklyn and Queens where the plaintiffs are located. Now those regions are "yellow zones" and the challenged restrictions on worship associated with "orange" and "red zones" do not apply. So, the reasoning goes, we should send the plaintiffs home with an invitation to return later if need be.

To my mind, this reply only advances the case for intervention. It has taken weeks for the plaintiffs to work their way through the judicial system and bring their case to us. During all this time, they were subject to unconstitutional restrictions. Now, just as this Court was preparing to act on their applications, the Governor loosened his restrictions, all while continuing to assert the power to tighten them again anytime as conditions warrant. So if we dismissed this case, nothing would prevent the Governor from reinstating the challenged restrictions tomorrow. And by the time a new challenge might work its way to us, he could just change them again. The Governor has fought this case at every step of the way. To turn away religious leaders bringing meritorious claims just because the Governor decided to hit the "off" switch in the shadow of our review would be, in my view, just another sacrifice of fundamental rights in the name of judicial modesty.

Even our dissenting colleagues do not suggest this case is moot or otherwise outside our power to decide. They counsel delay only because "the disease-related circumstances [are] rapidly changing." *Post*, at 5 (opinion of BREYER, J.). But look at what those "rapidly changing" circumstances suggest. Both Governor Cuomo and Mayor de Blasio have "indicated it's only a matter of time before [all] five boroughs" of New York City are flipped from yellow to orange. J. Skolnik, D. Goldiner, & D. Slattery, Staten Island Goes 'Orange' As Cuomo Urges Coronavirus 'Reality Check' Ahead of Thanksgiving, N. Y. Daily News (Nov. 23, 2020), https://www.nydailynews.com/coronavirus/ny-coronavirus-cuomo-thanksgiving-20201123-yyhxfo3kzbdinbfbsqos3tvrku-story-html. On anyone's account, then, it seems inevitable this dispute will require the Court's attention.

It is easy enough to say it would be a small thing to require the parties to "refile their applications" later. *Post*, at 3 (opinion of BREYER, J.). But none of us are rabbis wondering whether future services will be disrupted as the High Holy Days were, or priests preparing for Christmas. Nor may we discount the burden on the faithful who have lived for months under New York's unconstitutional regime unable to attend religious services. Whether this Court could decide a renewed application promptly is beside the point. The parties before us have already shown their entitlement to relief. Saying so now will establish clear legal rules and enable both sides to put their energy to productive use, rather than devoting it to endless emergency litigation. Saying so now will dispel, as well, misconceptions about the role of the Constitution in times of crisis, which have already been permitted to persist for too long.

It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE KAVANAUGH, concurring.

I vote to grant the applications of the Roman Catholic Diocese of Brooklyn and Agudath Israel of America for temporary injunctions against New York's 10-person and 25-person caps on attendance at religious services. On this record, temporary injunctions are warranted because New York's severe caps on attendance at religious services likely violate the First Amendment. Importantly, the Court's orders today are not final decisions on the merits. Instead, the Court simply grants *temporary* injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

To begin with, New York's 10-person and 25-person caps on attendance at religious services in red and orange zones (which are areas where COVID–19 is more prevalent) are much more severe than most other States' restrictions, including the California and Nevada limits at issue in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). In *South Bay*, houses of worship were limited to 100 people (or, in buildings with capacity of under 400, to 25% of capacity). And in *Calvary*, houses of worship were limited to 50 people.

New York has gone much further. In New York's red zones, most houses of worship are limited to 10 people; in orange zones, most houses of worship are limited to 25 people. Those strict and inflexible numerical caps apply even to large churches and synagogues that ordinarily can hold hundreds of people and that, with social distancing and mask requirements, could still easily hold far more than 10 or 25 people.

Moreover, New York's restrictions on houses of worship not only are severe, but also are discriminatory. In red and orange zones, houses of worship must adhere to numerical caps of 10 and 25 people, respectively, but those caps do not apply to some secular buildings in the same neighborhoods. In a red zone, for example, a church or synagogue must adhere to a 10-person attendance cap, while a grocery store, pet store, or big-box store down the street does not face the same restriction. In an orange zone, the discrimination against religion is even starker: Essential businesses and many non-essential businesses are subject to no attendance caps at all.

The State's discrimination against religion raises a serious First Amendment issue and triggers heightened scrutiny, requiring the State to provide a sufficient justification for the discrimination. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 537–538 (1993); *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 884 (1990). But New York has not sufficiently justified treating houses of worship more severely than secular businesses.

The State argues that it has not impermissibly discriminated against religion because some secular businesses such as movie theaters must remain closed and are thus treated less favorably than houses of worship. But under this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. See *Lukumi*, 508 U. S., at 537–538; *Smith*, 494 U. S., at 884; see also *Calvary*, 591 U. S., at ___

(KAVANAUGH, J., dissenting from denial of application for injunctive relief) (slip op., at 7). Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class. Here, therefore, the State must justify imposing a 10-person or 25-person limit on houses of worship but not on favored secular businesses. See *Lukumi*, 508 U. S., at 537–538; *Smith*, 494 U. S., at 884. The State has not done so.

To be clear, the COVID–19 pandemic remains extraordinarily serious and deadly. And at least until vaccines are readily available, the situation may get worse in many parts of the United States. The Constitution "principally entrusts the safety and the health of the people to the politically accountable officials of the States." *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring in denial of application for injunctive relief) (slip op., at 2) (internal quotation marks and alteration omitted). Federal courts therefore must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic. See *ibid*. But judicial deference in an emergency or a crisis does not mean wholesale judicial abdication, especially when important questions of religious discrimination, racial discrimination, free speech, or the like are raised.

In light of the devastating pandemic, I do not doubt the State's authority to impose tailored restrictions—even very strict restrictions—on attendance at religious services and secular gatherings alike. But the New York restrictions on houses of worship are not tailored to the circumstances given the First Amendment interests at stake. To reiterate, New York's restrictions on houses of worship are much more severe than the California and Nevada restrictions at issue in *South Bay* and *Calvary*, and much more severe than the restrictions that most other States are imposing on attendance at religious services. And New York's restrictions discriminate against religion by treating houses of worship significantly worse than some secular businesses.

For those reasons, I agree with THE CHIEF JUSTICE that New York's "[n]umerical capacity limits of 10 and 25 people . . . seem unduly restrictive" and that "it may well be that such restrictions violate the Free Exercise Clause." *Post*, at 1. I part ways with THE CHIEF JUSTICE on a narrow procedural point regarding the timing of the injunctions. THE CHIEF JUSTICE would not issue injunctions at this time. As he notes, the State made a change in designations a few days ago, and now none of the churches and synagogues who are applicants in these cases are located in red or orange zones. As I understand it, THE CHIEF JUSTICE would not issue an injunction unless and until a house of worship applies for an injunction and is still in a red or orange zone on the day that the injunction is finally issued. But the State has not withdrawn or amended the relevant Executive Order. And the State does not suggest that the applicants lack standing to challenge the red-zone and orange-zone caps imposed by the Executive Order, or that these cases are moot or not ripe. In other words, the State does not deny that the applicants face an imminent injury *today*. In particular, the State does not deny that some houses of worship, including the applicants here, are located in areas that likely will be classified as red or orange zones in the very near future. I therefore see no jurisdictional or prudential barriers to issuing the injunctions now.

There also is no good reason to delay issuance of the injunctions, as I see it. If no houses of worship end up in red or orange zones, then the Court's injunctions today will impose no harm on the State and have no effect on the State's response to COVID–19. And if houses of worship end up in red or orange zones, as is likely, then today's injunctions will ensure that religious organizations are not subjected to the unconstitutional 10-person and 25-person caps. Moreover, issuing the injunctions now rather than a few days from now not only will ensure that the applicants' constitutional rights are protected, but also will provide some needed clarity for the State and religious organizations.

* * *

On this record, the applicants have shown: a likelihood that the Court would grant certiorari and reverse; irreparable harm; and that the equities favor injunctive relief. I therefore vote to grant the applications for temporary injunctive relief until the Court of Appeals in December, and then this Court as appropriate, can more fully consider the merits.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN,
NEW YORK *v.* ANDREW M. CUOMO,
GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

CHIEF JUSTICE ROBERTS, dissenting.

I would not grant injunctive relief under the present circumstances. There is simply no need to do so. After the Diocese and Agudath Israel filed their applications, the Governor revised the designations of the affected areas. None of the houses of worship identified in the applications is now subject to any fixed numerical restrictions. At these locations, the applicants can hold services with up to 50% of capacity, which is at least as favorable as the relief they currently seek.

Numerical capacity limits of 10 and 25 people, depending on the applicable zone, do seem unduly restrictive. And it may well be that such restrictions violate the Free Exercise Clause. It is not necessary, however, for us to rule on that serious and difficult question at this time. The Governor might reinstate the restrictions. But he also might not. And it is a significant matter to override determinations made by public health officials concerning what is necessary for public safety in the midst of a deadly pandemic. If the Governor does reinstate the numerical restrictions the applicants can return to this Court, and we could act quickly on their renewed applications. As things now stand, however, the applicants have not demonstrated their entitlement to "the extraordinary remedy of injunction."

Nken v. *Holder*, 556 U. S. 418, 428 (2009) (internal quotation marks omitted). An order telling the Governor not to do what he's not doing fails to meet that stringent standard.

As noted, the challenged restrictions raise serious concerns under the Constitution, and I agree with JUSTICE KAVANAUGH that they are distinguishable from those we considered in *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020), and *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). See *ante,* at 1, 3–4 (concurring opinion). I take a different approach than the other dissenting Justices in this respect.

To be clear, I do not regard my dissenting colleagues as "cutting the Constitution loose during a pandemic," yielding to "a particular judicial impulse to stay out of the way in times of crisis," or "shelter[ing] in place when the Constitution is under attack." *Ante,* at 3, 5–6 (opinion of GORSUCH, J.). They simply view the matter differently after careful study and analysis reflecting their best efforts to fulfill their responsibility under the Constitution.

One solo concurrence today takes aim at my concurring opinion in *South Bay.* See *ante,* at 3–6 (opinion of GORSUCH, J.). Today's concurrence views that opinion with disfavor because "[t]o justify its result, [it] reached back 100 years in the U. S. Reports to grab hold of our decision in *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905)." *Ante*, at 3. Today's concurrence notes that *Jacobson* "was the first case *South Bay* cited on the substantive legal question before the Court," and "it was the only case cited involving a pandemic." *Ante,* at 5. And it suggests that, in the wake of *South Bay*, some have "mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic." *Ibid.* But while *Jacobson* occupies three pages of today's concurrence, it warranted exactly one sentence in *South Bay*. What did that one sentence say? Only that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring) (quoting *Jacobson*, 197 U. S., at 38). It is not clear which part of this lone quotation today's concurrence finds so discomfiting. The concurrence speculates that there is so much more to the sentence than meets the eye, invoking—among other interpretive tools—the new "first case cited" rule. But the actual proposition asserted should be uncontroversial, and the concurrence must reach beyond the words themselves to find the target it is looking for.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN,
NEW YORK *v.* ANDREW M. CUOMO,
GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

New York regulations designed to fight the rapidly spreading—and, in many cases, fatal—COVID–19 virus permit the Governor to identify hot spots where infection rates have spiked and to designate those hot spots as red zones, the immediately surrounding areas as orange zones, and the outlying areas as yellow zones. Brief in Opposition in No. 20A87, p. 12. The regulations impose restrictions within these zones (with the strictest restrictions in the red zones and the least strict restrictions in the yellow zones) to curb transmission of the virus and prevent spread into nearby areas. *Ibid.* In October, the Governor designated red, orange, and yellow zones in parts of Brooklyn and Queens. Brief in Opposition in *Agudath Israel of America* v. *Cuomo*, O. T. 2020, No. 20A90, pp. 10–11 (Brief in Opposition in No. 20A90). Among other things, the restrictions in these zones limit the number of persons who can be present at one time at a gathering in a house of worship to: the lesser of 10 people or 25% of maximum capacity in a red zone; the lesser of 25 people or 33% of maximum capacity in an orange zone; and 50% of maximum capacity in a yellow zone. *Id.*, at 8–9.

Both the Roman Catholic Diocese of Brooklyn and Agudath Israel of America (together with Agudath Israel of

Kew Garden Hills and its employee and Agudath Israel of Madison and its rabbi) brought lawsuits against the Governor of New York. They claimed that the fixed-capacity restrictions of 10 people in red zones and 25 people in orange zones were too strict—to the point where they violated the First Amendment's protection of the free exercise of religion. Both parties asked a Federal District Court for a preliminary injunction that would prohibit the State from enforcing these red and orange zone restrictions.

After receiving evidence and hearing witness testimony, the District Court in the Diocese's case found that New York's regulations were "crafted based on science and for epidemiological purposes." ___ F. Supp. 3d ___, ___, 2020 WL 6120167, *10 (EDNY, Oct. 16, 2020). It wrote that they treated "religious gatherings . . . more favorably than similar gatherings" with comparable risks, such as "public lectures, concerts or theatrical performances." *Id.,* at *9. The court also recognized the Diocese's argument that the regulations treated religious gatherings less favorably than what the State has called "essential businesses," including, for example, grocery stores and banks. *Ibid.* But the court found these essential businesses to be distinguishable from religious services and declined to "second guess the State's judgment about what should qualify as an essential business." *Ibid.* The District Court denied the motion for a preliminary injunction. The Diocese appealed, and the District Court declined to issue an emergency injunction pending that appeal. The Court of Appeals for the Second Circuit also denied the Diocese's request for an emergency injunction pending appeal, but it called for expedited briefing and scheduled a full hearing on December 18 to address the merits of the appeal. This Court, unlike the lower courts, has now decided to issue an injunction that would prohibit the State from enforcing its fixed-capacity restrictions on houses of worship in red and orange zones while the parties await the Second Circuit's decision. I cannot agree with that decision.

For one thing, there is no need now to issue any such injunction. Those parts of Brooklyn and Queens where the Diocese's churches and the two applicant synagogues are located are no longer within red or orange zones. Brief in Opposition in No. 20A90, at 17. Thus, none of the applicants are now subject to the fixed-capacity restrictions that they challenge in their applications. The specific applicant houses of worship are now in yellow zones where they can hold services up to 50% of maximum capacity. And the applicants do not challenge any yellow zone restrictions, as the conditions in the yellow zone provide them with more than the relief they asked for in their applications.

Instead, the applicants point out that the State might reimpose the red or orange zone restrictions in the future. But, were that to occur, they could refile their applications here, by letter brief if necessary. And this Court, if necessary, could then decide the matter in a day or two, perhaps even in a few hours. Why should this Court act now without argument or full consideration in the ordinary course (and prior to the Court of Appeals' consideration of the matter) when there is no legal or practical need for it to do so? I have found no convincing answer to that question.

For another thing, the Court's decision runs contrary to ordinary governing law. We have previously said that an injunction is an "extraordinary remedy." *Nken* v. *Holder*, 556 U. S. 418, 428 (2009) (internal quotation marks omitted). That is especially so where, as here, the applicants seek an injunction prior to full argument and contrary to the lower courts' determination. Here, we consider severe restrictions. Those restrictions limit the number of persons who can attend a religious service to 10 and 25 congregants (irrespective of mask-wearing and social distancing). And those numbers are indeed low. But whether, in present circumstances, those low numbers violate the Constitution's Free Exercise Clause is far from clear, and, in my view, the applicants must make such a showing here to show that they are entitled to "the extraordinary remedy of injunction." *Ibid.* (internal quotation marks omitted).

COVID–19 has infected more than 12 million Americans and caused more than 250,000 deaths nationwide. At least 26,000 of those deaths have occurred in the State of New York, with 16,000 in New York City alone. And the number of COVID–19 cases is many times the number of deaths. The Nation is now experiencing a second surge of infections. In New York, for example, the 7-day average of new confirmed cases per day has risen from around 700 at the end of the summer to over 4,800 last week. Nationwide, the number of new confirmed cases per day is now higher than it has ever been. Brief in Opposition in No. 20A87, at 1; COVID in the U. S.: Latest Map and Case Count (Nov. 24, 2020), http://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html#states; New York COVID Map and Case Count (Nov. 24, 2020), http://www.nytimes.com/interactive/2020/us/new-york-coronavirus-cases.html.

At the same time, members of the scientific and medical communities tell us that the virus is transmitted from person to person through respiratory droplets produced when a person or group of people talk, sing, cough, or breathe near each other. Brief in Opposition in No. 20A87, at 3 (citing the World Health Organization); Brief of the American Medical Association as *Amici Curiae* 5–6. Thus, according to experts, the risk of transmission is higher when people are in close contact with one another for prolonged periods of time, particularly indoors or in other enclosed spaces. *Id.,* at 3–6. The nature of the epidemic, the spikes, the uncertainties, and the need for quick action, taken together, mean that the State has countervailing arguments based upon health, safety, and administrative considerations that must be balanced against the applicants' First Amendment challenges. That fact, along with others that JUSTICE SOTOMAYOR describes, means that the applicants' claim of a constitutional violation (on which they base their request for injunctive relief) is far from clear. See *post*, p. 1 (dissenting opinion). (All of these matters could be considered and discussed in the ordinary course of proceedings at a later date.) At the same time, the public's serious health and safety needs, which call for swift government action in ever changing circumstances, also mean that it is far from clear that "the balance of equities tips in [the applicants'] favor," or "that an injunction is in the public interest." *Winter* v. *Natural Resources Defense Council, Inc.*, 555 U. S. 7, 20 (2008).

Relevant precedent suggests the same. We have previously recognized that courts must grant elected officials "broad" discretion when they "undertake to act in areas fraught with medical and scientific uncertainties." *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___, ___ (2020) (ROBERTS, C. J., concurring) (slip op., at 2) (alteration omitted). That is because the "Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States." *Ibid.* (alterations and internal quotation marks omitted). The elected branches of state and national governments can marshal scientific expertise and craft specific policies in response to "changing facts on the ground." *Id.,* at 3. And they can do so more quickly than can courts. That is particularly true of a court, such as this Court, which does not conduct evidentiary hearings. It is true even more so where, as here, the need for action is immediate, the information likely limited, the making of exceptions difficult, and the disease-related circumstances rapidly changing.

I add that, in my view, the Court of Appeals will, and should, act expeditiously. The State of New York will, and should, seek ways of appropriately recognizing the religious interests here at issue without risking harm to the health and safety of the people of New York. But I see no practical need to issue an injunction to achieve these objectives. Rather, as I said, I can find no need for an immediate injunction. I believe that, under existing law, it ought not to issue. And I dissent from the Court's decision to the contrary.

SUPREME COURT OF THE UNITED STATES

No. 20A87

ROMAN CATHOLIC DIOCESE OF BROOKLYN, NEW YORK *v.* ANDREW M. CUOMO, GOVERNOR OF NEW YORK

ON APPLICATION FOR INJUNCTIVE RELIEF

[November 25, 2020]

JUSTICE SOTOMAYOR, with whom JUSTICE KAGAN joins, dissenting.

Amidst a pandemic that has already claimed over a quarter million American lives, the Court today enjoins one of New York's public health measures aimed at containing the spread of COVID–19 in areas facing the most severe outbreaks. Earlier this year, this Court twice stayed its hand when asked to issue similar extraordinary relief. See *South Bay United Pentecostal Church* v. *Newsom*, 590 U. S. ___ (2020); *Calvary Chapel Dayton Valley* v. *Sisolak*, 591 U. S. ___ (2020). I see no justification for the Court's change of heart, and I fear that granting applications such as the one filed by the Roman Catholic Diocese of Brooklyn (Diocese) will only exacerbate the Nation's suffering.[1]

South Bay and *Calvary Chapel* provided a clear and workable rule to state officials seeking to control the spread of COVID–19: They may restrict attendance at houses of worship so long as comparable secular institutions face restrictions that are at least equally as strict. See *South Bay*, 590 U. S., at ___ (ROBERTS, C. J., concurring) (slip op., at 2). New York's safety measures fall comfortably within those bounds. Like the States in *South Bay* and *Calvary Chapel*, New York applies "[s]imilar or more severe restrictions . . . to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time." *Ibid.* Likewise, New York "treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Ibid.* That should be enough to decide this case.

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[1] Ironically, due to the success of New York's public health measures, the Diocese is no longer subject to the numerical caps on attendance it seeks to enjoin. See Brief in Opposition in *Agudath Israel of America* v. *Cuomo*, No. 20A90, p. 17. Yet the Court grants this application to ensure that, should infection rates rise once again, the Governor will be unable to reimplement the very measures that have proven so successful at allowing the free (and comparatively safe) exercise of religion in New York.

The Diocese attempts to get around *South Bay* and *Calvary Chapel* by disputing New York's conclusion that attending religious services poses greater risks than, for instance, shopping at big box stores. Application in No. 20A87, p. 23 (Application). But the District Court rejected that argument as unsupported by the factual record. ___, F. Supp. 3d ___, ___–___, 2020 WL 6120167, *8–*9 (EDNY, Oct. 16, 2020). Undeterred, JUSTICE GORSUCH offers up his own examples of secular activities he thinks might pose similar risks as religious gatherings, but which are treated more leniently under New York's rules (*e.g.,* going to the liquor store or getting a bike repaired). *Ante*, at 2 (concurring opinion). But JUSTICE GORSUCH does not even try to square his examples with the conditions medical experts tell us facilitate the spread of COVID–19: large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time. See App. to Brief in Opposition in No. 20A87, pp. 46–51 (declaration of Debra S. Blog, Director of the Div. of Epidemiology, NY Dept. of Health); Brief for the American Medical Association et al.

as *Amicus Curiae* 3–6 (Brief for AMA). Unlike religious services, which "have every one of th[ose] risk factors," Brief for AMA 6, bike repair shops and liquor stores generally do not feature customers gathering inside to sing and speak together for an hour or more at a time. *Id.*, at 7 ("Epidemiologists and physicians generally agree that religious services are among the riskiest activities"). Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily.

In truth, this case is easier than *South Bay* and *Calvary Chapel*. While the state regulations in those cases generally applied the same rules to houses of worship and secular institutions where people congregate in large groups, New York treats houses of worship far more favorably than their secular comparators. Compare, *e.g.*, *Calvary Chapel*, 591 U. S., at ___ (KAVANAUGH, J., dissenting) (slip op., at 8) (noting that Nevada subjected movie theaters and houses of worship alike to a 50-person cap) with App. to Brief in Opposition in No. 20A87, p. 53 (requiring movie theaters, concert venues, and sporting arenas subject to New York's regulation to close entirely, but allowing houses of worship to open subject to capacity restrictions). And whereas the restrictions in *South Bay* and *Calvary Chapel* applied statewide, New York's fixed-capacity restrictions apply only in specially designated areas experiencing a surge in COVID–19 cases.

The Diocese suggests that, because New York's regulation singles out houses of worship by name, it cannot be neutral with respect to the practice of religion. Application 22. Thus, the argument goes, the regulation must, *ipso facto*, be subject to strict scrutiny. It is true that New York's policy refers to religion on its face. But as I have just explained, that is because the policy singles out religious institutions for preferential treatment in comparison to secular gatherings, not because it discriminates against them. Surely the Diocese cannot demand laxer restrictions by pointing out that it is already being treated better than comparable secular institutions.[2]

Finally, the Diocese points to certain statements by Governor Cuomo as evidence that New York's regulation is impermissibly targeted at religious activity—specifically, at combatting heightened rates of positive COVID–19 cases among New York's Orthodox Jewish community. Application 24. The Diocese suggests that these comments supply "an independent basis for the application of strict scrutiny." Reply Brief in No. 20A87, p. 9. I do not see how. The Governor's comments simply do not warrant an application of strict scrutiny under this Court's precedents. Just a few Terms ago, this Court declined to apply heightened scrutiny to a Presidential Proclamation limiting immigration from Muslim-majority countries, even though President Trump had described the Proclamation as a "Muslim Ban," originally conceived of as a "'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on.'" *Trump* v. *Hawaii*, 585 U. S. ___, ___ (2018) (slip op., at 27). If the

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[2] JUSTICE KAVANAUGH cites *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520, 537–538 (1993), and *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 884 (1990), for the proposition that states must justify treating even noncomparable secular institutions more favorably than houses of worship. *Ante*, at 2 (concurring opinion). But those cases created no such rule. *Lukumi* struck down a law that allowed animals to be killed for almost any purpose other than animal sacrifice, on the ground that the law was a "'religious gerrymander'" targeted at the Santeria faith. 508 U. S., at 535. *Smith* is even farther afield, standing for the entirely inapposite proposition that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." 494 U. S., at 879 (internal quotation marks omitted).

President's statements did not show "that the challenged restrictions violate the 'minimum requirement of neutrality' to religion," *ante*, at 2 (quoting *Lukumi*, 508 U. S., at 533), it is hard to see how Governor Cuomo's do.

* * *

Free religious exercise is one of our most treasured and jealously guarded constitutional rights. States may not discriminate against religious institutions, even when faced with a crisis as deadly as this one. But those principles are not at stake today. The Constitution does not forbid States from responding to public health crises through regulations that treat religious institutions equally or more favorably than comparable secular institutions, particularly when those regulations save lives. Because New York's COVID–19 restrictions do just that, I respectfully dissent.

Canada (Attorney General) v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735

Supreme Court Reports

Supreme Court of Canada

Present: Laskin C.J. and Martland, Dickson, Beetz, Estey, McIntyre and Chouinard JJ.

1980: February 12 / 1980: October 7.

[1980] 2 S.C.R. 735 | [1980] 2 R.C.S. 735 | [1980] S.C.J. No. 99 | [1980] A.C.S. no 99

The Attorney General of Canada (Defendant), Appellant; and Inuit Tapirisat of Canada and the National Anti-poverty Organization (Plaintiffs), Respondents.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Administrative law — Decision of CRTC — Review by Governor in Council — Rules of natural justice and duty of fairness — Whether Governor in Council subject to judicial review National Transportation Act, R.S.C. 1970, c. N-17 as amended, s. 64 — Railway Act, R.S.C. 1970, c. R-2 as amended, ss. 320, 321(1) — Interpretation Act, R.S.C. 1970, c. I-23, s. 28.

After the approval by the CRTC of a new rate structure for Bell Canada, the plaintiffs-respondents appealed the CRTC decision to the Governor General in Council pursuant to s. 64(1) of the National Transportation Act. Their petitions having been denied, the respondents attacked the decisions of the Governor General in Council alleging that they had not been given a hearing in accordance with the principles of natural justice. This appeal arises from an application made in the Trial Division of the Federal Court for an order striking out the plaintiffs' statement of claim on the ground that the statement disclosed "no reasonable cause of action". The application was granted but the Federal Court of Appeal set aside the order of the Trial Division judge. Hence the appeal to this Court.

Held: The appeal should be allowed.

The substance of the question before this Court in this appeal is whether there is a duty to observe natural justice in, or at least a duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents. upon their submission of a petition under s. 64(1) of the National Transportation Act.

Such petitions are to be contrasted with the mechanism for appeal to the Federal Court of Appeal on questions of law or jurisdiction provided in subs. (2) and following of s. 64. The courts have held that the rules of natural justice and the duty to act fairly depend on the circumstances of the case, the nature of the inquiry or investigation, the subject matter that is being dealt with, the consequences on the persons affected and so forth. The mere fact that a decision is made pursuant to a statutory power vested in the Governor in Council does not mean that it is beyond review if the latter fails to observe a condition precedent to the exercise of that power, whether such power is classified as administrative or quasi-judicial. However in this case, there is no failure to observe a condition precedent but rather the attack is directed at procedures adopted by the Governor in Council, once validly seized of the respondents' petitions. The very nature of the Governor in Council must be taken into account in assessing the technique of review which he adopted. The executive branch cannot be deprived of the right to resort to its staff, departmental personnel and ministerial members concerned with the various policy issues raised by a petition.

Under s. 64(1), the Governor in Council is not limited to varying orders made inter partes but he may act "of his motion"; he may act "at any time"; he may vary or rescind any order, decision, rule or regulation "in his discretion". Parliament has in s. 64(1) not burdened the Governor in Council with any standards or guidelines in the exercise of its rate review function. Nor were procedural standards imposed or even implied. The discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1). Furthermore there is no need for the Governor in Council to give reasons for his decision, to hold any kind of hearing, or even to acknowledge the receipt of a petition. Where the executive branch has been assigned a function performable in the past by the Legislature itself and where the res or subject matter is not an individual concern, considerations different from Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, arise. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

Further, there is nothing in s. 64(1) to justify a variable yardstick for the application to that section of the principle of fairness according to the source of the information placed before the Governor in Council. Once the proper construction of the section is determined, it applies consistently throughout the proceedings before the Governor in Council.

Cases Cited

Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308; Wiseman v. Borneman, [1971] A.C. 297; Pearlberg v. Varty, [1972] 1 W.L.R. 534; Russell v. Duke of Norfolk, [1949] 1 All E.R. 109; Selvarajan v. Race Relations Board, [1976] 1 All E.R. 12; Border Cities Press Club v. Attorney General for Ontario, [1955] 1 D.L.R. 404; Martineau v. Matsqui Institution (No. 2), [1980] 1 S.C.R. 602; Re Davisville Investment Co. Ltd. and City of Toronto et al. (1977), 15 O.R. (2d) 553; Alliance des Professeurs Catholiques de Montréal v. Commission des Relations Ouvrières de la Province de Québec, [1953] 2 S.C.R. 140; Bates v. Lord Hailsham, [1972] 1 W.L.R. 1373; Essex County Council v. Minister of Housing (1967), 66 L.G.R. 23, referred to; Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, considered.

APPEAL from a judgment of the Federal Court of Appeal [[1979] 1 F.C. 710, setting aside the order of the Trial Division. Appeal allowed and order of the Trial Division restored.
E.A. Bowie, and H.L. Molot, for the defendant, appellant. B.A. Crane, Q.C., and Andrew J. Roman, for the plaintiffs, respondents.

Solicitor for the defendant, appellant: R. Tassé, Ottawa. Solicitor for the plaintiffs, respondents: Andrew J. Roman, Toronto.

The judgment of the Court was delivered by

ESTEY J.

ESTEY J.:— This appeal relates to the proper disposition of an application made in the Trial Division of the Federal Court of Canada for an order pursuant to the rules of that Court striking out the statement of claim and dismissing this action on the grounds that the statement of claim discloses "no reasonable cause of action". Mr. Justice Marceau of the Trial Division of the Federal Court allowed the application, struck out the statement of claim, and dismissed the action. The Federal Court of Appeal set aside the order of the Trial Division although in doing so found that there was no basis for the relief sought in the statement of claim except with regard to one issue to which I will make reference later. The effect, therefore, of the disposition below is that if left undisturbed, the matter would go to trial on the basis of the pleadings as they now stand.

A brief outline of events leading up to these proceedings will be helpful. The Canadian Radio-television and Telecommunications Commission (herein for brevity referred to as the CRTC), in response to an application from Bell Canada, conducted lengthy hearings concerning a proposed increase in telephone rates to be charged to subscribers in the provinces of Ontario and Quebec and in the Northwest Territories. The plaintiffs/respondents participated in these hearings as intervenants throughout. In conducting these proceedings, the CRTC was proceeding under authority provided in the Railway Act, R.S.C. 1970, c. R-2 as amended, the National Transportation Act, R.S.C. 1970, c. N-17 as amended, and the Canadian Radio-television and Telecommunications

Commission Act, S.C. 1974-75-76, c. 49. We are not here concerned with the actual proceedings before the CRTC. The balance of the narrative can best be set out by quoting from the statement of claim which, because this is an application for dismissal, must be taken as proved.

> 5. On June 1st, 1977 the CRTC issued its decision in the matter, which decision denied some of the relief sought by each of the plaintiffs.
>
> 6. On June 10th, 1977 ITC [a respondent herein] appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the National Transportation Act, requesting the Governor-in-Council to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefor. On June 29th, 1977 Bell Canada issued a reply thereto. While ITC was preparing its final reply to the reply of Bell Canada, the Governor-in-Council decided the appeal adversely to ITC. On July 14th, 1977 Order-in-Council P.C. 1977-2027 was made. ITC's final reply was never submitted.
>
> 7. On June 9th, 1977 NAPO [a respondent herein] also appealed the decision of the CRTC to the Governor-in-Council pursuant to section 64 of the National Transportation Act, to which Bell Canada prepared a reply dated June 29th, 1977. The Governor-in-Council decided this appeal adversely to NAPO without waiting to receive the final reply of NAPO. On July 14th, 1977 Order-in-Council P.C. 1977-2026 was made. NAPO's final reply was never submitted.
>
> 8. In arriving at its decision the Governor-in-Council, following customary practice, allowed no oral presentation but conducted the hearing entirely in writing. However, following the usual practice, the actual written submissions of the parties were not presented to the members of the Governor-in-Council but rather, evidence and opinions were obtained from officials of the Department of Communications as to:
>
>   a) What that Department thought were the positions of the parties in the appeal;
>
>   b) The position of the Department, or certain officials thereof, in relation to the facts and issues in the appeal;
>
>   c) Whether either or both of the appeals should be allowed. None of this evidence or these opinions have ever been communicated to the appellants (plaintiffs herein).
>
> 9. The CRTC was requested by the Governor-in-Council to submit its views as to the disposition of the appeals. These views of the CRTC were neither made available to the appellants (plaintiffs herein) by the CRTC itself, nor by the Governor-in-Council.
>
> 10. The Minister of Communications, at the meeting of the Governor-in-Council at which the appeals were decided, both participated in the making of the decisions and submitted to the meeting her recommendation that the decision be that the appeals be disallowed, together with evidence and argument in support of this recommendation. The submissions of the Minister were a conduit for, were based upon, or at least included evidence, opinions and recommendations from the CRTC and from officials of her Department. Neither the content of these opinions and recommendations nor of any evidence or argument submitted in support thereof has ever been communicated to the appellants (plaintiffs herein), and hence the plaintiffs have been denied an opportunity to make a reply thereto; yet the two decisions and the resultant Orders-in-Council were made on the basis of the submissions of the Minister.
>
> 11. The plaintiffs submit that the defendant Governor-in-Council, when deciding a matter on a petition pursuant to section 64 of the National Transportation Act, is a Federal Board, Commission or other tribunal within the meaning of section 18 of the Federal Court Act.
>
> 12. The plaintiffs submit that the defendant Governor-in-Council was required to decide these appeals himself and to reach these decisions by means of a procedure which is fair and in accordance with the principles of natural justice.
>
> 13. The plaintiffs submit that in the circumstances, the Governor-in-Council held no hearing in any meaningful sense of that word, and that, therefore, the decisions and Orders-in-Council made pursuant

to them are nullities, Alternatively, it is submitted that if there was a hearing, the procedure employed did not result in a fair hearing, hence the decisions and orders resulting are nullities.

14. Accordingly, the plaintiffs pray for the following relief:

    i) [This paragraph being a prayer for issuance of writ of certiorari was omitted as the respondents, after the judgment of the court of first instance was issued, no longer advanced this claim. We are now concerned only with para. 14(ii) of the prayer for relief in which a declaration is sought.]

    ii) In the alternative, a declaration that the procedure employed by the Governor-in-Council in these two appeals resulted in:

        a) no hearing having been held, or in the alternative,

        b) such hearing as was held was not a full and fair hearing, in accordance with the principles of natural justice.

    iii) Such other relief as the Court deems proper.

Paragraph 14(ii) does not, of course, when read literally, frame a proper request for declaration. There is no declaration sought with reference to any rights or obligations allegedly arising in the parties to the proceeding. The declaration is with reference to a failure to hold a hearing, or, in any case, "a full and fair hearing" without reference to any statutory or other right or duty relating to the parties. The declaration sought should have related to the inferentially alleged invalidity of the two Orders-in-Council issued by the Governor-in-Council in response to the petition of the respondents, and I proceed to dispose of this appeal on the basis that the prayer for relief was so framed.

As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co. [(1920), 47 O.L.R. 308 (App. Div.).] Here Bell Canada in its statement of defence has raised the issue of law as to the position of the Governor in Council when acting under s. 64 of the National Transportation Act, supra, and the power and jurisdiction of the court in relation thereto. The issue so raised requires for its disposition neither additional pleadings nor any evidence. I therefore agree with respect with the judge of first instance that it is a proper occasion for a court to respond in the opening stages of the action to such an issue as this application raises.

The defendants other than Bell Canada comprise the occupant of the office of the Governor General of Canada at the time of the commencement of these proceedings and the then members of the federal Cabinet, collectively described in the style of cause as the Governor in Council. I note that the term is defined in the Interpretation Act, R.S.C. 1970, c. I-23, s. 28 in the following way:

> "Governor in Council", or "Governor General in Council" means the Governor General of Canada, or person administering the Government of Canada for the time being, acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada.

The more traditional procedure has been to join only the Attorney General of Canada as a party representing the Governor in Council. Exception was taken to the particular procedure in the motion for dismissal but the learned trial judge did not find it necessary to refer to the matter because he dismissed the action; and the Federal Court of Appeal did not deal with it. Because of the disposition I shall propose, the matter does not require an answer to the second request in the appellant's application wherein the applicant asks that the claim be struck out as against all named defendants other than the Attorney General of Canada.

The CRTC proceedings concerned the application by Bell Canada for approval under s. 320 of the Railway Act, supra, of those telephone tolls proposed to be charged by Bell Canada for its services in areas including the Northwest Territories. Section 321(1) of the Railway Act, supra, requires that "all tolls shall be just and reasonable ...". Subsection (2) prohibits "unjust discrimination" and subs. (3) authorizes the CRTC to determine "as a question of fact" whether or not there has been unjust discrimination or unreasonable preference. The National Transportation Act, supra, makes further provision for such hearings by the CRTC and for appeals therefrom; and we are here principally concerned with s. 64 of that statute, as amended by R.S.C. 1970 (2nd Supp.), c. 10, s. 65 (Schedule II, Item 32). It provides as follows:

> 64. (1) The Governor in Council may at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the Commission, whether such order or decision is made inter partes or otherwise, and whether such regulation is general or limited in its scope and application; and any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.
>
> (2) An appeal lies from the Commission to the Federal Court of Appeal upon a question of law, or a question of jurisdiction, upon leave therefor being obtained from that Court upon application made within one month after the making of the order, decision, rule or regulation sought to be appealed from or within such further time as a judge of that Court under special circumstances allows, and upon notice to the parties and the Commission, and upon hearing such of them as appear and dire to be heard; and the costs of such application are in the discretion of that Court.

The foregoing statutes were enacted at a time when the approval of telephone tariffs was a function of the Canadian Transport Commission and its predecessors. By the Canadian Radio-television and Telecommunications Commission Act, supra, ss. 14, 17 and Schedule Items 2 and 5, the CRTC was assigned these responsibilities with reference to telephones and telegraphs.

The two respondent organizations participated "actively throughout the hearing" (to quote from the statement of claim) in the Bell Canada application "to increase the rates charged to customers". Not being satisfied with the decision of the CRTC, the two respondents had the alternative of appealing to the Federal Court of Appeal on a question of law or jurisdiction (s. 64(2), supra) or of filing a petition with the Governor in Council "to set aside the relevant portion of the decision of the CRTC and to substitute its own order therefor" (to quote from para. 6 of the statement of claim). The respondents elected to follow the latter course. The record does not reveal the contents of the respondents' petition and arguments, if arty, in support of their application to the Governor in Council. Paragraph 10 of the claim asserts, and I treat it for the purposes of these proceedings as factually correct, that the Governor in Council received recommendations from the Minister of Communications, together with evidence and argument in support; evidence, opinions, and recommendations from the CRTC; reports from officials of the Department of Communications; and the reply of Bell Canada to each of the respondents' petitions. The respondents did not receive from the Governor in Council the contents of the recommendations and the material described in para. 10 of the claim, supra, but apparently did receive a copy of the Bell Canada reply to the petition. The Governor in Council denied the petitions of the respondents before the respondents had filed their respective responses to Bell Canada. According to the allegations made in the statement of claim, the Governor in Council did not communicate to the respondents the substance of the material received from the Minister and other sources mentioned above and did not invite and consequently did not receive the respondents' comments on such material. No oral hearing occurred in the sense of a session at which the Governor in Council heard the petitioners and the various respondents, and indeed the respondents do not insist that such a procedure is prescribed by law and do not now press for an 'oral' hearing. Before this Court the respondents' position was principally founded on the failure of the Governor in Council (a) to receive the actual petitions of the respondents and (b) to afford the respondents the opportunity to respond to the case made against them by the Minister, the departmental officials and the CRTC. To a much lesser extent the respondents objected to the lack of opportunity to answer the response by Bell Canada to the petitions, presumably because the respondents had already encountered at length the arguments and submissions of Bell Canada during the CRTC hearings and had no doubt anticipated Bell Canada's position in their respective petitions to the Governor in Council.

In support of these objections to the course followed by the Governor in Council the respondents submit:

(a) that the Governor in Council acting under s. 64 is a quasi-judicial body or at least owes the respondents a duty of fairness;

(b) the duty includes disclosure to the respondent of submissions received from the CRTC;

(c) the respondents have the right to answer Bell Canada if it has introduced some new aspect or submission;

> (d) the very minimum requirement is that the actual written submissions of the petitioners (respondents) must be placed before the Council and not a summary thereof prepared by officials;
>
> (e) the Governor in Council is required by s. 64 to give notice to all "parties" even if it moves on its own initiative (as the subsection authorizes it to do) so as to give prior notice to all those who may be affected by the rules to be established by the Governor in Council.

I turn then to the wording of s. 64 itself. This provision finds its roots in the Railway Act, 1868, 31 Vict., c. 68, subss. 12(9) and 12(10), which gave to the Governor in Council the power to approve rates and tariffs for the haulage of freight by rail. In 1903 the task was given to the Board of Railway Commissioners. Section 64 assumed its present form in the Railway Act, 1903, 3 Edw. VII, c. 58, s. 44. All these statutes related to railway rates in the first instance and eventually were extended to cover telephone and telegraph rates. In the meantime provision had been made for telephone rates and charges in the private statutes of incorporation of the Bell Telephone Company of Canada, for example the 1892 Bell Telephone Company of Canada Act, 55-56 Vict., c. 67, s. 3:

> The existing rates shall not be increased without the consent of the Governor in Council.

In its present state, s. 64 creates a right of appeal on questions of "law or jurisdiction" to the Federal Court of Appeal and an unlimited or unconditional right to petition the Governor in Council to "vary or rescind" any "order, decision, rule or regulation" of the Commission. These avenues of review by their terms are quite different. The Governor in Council may vary any such order on his own initiative. The power is not limited to an order of the Commission but extends to its rules or regulations. The review by the Governor in Council is not limited to an order made by the Commission inter partes or to an order limited in scope. It is to be noted at once that following the grant of the right of appeal to the Court in subs. (2), there are five subsections dealing with the details of an appeal to the Court. There can be found in s. 64 nothing to qualify the freedom of action of the Governor in Council, or indeed any guidelines, procedural or substantive, for the exercise of its functions under subs. (1).

The substance of the question before this Court in this appeal is this: is there a duty to observe natural justice in, or at least a lesser duty of fairness incumbent on, the Governor in Council in dealing with parties such as the respondents upon their submission of a petition under s. 64(1)? It will be convenient first to consider briefly the nature of the duty to be fair in our law.

It has been said by Lord Reid in Wiseman v. Borneman [[1971] A.C. 297., at p. 308:

> Natural justice requires that the procedures before any tribunal which is acting judicially shall be fair in all the circumstances.

Such a broad statement depends for its validity upon the meaning to be ascribed to "any tribunal", and to the terms of its parent statute. This Court was concerned with such matters in Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police and the Attorney General for Ontario [[1979] 1 S.C.R. 311.]. A probationary constable was dismissed without being told why his services were being dispensed with and without being given an opportunity to respond or to defend his position. In the result the majority decision of this Court required in those circumstances that the probationary constable should have been treated fairly, not arbitrarily, even though he was not entitled to all the procedural protection accorded to a full constable. The Chief Justice writing for the majority stated at p. 325:

> What rightly lies behind this emergence is the realization that the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the result of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

The essence of the decision is found in the Chief Justice's remarks at p. 328:

> In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a

> course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged. Status in office deserves this minimal protection, however brief the period for which the office is held.

The House of Lords in the earlier decision of Pearlberg v. Varty [[1972 1 W.L.R. 534.], had in effect found a presumption that the rules of natural justice apply to a tribunal entrusted with judicial or quasi-judicial functions but that no such presumption arises where the body is charged with administrative or executive functions. In the latter case courts will act on the presumption that Parliament had not intended to act unfairly and will "in suitable cases" imply an obligation in the body or person to act with fairness. See Lord Pearson at p. 547. Lord Hailsham L.C., combining the idea of fairness and natural justice, put it this way at p. 540:

> The doctrine of natural justice has come in for increasing consideration in recent years and the courts generally, and your Lordships' House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases.

Tucker L.J., thirty years earlier, came closer to our situation in this appeal when he said in Russell v. Duke of Norfolk [[1949] 1 All E.R. 109.], at p. 118:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.

The arena in which the broad rules of natural justice arose and the even broader rule of fairness now performs is described by Lord Denning M.R. in Selvarajan v. Race Relations Board [[1976] 1 All E.R. 12.] where His Lordship, after enumerating a number of authorities dealing with tribunals generally concerned with a lis inter partes in a variety of administrative fields, said at p. 19:

> In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

(Even in those instances the Court went on to add that such a body may adopt its own procedure, can employ staff for all preliminary work, but in the end must come to its own decision.)

Let it be said at the outset that the mere fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review. If that body has failed to observe a condition precedent to the exercise of that power, the court can declare that such purported exercise is a nullity. In Wilson v. Esquimalt and Nanaimo Railway Company [[1922] 1 A.C. 202.], for example, the Privy Council considered the position of the Lieutenant-Governor of British Columbia under the Vancouver Island Settlers' Rights Act, 1904, Amendment Act, 1917, S.B.C. 1917, c. 71. The effectiveness of a Crown land grant issued by order of the Lieutenant-Governor in Council was contested on the grounds that the Lieutenant-Governor in Council had no "reasonable proof" before them that the grantees had improved the lands in question or occupied them with an intention to reside thereon. The Court of Appeal found that there was no such evidence and hence declared the Order in Council to be void. The Privy Council proceeded on the basis that before the Lieutenant-Governor in Council could make the grant in question, it must determine that the statutorily prescribed conditions had been met by the applicant for the grant. As here, the allegation was made that the owners did not have "an adequate opportunity" to show that there was no factual foundation for the grant made by the Lieutenant-Governor in Council. The Privy Council found against this submission stating at p. 213 through Duff J., sitting as a member of the Board:

> The respondents were given the fullest opportunity to present before the Lieutenant-Governor in Council everything they might to urge against the view that the depositions produced in themselves constituted "reasonable proof," and they had the fullest opportunity also of supporting their contention that the

> depositions alone, in the absence of cross-examination, ought not to be considered sufficient, and that further time should be allowed to enable them to prepare their case. The appointed authority for dealing with the matter, it must be remembered, was the Executive Government of the Province directly answerable to the Legislature, and their Lordships agree without hesitation with the majority of the Court of Appeal in holding as they explicitly decided upon the same facts in Dunlop's case, that the Lieutenant-Governor in Council was not bound to govern himself by the rules of procedure regulating proceedings in a Court of justice.
>
> It cannot be suggested that he proceeded without any regard to the rights of the respondents and the procedure followed must be presumed, in the absence of some conclusive reason to the contrary, to have been adopted in exercise of his discretion under the statute as a proper mode of discharging the duty entrusted to him. His decisions taken in the exercise of that discretion are, in their Lordships' opinion, final and not reviewable in legal proceedings.

The Privy Council also determined in the case that factual issues, including the "reasonableness" or "sufficiency" of the evidence, were exclusively for the Lieutenant-Governor whose decision would not be reviewable by a court if there was "some evidence in support of the application" (per Duff J. at p. 213).

The Ontario Court of Appeal was concerned with similar issues in Border Cities Press Club v. Attorney General for Ontario [[1955] 1 D.L.R. 404.]. The factual differences are such that it affords no direct assistance here. The statute prescribed conditions precedent to the exercise of the powers granted by the Legislature to the Lieutenant-Governor in Council in that "sufficient cause must be shown" before the letters patent in question might be cancelled. The trial court found that an unreasonable request had been made to the applicant by the province, no hearing or opportunity was afforded the applicant, and indeed no notice of the impending cancellation of the charter was given by the Lieutenant-Governor in Council. The Court of Appeal set aside the declaration that the Order in Council was void for procedural reasons applicable to the powers of the court of the first instance and for reasons not here relevant, but in doing so stated through Pickup C.J.O. at p. 412:

> I agree with the learned Judge in Weekly Court, for the reasons stated by him, that the power conferred is conditional upon sufficient cause being shown, and that without giving the respondent an opportunity of being heard, or an opportunity to show cause why the letters patent should not be forfeited, the Lieutenant-Governor in Council would not have jurisdiction under the statute to make the order complained of. In exercising the power referred to, the Lieutenant-Governor in Council is not, in my opinion, exercising a prerogative of the Crown, but a power conferred by statute, and such a statutory power can be validly exercised only by complying with statutory provisions which are, by law, conditions precedent to the exercise of such power.

It may be of interest to note that in approving the observations of the court below with respect to the statutory powers granted to the Lieutenant-Governor in Council, no express approval was given to the comment by the learned Judge in Weelky [sic] Court that in performing his function under the statute the Lieutenant-Governor in Council was required to act judicially.

However, no failure to observe a condition precedent is alleged here. Rather it is contended that, once validly seized of the respondents' petition, the Governor in Council did not fulfill the duty to be fair implicitly imposed upon him, the argument goes, by s. 64(1) of the National Transportation Act. While, after Nicholson, supra, and Martineau v. Matsqui Institution (No. 2) [[1980] 1 S.C.R. 602.], (decision of this Court handed down December 13, 1979) the existence of such a duty no longer depends on classifying the power involved as "administrative" or "quasi-judicial", it is still necessary to examine closely the statutory provision in question in order to discern whether it makes the decision-maker subject to any rules of procedural fairness.

Instructive in this regard is the decision of the Ontario Court of Appeal in Re Davisville Investment Co. Ltd. and City of Toronto et al. [(1977) 15 O.R. (2d) 553.], where judicial review of an Order in Council was sought. The applicant had unsuccessfully applied to the Ontario Municipal Board for review of an earlier Board decision. By petition the applicant sought to have the Lieutenant-Governor in Council rescind the earlier Board order and direct a public hearing by the Board "to correct the earlier denial thereof" by the Board. The statute under which the petition was filed provided that the Lieutenant-Governor in Council might confirm, vary or rescind the Board order or require the Board to hold a new hearing. Lacourciere J.A speaking on behalf of the majority, after describing the alternative provision for appeal to the court on a question of law or jurisdiction, described the petition as "the political route to the Lieutenant-Governor in Council" and went on to state at pp. 555-56:

> The petition does not constitute a judicial appeal or review. It merely provides a mechanism for a control by the executive branch of Government applying its perception of the public interest to the facts established before the Board, plus the additional facts before the Council. The Lieutenant-Governor in Council is not concerned with matters of law and jurisdiction which are within the ambit of judicial control. But it can do what Courts will not do, namely, it can substitute its opinion on a matter of public convenience and general policy in the public interest. This is what was done by the Order in Council: if it was done without any error of law, or without defects of a jurisdictional nature, the Divisional Court had no power to interfere and properly dismissed the application before it.

At p. 557 His Lordship returns to the same point:

> Section 94 of The Ontario Municipal Board Act should not be construed restrictively as if it involved an inferior tribunal to which certain matters have been committed by the Legislature. I prefer to regard the power as one reserved by the legislative to the executive branch of Government acting on broad lines of policy. There is no reason to fetter and restrict the scope of the power by a narrow judicial interpretation.

In the Davisville proceeding the petition was treated as an appeal in writing and it may be noted that the respondent party filed a reply but no response thereto was made by the applicant. Blair J.A. dissented on the interpretation to be placed upon s. 94 as it related to the alternative courses open on such a petition to the Lieutenant-Governor in Council, but agreed with the majority of the court that the action of the Executive is reviewable only if the Lieutenant-Governor in Council acts outside the terms of the enabling statute.

It is not helpful in my view to attempt to classify the action or function by the Governor in Council (or indeed the Lieutenant-Governor in Council acting in similar circumstances) into one of the traditional categories established in the development of administrative law. The Privy Council in the Wilson case, supra, described the function of the Lieutenant-Governor as "judicial" as did the judge of first instance in the Border Cities Press proceedings, supra. However, in my view the essence of the principle of law here operating is simply that in the exercise of a statutory power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the superior court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorized by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute.

I turn now to a consideration of s. 64(1) in light of those principles. Clearly the Governor in Council is not limited to varying orders made inter partes where a lis existed and was determined by the Commission. The Commission is empowered by s. 321 of the Railway Act, supra, and the section of the CRTC Act already noted to approve all charges for the use of telephones of Bell Canada. In so doing the Commission determines whether the proposed tariff of tolls is just and reasonable and whether they are discriminatory. Thus the statute delegates to the CRTC the function of approving telephone service tolls with a directive as to the standards to be applied. There is thereafter a secondary delegation of the rate-fixing function by Parliament to the Governor in Council but this function only comes into play after the Commission has approved a tariff of tolls; and on the fulfilment of that condition precedent, the power arises in the Governor in Council to establish rates for telephone service by the variation of the order, decision, rule or regulation of the CRTC. While the CRTC must operate within a certain framework when rendering its decisions, Parliament has in s. 64(1) not burdened the executive branch with any standards or guidelines in the exercise of its rate review function. Neither were procedural standards imposed or even implied. That is not to say that the courts will not respond today as in the Wilson case supra, if the conditions precedent to the exercise of power so granted to the executive branch have not been observed. Such a response might also occur if, on a petition being received by the Council, no examination of its contents by the Governor in Council were undertaken. That is quite a different matter (and one with which we are not here faced) from the assertion of some principle of law that requires the Governor in Council, before discharging its duty under the section, to read either individually or en masse the petition itself and all supporting material, the evidence taken before the CRTC and all the submissions and arguments advanced by the petitioner and responding parties. The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature. Parliament might otherwise ordain, but in s. 64 no such limitation had been imposed on the Governor in Council in the adoption of the procedures for the hearing of petitions under subs. (1).

This conclusion is made all the more obvious by the added right in s. 64(1) that the Governor in Council may "of his motion" vary or rescind any rule or order of the Commission. This is legislative action in its purest form where the subject matter is the fixing of rates for a public utility such as a telephone system. The practicality of giving notice to "all parties", as the respondent has put it, must have some bearing on the interpretation to be placed upon s. 64(1) in these circumstances. In these proceedings the respondent challenged the rates established by the CRTC and confirmed in effect by the Governor in Council. There are many subscribers to the Bell Canada services all of whom are and will be no doubt affected to some degree by the tariff of tolls and charges authorized by the Commission and reviewed by the Governor in Council. All subscribers should arguably receive notice before the Governor in Council proceeds with its review. The concluding words of subs. (1) might be said to support this view where it is provided that:

> ... any order that the Governor in Council may make with respect thereto is binding upon the Commission and upon all parties.

I read these words as saying no more than this: if the nature of the matter before the Governor in Council under s. 64 concerns parties who have been involved in proceedings before the administrative tribunal whose decision is before the Governor in Council by virtue of a petition, all such persons, as well as the tribunal or agency itself, will be bound to give effect to the order in council issued by the Governor in Council upon a review of the petition. Different terminology to the same effect is found in predecessor statutes and I see no basis for reading into this statute any different parliamentary intent from that which I have ascribed to these words as they are found now in s. 64(1).

It was pointed out that in the past the Governor in Council has proceeded by way of an actual oral hearing in which the petitioner and the contending parties participated (P.C. 2166 dated 24/10/23; and P.C. 1170 dated 17/6/27). These proceedings do no more than illustrate the change in growth of our political machinery and indeed the size of the Canadian community. It was apparently possible for the national executive in those days to conduct its affairs under the Railway Act, supra, through meetings or hearings in which the parties appeared before some or all of the Cabinet. The population of the country was a fraction of that today. The magnitude of government operations bears no relationship to that carried on at the federal level at present. No doubt the Governor in Council could still hold oral hearings if so disposed. Even if a court had the power and authority to so direct (which I conclude it has not) it would be a very unwise and impractical judicial principle which would convert past practice into rigid, invariable administrative procedures. Even in cases mentioned above, while the order recites it to have been issued on the recommendation of the responsible Minister, there is nothing to indicate that the parties were informed of such a recommendation prior to the conduct of the hearing.

While it is true that a duty to observe procedural fairness, as expressed in the maxim audi alteram partem, need not be express (Alliance des Professeurs Catholiques de Montréal v. Commission des Relations Ouvrières de la Province de Québec [[1953] 2 S.C.R. 140]), it will not be implied in every case. It is always a question of construing the statutory scheme as a whole in order to see to what degree, if any, the legislator intended the principle to apply. It is my view that the supervisory power of s. 64, like the power in Davisville, supra, is vested in members of the Cabinet in order to enable them to respond to the political, economic and social concerns of the moment. Under s. 64 the Cabinet, as the executive branch of government, was exercising the power delegated by Parliament to determine the appropriate tariffs for the telephone services of Bell Canada. In so doing the Cabinet, unless otherwise directed in the enabling statute, must be free to consult all sources which Parliament itself might consult had it retained this function. This is clearly so in those instances where the Council acts on its own initiative as it is authorized and required to do by the same subsection. There is no indication in subs. (1) that a different interpretation comes into play upon the exercise of the right of a party to petition the Governor in Council to exercise this same delegated function or power. The wording adopted by Parliament in my view makes this clear. The Governor in Council may act "at any time". He may vary or rescind any order, decision, rule or regulation "in his discretion". The guidelines mandated by Parliament in the case of the CRTC are not repeated expressly or by implication in s. 64. The function applies to broad, quasi-legislative orders of the Commission as well as to inter-party decisions. In short, the discretion of the Governor in Council is complete provided he observes the jurisdictional boundaries of s. 64(1).

The procedure sanctioned by s. 64(1) has sometimes been criticized as an unjustifiable interference with the regulatory process: see Independent Administrative Agencies, Working Paper 25 of the Law Reform Commission of Canada (1980), at pp. 87-89. The Commission recommended that

> provisions for the final disposition by the Cabinet or a minister of appeals of any agency decisions except those requesting the equivalent of the exercise of the prerogative of mercy or a decision based on humanitarian grounds, should be abolished. (at p. 88)

Indeed it may be thought by some to be unusual and even counter-productive in an organized society that a carefully considered decision by an administrative agency, arrived at after a full public hearing in which many points of view have been advanced, should be susceptible of reversal by the Governor in Council. On the other hand, it is apparently the judgment of Parliament that this is an area inordinately sensitive to changing public policies and hence it has been reserved for the final application of such a policy by the executive branch of government. Given the interpretation of s. 64(1) which I adopt, there is no need for the Governor in Council to give reasons for his decision, to hold any kind of a hearing, or even to acknowledge the receipt of a petition. It is not the function of this Court, however, to decide whether Cabinet appeals are desirable or not. I have only to decide whether the requirements of s. 64(1) have been satisfied.

In reaching this conclusion concerning the procedures to be followed with reference to s. 64(1), I am assisted by the reasoning of Megarry J. in Bates v. Lord Hailsham [[1972] 1 W.L.R. 1973.] (cited by the majority judgment of this Court in Nicholson, supra). There the court was dealing with a challenge made to the legality of an order issued under the Solicitors Act abolishing a tariff of fees, on the grounds that the order should have been preceded by wider consideration by the rule enacting body. In refusing to intervene, Megarry J. stated at p. 1378:

> Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy ... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

Both the Bates case, supra, and this one deal with delegated legislation, the difference being that the delegatee in this case is, in effect, the executive branch of government while in the Bates case it was a committee of judges and solicitors constituted under s. 56 of the Solicitors Act. Under s. 56(2) the committee could

> make general orders prescribing and regulating in such manner as they think fit the remuneration of solicitors in respect of non-contentious business.

The Governor in Council under s. 64(1) is entitled to vary decisions on telephone tariffs already made by another body, but this difference does not strike me as material. Nor does the fact that a citizen may invoke the review procedure of s. 64(1) via petition, while no comparable right existed under the English act, constitute a valid ground of distinction. There is only one review procedure under s. 64(1) though it may be triggered in two ways, i.e., by petition or by the Governor in Council's own motion. It is clear that the orders in question in Bates and the case at bar were legislative in nature and I adopt the reasoning of Megarry J. to the effect that no hearing is required in such cases. I realize, however, that the dividing line between legislative and administrative functions is not always easy to draw: see Essex County Council v. Minister of Housing [(1967), 66 L.R.G. 23.].

The answer is not to be found in continuing the search for words that will clearly and invariably differentiate between judicial and administrative on the one hand, or administrative and legislative on the other. It may be said that the use of the fairness principle as in Nicholson, supra, will obviate the need for the distinction in instances where the tribunal or agency is discharging a function with reference to something akin to a lis or where the agency may be described as an 'investigating body' as in the Selvarajan case, supra. Where, however, the executive branch has been assigned a function performable in the past by the Legislature itself and where the res or subject matter is not an individual concern or a right unique to the petitioner or appellant, different considerations may be thought to arise. The fact that the function has been assigned as here to a tier of agencies (the CRTC in the first instance and the Governor in Council in the second) does not, in my view, alter the political science pathology of the case. In such a circumstance the Court must fall back upon the basic jurisdictional supervisory role and in so doing construe the statute to determine whether the Governor in Council has performed its functions within the boundary of the parliamentary grant and in accordance with the terms of the parliamentary mandate.

The precise terminology employed by Parliament in s. 64 does not reveal to me any basis for the introduction by implication of the procedural trappings associated with administrative agencies in other areas to which the principle in Nicholson, supra, was directed. The roots of that authority do not reach the area of law with which we are concerned in scanning s. 64(1).

As mentioned at the outset, the Federal Court of Appeal, speaking through Le Dain J., agreed with the trial division except with respect to the lack of opportunity for the respondents to respond to the reply forwarded to the Governor in Council by Bell Canada in the proceedings initiated by the petition of the respondents. Le Dain J. regarded this issue as being one of fact depending for its determination on the nature of Bell Canada's answer and the issues raised thereby, and on the reasonableness of the delay of two weeks before the issuance of the decision of the Governor in Council. His Lordship concluded:

> Since the question is essentially one of fact, one cannot say before the issue has been tried that the Statement of Claim does not disclose a reasonable cause of action.

For the reasons already given I am unable, with respect, to conclude that the issue of fairness arises in these proceedings on a proper construction of s. 64(1). If there were to be a distinction between rights arising with reference to submissions from government sources and rights arising with reference to the response from the rate applicant Bell Canada, more compelling reasons exist for disclosure of the intra-governmental communications as the respondents were, by this stage in these lengthy proceedings, very familiar with the application made by Bell Canada and the position taken by that company before the Commission by reason of the respondents' active participation in the hearings before the CRTC. In any case, I can discern nothing in s. 64(1) to justify a variable yardstick for the application to that section of the principle of fairness according to the source of the information placed before the Governor in Council for the disposition of the respondents' petition. The basic issue is the interpretation of this statutory provision in the context of the pattern of the statute in which it is found. In my view, once the proper construction of the section is determined, it applies consistently throughout the proceedings before the Governor in Council.

I would therefore allow the appeal and restore the order of the trial court. As to costs, the respondent has never asked for costs and the Attorney General of Canada at the hearing in this Court placed himself in the hands of the Court. In all the circumstances of these proceedings, I would not consider this to be a case for costs and I would award no costs to any party in this Court or in any of the courts below.

Appeal allowed.

Adams-Smith v. Christian Horizons, [1997] O.J. No. 2887

Ontario Judgments

Ontario Court of Justice (General Division)

Motions Court

Molloy J.

Heard: July 11, 1997.

Oral judgment: July 17, 1997.

Court File No. 97-CV- 122871

[1997] O.J. No. 2887 | 31 C.C.E.L. (2d) 238 | 14 C.P.C. (4th) 78 | 1997 CarswellOnt 3200

Between Jean Adams-Smith, plaintiff (responding party), and Christian Horizons, defendant (moving party)

(8 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a cause of action or defence — Particulars — Failure to provide, effect of.

This was an application to strike a statement of claim. The plaintiff alleged that the defendant employer breached a fiduciary duty owed to her as an employee. The defendant argued that the claim did not disclose a reasonable cause of action as the cause of action was not known to the law. It also argued that a minimum level of disclosure of particulars had not been met and that the most appropriate remedy was to strike the pleadings as a whole.
HELD: The application was dismissed.

While the plaintiff's claim was a novel argument, the area of fiduciary duty was one that was continually being developed by the courts. Therefore it could not be said that the claim could not possibly succeed at trial so as to justify the exercise of the discretion to strike under Rule 21 of the Ontario Rules of Civil Procedure. The references in the pleadings to the Occupational Health and Safety Act were not to be struck. While the plaintiff had not alleged that a cause of action as a result of a breach of the Act arose, the alleged breaches might be relevant to other causes of action and whether an appropriate standard of conduct had been met. However the pleadings as a whole were not sufficiently coherent and particularized to enable the defendant to plead to it. As the pleading as a whole needed to be amended, ordering particulars on a piece meal basis would not be sufficient. Paragraphs 8 to 23 of the claim were to be struck out with leave to amend. The plaintiff was directed to provide particulars in the amended pleadings.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 21, 25.06, 25.11.

Counsel

James Jagtoo, for the plaintiff (responding party). Adrian J. Miedema, for the defendant (moving party).

MOLLOY J. (orally)

1 The defendant moves to strike the Statement of Claim on various grounds. With respect to some of the claims, the allegation is that the claims do not disclose a reasonable cause of action and the motion to strike is under Rule 21. With respect to other aspects of the claim the defendant is moving under Rule 25.11 and 25.06 on the grounds that a minimum level of disclosure of particulars has not been met and that the appropriate remedy is to strike the pleading altogether, rather than to order particulars in a piecemeal fashion.

2 I will deal first with the allegations of no cause of action under Rule 21. The plaintiff alleges that the employer breached a fiduciary duty owed to her as employee. The defendant takes the position that this is a cause of action which is not known to the law, and should be struck on that basis. I agree that this is a novel argument. I am not aware of, and the parties have not been able to point me to, any case law that has recognized a breach of fiduciary duty by an employer as a cause of action. However, the Supreme Court of Canada has directed in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; 74 D.L.R. (4th) 321 that the power under Rule 21 to strike an action as disclosing no cause of action should be exercised with care and only in a situation where it is not possible that the claim can succeed at trial. A Statement of Claim should not be struck merely because the cause of action which is raised is novel. This is a novel cause of action. However the entire area of fiduciary duty is an emerging one and one which continues to be developed and fine tuned by the courts. We have yet to see how the concept will be affected by decisions from the Supreme Court of Canada such as the Lac Minerals v. Corona decision, [1989] 2 S.C.R. 574. Therefore I am not prepared to say that the breach of fiduciary duty cause of action cannot possibly succeed. It is possible that a cause of action can be founded on this concept. Therefore that aspect of the defendant's motion is dismissed.

3 With respect to the Occupational Health and Safety Act claim, the plaintiff is not alleging that she has a cause of action as a result of a breach of the Occupational Health and Safety Act. However, breaches of that Act are pleaded without any particular reference to how they are relevant. Counsel for the plaintiff argues that the Occupational Health and Safety Act breaches are relevant to show the standard of conduct or unacceptable level of standard of conduct by the employer. It is clear on the case law that a breach of a statute or of a statutory duty does not create a cause of action, either under the statute or at common law: See Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria (1981), 124 D.L.R. (3d) 193 (S.C.C.), see also Canada v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205 (S.C.C.). However the breach of a statutory duty may be relevant to components of other causes of action and relevant to whether an appropriate standard of conduct has been met: See Saskatchewan Wheat Pool, supra. Therefore the defendant's motion to strike this paragraph (that is paragraph 17 of the Statement of Claim) as disclosing no cause of action is dismissed.

4 The balance of the defendant's motion to strike relates to a lack of particularity. Here I am in agreement with the position taken by counsel for the defendant, that the pleading as a whole is not sufficiently coherent and particularized to enable the defendant to plead to it. For example, breach of contract is alleged. However, in the portion of the claim that deals with particulars of the contract, a written contract is first alleged. The plaintiff then goes on to plead that this contract, and other written contracts which replaced it, are invalid and unenforceable and relies on the doctrine of non est factum. The plaintiff then goes on to plead a course of conduct in her employment which includes hours of work and hourly rates of pay which are not consistent with the written contract she has alleged nor with the schedule that she has attached showing what she was actually paid. It is not clear whether this allegation relates to an oral agreement which varies the written contract or whether it is an allegation of a breach of the written contract. Also, it is not clear whether the claim here is truly that the written contract is invalid, unconscionable or unenforceable for whatever reasons, or whether it is alleged that the written contract is binding and has been breached. It is difficult to simply order particulars of these kinds of deficiencies and still come out with a coherent and understandable pleading. It is far preferable, in my view, to strike the pleading with leave to amend, so that a logical and coherent pleading can be delivered which sets out clearly and precisely the nature of the contract, whether it was in writing or oral and the approximate dates of the contract, who the parties were, if there were oral representations, who made them, and then set out the nature of the breach, whether it is a breach of the written contract or a breach of oral amendments to the written contract, or whatever. If there are alternative claims with respect to the contract being invalid as opposed to breached, then they should be expressed as alternative claims.

5 With respect to the breach of fiduciary duty cause of action and the unjust enrichment claims, and in this regard I am mainly referring to the breach of fiduciary duty, the main difficulty is that there is no identification of which factual allegations relate to which causes of action. It may be the case that some factual components will relate to more than one cause of action or even all of the causes of action, but this is not apparent from the pleading as it is presently constituted. It would be of great assistance if the Statement of Claim was organized in categories identifying specifically what causes of action are alleged and which facts are pleaded to support each of those causes of action.

6 The same applies to the Occupational Health and Safety Act. I have dismissed the defendant's motion based on the argument that this paragraph should be struck entirely. However it is necessary to tie the breach or alleged breach of the Occupational Health and Safety Act to some aspect of the cause of action or causes of action. Also the particular sections of the Occupational Health and Safety Act which are alleged to have been breached should be pleaded with specificity.

7 In addition to these general matters there were some items of particulars which were identified in the Notice of Motion. Initially, there was a long list of them, but counsel managed to whittle that down to five subparagraphs of paragraph 2 in the Notice of Motion.

8 In subparagraph (v), particulars of "minimum sleep" were required, as referred to in paragraph 13 of the Statement of Claim. In my view this is not necessary for the defendant to plead and can be obtained on discovery. Also this not a matter which would be easily particularized. On balance, I find that the plaintiff does not need to provide particulars of this particular allegation.

9 With respect to subparagraph (ix), the defendant seeks particulars of the "numerous complaints" referred to by the plaintiff in paragraph 15 of the Statement of Claim. I believe this point is well taken. It may well be that the plaintiff cannot remember each and every incident of complaint or that she has not kept full records of them, but she must provide particulars of the information she does have. For example, if there are written complaints, the dates of those complaints should be itemized and the person to whom they were directed. If the complaints were oral, that should be stated as well as the person to whom the complaint was directed. The plaintiff should also provide the approximate date or range of dates, and in each of those situations, whether or not there was a response and what that response was from the defendant.

10 Subparagraphs (x) and (xii) of paragraph 2 both relate to the production of documentation to substantiate allegations made in the Statement of Claim. Those documents are not required by way of particulars and are not needed for the purpose of the defendant pleading. Therefore the defendant's request for particulars of these two subparagraphs is dismissed.

11 With respect to subparagraph (xiv), the defendant seeks particulars of the allegations of "deliberate, calculated and malicious" actions by the defendant as alleged in paragraph 21 of the Statement of Claim. In my view paragraph 21 of the Statement of Claim already provides the particulars of those actions and states that the actions referred to are the defendant's leaving the plaintiff at risk to her charges, who were known to have aggressive tendencies and against whom there was no protection in law. If in fact those are the only facts relied upon with respect to the punitive damages and with respect to the allegation of deliberate calculated and malicious conduct, then the requirements for particulars is met. The paragraph is plain enough on its face.

12 As I have already said, I do not consider this to be a situation in which ordering particulars on a piece meal basis would be sufficient. The pleading as a whole needs to be amended. I am therefore striking out paragraphs 8 to 23 of the Statement of Claim with leave to amend.

13 The plaintiff is directed to provide particulars in the amended pleading of the items set out in paragraph 2 (b) (ix) of the Statement of Claim. In other respects the defendant's motion is dismissed.

MOLLOY J.

End of Document

Air Canada v. British Columbia (Attorney General), [1986] 2 S.C.R. 539

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Wilson, Le Dain and La Forest JJ.

1985: November 4 / 1986: November 27.

File No: 18089.

[1986] 2 S.C.R. 539 | [1986] 2 R.C.S. 539 | [1986] S.C.J. No. 68 | [1986] A.C.S. no 68 | 32 D.L.R. (4th) 1

Air Canada, appellant; v. The Attorney General of British Columbia, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Crown — Proceedings against the Crown — Petition of right — Fiat — Appellant seeking redress from Crown for benefits obtained pursuant to an invalid statute — Fiat refused by Lieutenant-Governor on advice of Provincial Attorney General — Whether mandamus may be issued to direct Attorney General to advise Lieutenant-Governor to grant fiat — Crown Proceeding Act, R.S.B.C. 1979, c. 86.

Appellant had in a separate action sought a declaration that the British Columbia Gasoline Tax Act was ultra vires and a declaration that it was entitled to be reimbursed all monies paid after August 1, 1974. For the monies paid before that date, however, appellant, in conformity with the Crown Proceeding Act, issued a petition of right seeking substantially the same relief. This Act preserved the traditional method of suit against the Crown by way of petition of right with respect to causes of action that arose before August 1, 1974, and required those seeking redress from the Crown to obtain a fiat. The provincial Attorney General advised the Executive Council to recommend that the Lieutenant Governor deny the fiat and he did. Appellant then applied to the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act for an order in the nature of mandamus to compel the Attorney General to consider the petition of right and then to advise the Lieutenant Governor whether to grant his fiat. The application was dismissed and the judgment affirmed by a majority of the Court of Appeal. This appeal is to determine whether an order may be issued directing a provincial Attorney General to advise the Lieutenant Governor to grant a fiat to a petition of right under which a claim is made for the return of money [page540] alleged to have been levied by the province under an unconstitutional statute.

Held: The appeal should be allowed and an order in the nature of mandamus should be issued directing the Attorney General of British Columbia to advise the Lieutenant-Governor to grant his fiat to the petition of right.

It has been established that a statute cannot permit the retention of monies obtained under an unconstitutional statute. Consequently, a similar result cannot be attained indirectly under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. The discretion to grant or refuse a fiat, like other executive powers, must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution. Under the British Columbia Attorney General Act, the Attorney General is the Lieutenant-Governor's principal legal adviser and the legal member of the Executive Council. Though his duty, technically, is simply to advise, the issue here was a legal one and one to which there was only one answer under the Constitution. The Attorney General was bound to advise the Lieutenant-Governor to grant his fiat, and the Executive Council was in turn bound to accept that advice.

Cases Cited

Applied: Amax Potash Ltd. v. Government of Saskatchewan [1977] 2 S.C.R. 576; referred to: Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138; British Columbia Power Corp. v. British Columbia Electric Co., [1962] S.C.R. 642; Ryves v. Duke of Wellington (1846), 9 Beav. 579, 50 E.R. 467; In Re Nathan (1884), 12 Q.B.D. 461; Orpen v. Attorney-General for Ontario, [1925] 2 D.L.R. 366; Bombay and Persia Steam Navigation Co. v. MacLay, [1920] 3 K.B. 402; Irwin v. Grey (1862), 3 F. & F. 635, 176 E.R. 290; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Teh Cheng Poh v. Public Prosecutor, Malaysia, [1980] A.C. 458; Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997.

[page541]

Statutes and Regulations Cited

Attorney General Act, R.S.B.C. 1979, c. 23, s. 2(a), (e). Crown Procedure Act R.S.B.C. 1960, c. 89 [rep. 1974, c. 24, s. 16], s. 4. Crown Proceeding Act, R.S.B.C. 1979, c. 86. Gasoline Tax Act, R.S.B.C. 1979, c. 152. Interpretation Act, R.S.B.C. 1979, c. 206, s. 29 "Lieutenant Governor", "Lieutenant Governor in Council". Judicial Review Procedure Act, R.S.B.C. 1979, c. 209.

Authors Cited

Edwards, J.Ll.J. The Law Officers of the Crown. London: Sweet & Maxwell, 1964. Halsbury's Laws of England, vol. 9, 2nd ed. London: Butterworths, 1933.

APPEAL from a judgment of the British Columbia Court of Appeal (1983), 47 B.C.L.R. 341, 150 D.L.R. (3d) 653, [1983] 6 W.W.R. 689, dismissing appellant's appeal from a judgment of Callaghan J. (1982), 41 B.C.L.R. 41, 141 D.L.R. (3d) 530, [1982] 6 W.W.R. 415, dismissing its petition presented pursuant to the Judicial Review Procedure Act of British Columbia. Appeal allowed.
D.M.M. Goldie, Q.C., and W.S. Martin, for the appellant. E.R.A. Edwards, Q.C., and Robert Vick Farley, for the respondent.

[Quicklaw note: An errata was published at [1989] 1-A S.C.R., page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of the Court was delivered by

LA FOREST J.

1 The issue in this case is whether an order may be issued directing a provincial Attorney General to advise the Lieutenant Governor to grant a fiat to a petition of rights under which a claim is made for the return of money alleged to have been levied by the province under an unconstitutional statute.

2 In July 1980, the appellant, Air Canada, commenced an action in the Supreme Court of British Columbia seeking a declaration that the Gasoline Tax Act, R.S.B.C. 1979, c. 152, does not apply to Air Canada or is ultra vires the province, an accounting of all monies paid under that Act by [page542] Air Canada and a declaration that the appellant is entitled to be repaid all monies paid after August 1, 1974. This action represented only a portion of Air Canada's claim. It had been paying taxes under the Act since 1937. However, as regards causes of action that arose before August 1, 1974, the Crown Proceeding Act, R.S.B.C. 1979, c. 86, preserved the traditional method of suit against the Crown by way of petition of right which requires those seeking redress from the Crown to obtain a fiat. In conformity with this procedure, Air Canada in July 1981 issued a petition of right seeking substantially the same relief as in the action described above, but for monies paid before August 1, 1974. It is with this petition of rights that we are concerned on this appeal.

3 The petition was duly served on the Provincial Secretary and a copy was forwarded to the provincial Attorney General. The Attorney General advised the Executive Council to recommend that the Lieutenant Governor deny the fiat. The Provincial Secretary then forwarded a copy of the petition to the Lieutenant Governor along with the following advice:

> After due deliberation and on the recommendation of the Attorney General, the Executive Council humbly advises that this is not an appropriate case for the granting of a Fiat. The Executive Council has instructed me to transmit this advice.

Pursuant to this advice, the Lieutenant Governor accordingly declined to grant the fiat and the Provincial Secretary communicated this fact to Air Canada.

4 Air Canada then applied to the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, for:

(a) an order in the nature of mandamus compelling the Attorney General to consider the petition of right and then advise the Lieutenant-Governor whether to grant his fiat;

[page543]

(b) a declaration that the Attorney General has omitted to exercise his statutory power of decision to advise the Lieutenant-Governor and that he has a duty to do so;

(c) a direction to the Attorney General to reconsider and determine whether the Lieutenant-Governor should be advised to grant his fiat together with reasons.

5 Air Canada's application was heard by Callaghan J. who dismissed it in a judgment pronounced on October 1, 1982: 41 B.C.L.R. 41, 141 D.L.R. (3d) 530, [1982] 6 W.W.R. 415. Air Canada then appealed to the British Columbia Court of Appeal which,by majority (Taggart and Aikins JJ.A., Anderson J.A. dissenting), dismissed the appeal: (1983), 47 B.C.L.R. 341, 150 D.L.R. (3d) 653, [1983] 6 W.W.R. 689. Air Canada was then granted leave to appeal to this Court, [1983] 2 S.C.R. v.

6 In this Court, counsel for Air Canada did not press the arguments regarding judicial review of statutory powers, but essentially sought an order in the nature of mandamus, which formed the basis of the judgment of Anderson J.A., the dissenting judge in the Court of Appeal. Since I am substantially in agreement with Anderson J.A., I need not enter into a discussion of the other issues raised in the case.

7 The applicable law on this issue evolved from the well established principle that neither Parliament nor a legislature can preclude a determination of the constitutional validity of legislation. That principle was thus expressed by Laskin J. (as he then was) in Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138, at p. 151:

> The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied.

[page544]

8 I cannot believe that if there was no Crown Proceeding Act permitting suits against the Crown, a court could, where the case was not frivolous, refuse access to the court to test the constitutionality of a statute simply because a fiat was refused. What is sought here, however, is more involved. The action is an attempt to obtain redress from the Crown for benefits obtained pursuant to an invalid statute.

9 This Court took an important step in that direction in British Columbia Power Corp. v. British Columbia Electric Co., [1962] S.C.R. 642. There the plaintiff sought the appointment of a receiver over property owned by a corporation whose common shares had been vested in the Crown in right of the province by a statute whose constitutional validity was contested. The Crown resisted the appointment of the receiver on the ground that this would affect its property and interests. This Court, however, rejected the Crown's contention. Kerwin C.J., giving the majority judgment, set forth the following principles at pp. 644-45:

> In a federal system, where legislative authority is divided, as are also the prerogatives of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is a reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid.

10 In Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576, this Court went further and held ultra vires a statute that prohibited the recovery of taxes paid under protest pursuant to an unconstitutional statute. Dickson J. (as he then was) succinctly put the principle in these terms at p. 592:

> The principle governing this appeal can be shortly and simply expressed in these terms: if a statute is found to be ultra vires the legislature which enacted it, legislation [page545] which would have the effect of attaching legal consequences to acts done pursuant to that invalid law must equally be ultra vires because it relates to the same subject-matter as that which was involved in the prior legislation. If a state cannot take by unconstitutional means it cannot retain by unconstitutional means.

11 Let us examine the present situation in the light of these principles. Until the passage of the Crown Proceeding Act, the traditional way to sue the Crown, we saw, was by petition of right, but no court would take cognizance of a case until the Lieutenant Governor had issued his fiat. This traditional procedure has been retained in British Columbia in respect of causes of action against the Crown that arose before August 1, 1974. The present is such an action. The Lieutenant Governor has refused his fiat. Thus, if this refusal is constitutionally permissible, what Amax declared was not possible has been effectively, if indirectly, accomplished by the exercise of the Crown's prerogative power to refuse a fiat.

12 In my view, if even a statute cannot permit the retention of monies obtained under an unconstitutional statute, that result cannot be achieved under a purported exercise of a discretion to refuse a fiat, whatever may be the legal foundation of that supposed discretion. All executive powers, whether they derive from statute, common law or prerogative, must be adapted to conform with constitutional imperatives.

13 There was considerable discussion in the courts below regarding the extent of the discretion of the Lieutenant Governor to grant or deny his fiat. There are indications in some cases that there is, in effect, a duty to grant the fiat unless a claim is frivolous; see Ryves v. Duke of Wellington (1846), 9 Beav. 579, 50 E.R. 467, at p. 475; In re Nathan (1884), 12 Q.B.D. 461, at p. 479. The fiat, Bowen L.J. states in the latter case, is granted as a matter of "invariable grace" by the Crown and it is the constitutional duty of his adviser not to advise refusal of a fiat unless the claim is frivolous. In Orpen v. Attorney General for Ontario, [1925] 2 D.L.R. 366 (Ont. H.C.) at p. 372, however, [page546] Riddell J. explained these remarks as simply reflecting the usual practice. The constitutional duty of the sovereign's advisers in such a case, he stated, is to act conscientiously in their best judgment (p. 375).

14 I need not consider which of these views should prevail in ordinary cases. For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution. Assuming there might still be a residual power to refuse a fiat in a truly frivolous case, no one can claim this is such a case, and no such contention was put forward.

15 It does not follow, as Taggart J.A. suggested, that if the foregoing constitutional position is correct, then there is no need for Air Canada to seek a fiat. The principle I have enunciated must be applied within the context of the institutional arrangements provided by law. The only machinery provided for obtaining a judgment for money against the Crown in circumstances like the present is, by virtue of the Crown Proceeding Act, by petition of rights, and to pursue a claim in that way, a fiat is necessary.

16 To achieve this result, Air Canada seeks to obtain an order by way of mandamus directing the Attorney General to advise the Lieutenant-Governor to grant a fiat because the Lieutenant-Governor acts on his advice in considering the grant of a fiat. This power of the Attorney General is exercised in conformity with s. 2(a) and (e) of the Attorney General Act, R.S.B.C. 1979, c. 23, which read as follows:

> 2. The Attorney General
>
> [page547]
>
> (a) is the official legal adviser of the Lieutenant Governor and the legal member of the Executive Council;
>
> . . .
>
> (e) is entrusted with the powers and charged with the duties which belong to the office of the Attorney General and Solicitor General of England by law or usage, so far as the same powers and duties are applicable to the Province, and also with the powers and duties which, by the laws of Canada and of the Province to be administered and carried into effect by the government of the Province, belong to the office of the Attorney General and Solicitor General;

These provisions make the Attorney General the official legal adviser of the Lieutenant-Governor and the legal member of the Executive Council and, by s. 2(e), entrusts him with the duties of the Attorney General of England as far as these are applicable to the province. This includes the right to advise the Crown regarding the grant of a fiat; see J.Ll.J. Edwards, The Law Officers of the Crown (1964), at p. 154; In re Nathan, supra, at pp. 468, 475, 479; Halsbury's Laws of England, 2nd ed. 1933, vol. 9, para. 1180, note (c). It is true that some cases mention that in England the sovereign acted on the advice of the Secretary of State; see Bombay and Persia Steam Navigation Co. v. MacLay, [1920] 3 K.B. 402, at p. 408; Irwin v. Grey (1862), 3 F. & F. 635, 176 E.R. 290 (C.P.), at p. 291. But as is obvious from the latter case, the Secretary's duties in this area were essentially to receive petitions of right and, after seeking the opinion of the law officers thereon, to advise Her Majesty accordingly.

17 A similar position prevails in British Columbia. There the Provincial Secretary is assigned the task of receiving petitions for transmittal to the Lieutenant Governor for consideration. This is done by s. 4 of the Crown Procedure Act, R.S.B.C. 1960, c. 89, which reads as follows:

> 4. (1) The petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in [page548] order that the Lieutenant-Governor, if he thinks fit, may grant his fiat that right be done.
>
> (2) No fee or sum of money shall be payable by the suppliant on so leaving the petition, or upon his receiving back the same.

18 As Taggart and Anderson JJ.A. in the Court of Appeal explain, however, the Provincial Secretary seeks the advice of the Attorney General, the legal member of the Executive Council, before referring the matter to the Executive Council. The Executive Council then advises the Lieutenant Governor as to the manner in which he should dispose of the matter on the recommendation of the Attorney General.

19 From the foregoing, it seems to me that the appropriate officer against whom an order by way of mandamus should issue in this case is the Attorney General. He is the Lieutenant Governor's principal legal adviser, and I am inclined to agree with Anderson J.A.'s view that, by virtue of s. 2 of the Attorney General Act, he is entrusted with the sole power and duty to advise the Lieutenant Governor whether or not to issue a fiat. That was the English position, which s. 2(e) adopts. One must make a distinction here between the Lieutenant Governor and the Lieutenant-Governor in Council. The latter includes the Executive Council; the former does not; see Interpretation Act, R.S.B.C. 1979, c. 206, s. 29. It is to the Lieutenant-Governor alone that the power to issue a fiat is given by the Crown Procedure Act. That being so, as Anderson J.A. notes, there is no legal scope for the involvement of the Executive Council. The referral to the Council becomes a mere formality.

20 It is not really necessary, however, to pronounce definitively on the latter issues. Even on the assumption that under ordinary circumstances there is a meaningful role for the Executive Council to play in deciding whether or not a fiat should issue, I would retain the same view. Technicality must be tempered with realism. The Attorney General is the Lieutenant Governor's principal legal adviser and the legal member of the Executive Council. Though his duty is technically simply to advise, the issue here is a legal one, one moreover to which under the Constitution, there is only [page549] one answer. In giving advice, the Attorney General must conform to the requirements imposed by the federal structure of the Constitution. He is bound to advise the Lieutenant-Governor to grant his fiat. I cannot accept the proposition advanced by Callaghan J. and the majority of the Court of Appeal to the effect that the Attorney General complied with his duty to advise the Lieutenant Governor when he advised him to refuse a fiat.

21 The Executive Council is in turn bound to accept the advice of the Attorney General in a case like the present. For, even if it has a right to advise the Lieutenant Governor, it, too, is under an obligation to exercise that right consistently with constitutional imperatives. In any event, one could look at the order sought as being directed to the Attorney General in a representative capacity; see Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.

22 Finally, I would note that there is precedent for the kind of order sought here. Teh Cheng Poh v. Public Prosecutor Malaysia, [1980] A.C. 458 (P.C.) stands for the proposition that mandamus lies to compel a minister to properly advise the executive where there has been a constitutional abuse of power by the Crown; see also Padfield v. Minister of Agriculture, Fisheries & Food, [1968] A.C. 997 (H.L.)

23 Finally, counsel for the respondent argued that a judgment along these lines would preclude the province's relying not only on Crown immunity, but also on limitation periods, retroactive remedial legislation and mutual mistake of law to retain monies collected under ultra vires legislation. While I do not wish to enter into these issues at any length, I do not think this conclusion necessarily follows. There is a difference between an executive act directly interfering with a recourse to the courts for the recovery of monies under an allegedly unconstitutional statute and relying on general principles of law like limitation periods which are aimed at different purposes, in that case, [page550] barring stale claims. The significance of this distinction is best left to be raised in the principal action when the matter, which was simply touched upon in this Court, can be examined in depth.

24 For these reasons, I would allow the appeal set aside the decision of the judge who heard the application, reverse the judgment of the Court of Appeal of British Columbia, and direct that an order in the nature of mandamus issue directing the Attorney General to advise the Lieutenant Governor to grant his fiat to the petition of right in this case.

* * * * *

Errata, published at [1989] 1-A S.C.R., page iv

[1986] 2 S.C.R. p. 539, line e-1 of the English version. Read "separate action" instead of "separation action".

Arsenault v. Canada, [2009] F.C.J. No. 896

Federal Court Judgments

Federal Court of Appeal

Charlottetown, Prince Edward Island

Nadon, Blais and Pelletier JJ.A.

Heard: June 10, 2009.

Judgment: August 11, 2009.

Docket A-124-08

[2009] F.C.J. No. 896 | [2009] A.C.F. no 896 | 2009 FCA 242 | 395 N.R. 377 | 179 A.C.W.S. (3d) 813

Between Her Majesty the Queen, Appellant, and Robert Arsenault, Joseph Aylward, Wayne Aylward, James Buote, Richard Blanchard, Executor of the Estate of Michael Deagle, Bernard Dixon, Clifford Doucette, Kenneth Fraser, Terrance Gallant, Devin Gaudet, Peter Gaudet, Rodney Gaudet, Taylor Gaudet, Casey Gavin, Jamie Gavin, Sidney Gavin, Donald Harper, Carter Hutt, Terry Llewellyn, Ivan MacDonald, Lance MacDonald, Wayne MacIntyre, David McIsaac, Gordon MacLeod, Donald Mayhew, Austin O'Meara and Boyd Vuozzo, Respondents

(13 paras.)

Case Summary

Appeal by the Crown from an order of a motions judge setting aside a Prothonotary's order striking out the respondents' action for damages for breach of agreements respecting their snow crab fishing quotas, as result of the Minister's reallocation of the snow crab quota for other purposes. Although the respondents did not allege that this reallocation was unauthorized, they argued that they were entitled to compensation for any resulting loss in accordance with their agreements with the Minister. The Prothonotary ordered that all those portions of the respondents' pleadings that asserted their claim in contract were to be struck out, on the ground that they disclosed no reasonable cause of action since the Minister could not, by means of contract, fetter his discretion to award fishing quota. As for the balance of the claims, the Prothonotary ordered that they be stayed. The Motions Judge set aside the Prothonotary's decision striking the portions of the pleadings asserting a claim in contract on the basis that this was a complex issue of fact and law which should not be resolved on a motion to strike. With respect to the other claims asserted by the respondents, the Motions Judge was not prepared to find that it was plain and obvious that those claims would fail. The Crown argued that the claim was a collateral attack on the Minister's licensing decisions, the legality of which must first be established by means of an application for judicial review.
HELD: Appeal dismissed.

Since the respondents accepted that the Minister's decisions were validly made, the action should be allowed to proceed on that basis. Should it become apparent later that the respondents must rely upon the illegality of the Minister's decisions in order to succeed, the Crown's arguments could be dealt with at that time.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, SOR/98-106, Rule 221(1)

Appeal From:

Appeal from an Order of Mr. Justice Martineau dated March 5, 2008, Docket Number T-378-07, [2008] F.C.J. No. 375.

Counsel:

Reinhold M. Endres, Q.C. and Patricia MacPhee, for the Appellant.

Kenneth L. Godfrey, for the Respondents.

The judgment of the Court was delivered by

PELLETIER J.A.

1 This is an appeal from the decision of Mr. Justice Martineau of the Federal Court (the Motions Judge), reported as *Arsenault v. Canada*, 2008 FC 299, 330 F.T.R. 8, in which the Motions Judge set aside a decision of Prothonotary Morneau. The issue in the appeal is the application of this Court's decision in *Grenier v. Canada*, 2005 FCA 348, [2006] 2 F.C.R. 287 (*Grenier*), to the facts pleaded in the respondents' statement of claim and, in particular, whether the claim should be stayed until the respondents have challenged certain decisions of the Minister of Fisheries and Oceans (the Minister) by way of judicial review.

2 The respondents are fishermen and residents of Prince Edward Island. Their allegations against the Minister are concisely set out in the Crown's memorandum of fact and law as follows:

> 4. According to the statement of claim, the Respondents allege that between 1990 and 2002 they entered into a series of agreements with the Minister (the Individual Quota Agreements) that provided them each with a certain quota out of the total allowable catch ("TAC") for Prince Edward Island for snow crab fishing.
> 5. In addition to the Individual Quota Agreements, the Respondents also claim to have entered into an agreement with the Minister pursuant to which First Nations would be brought into the fishery through a voluntary licence buy-back and that no increase in the number of fishing licenses or in the actual fishing effort would result from the integration of the aboriginal fishery (the "Marshall Agreement").
> 6. The Respondents claim that both the Individual Quota Agreements and the Marshall Agreement contained implicit promises that the appellant would compensate them for any breach of the agreements.
> 7. The Respondents claim that as a result of various measures taken by the Minister in May 2003, which were continued or repeated from 2004 to 2006, the agreements were broken. They claim that the Minister reallocated a portion of the snow crab quota, to which they were entitled under the Agreements, for other purposes in each of these years.

3 The respondents do not contest this statement of the facts.

4 The respondents claim that they are entitled to be compensated for the loss of quota, either as damages for breach of contract, or, if no enforceable contract is found, as damages for negligent misrepresentation. In addition, the respondents raise a number of other potential heads of recovery, but insist that their claim is first and foremost a claim for compensation from the Minister in accordance with his contractual undertaking to compensate them for loss of their share of the Total Allowable Catch (TAC).

5 The respondents do not allege that the Minister's reallocation of the TAC was unauthorized or otherwise unlawful. They agree that the Minister was entitled to exercise his discretion under the *Fisheries Act*, R.S.C. 1985, c. F-14, as he did, but say that if the exercise of that discretion caused them a loss, then they were entitled to be compensated in accordance with their agreement with the Minister.

6 In the Crown's view, the respondents' claim is, in essence, an attack upon the validity of the various decisions that the respondents claim have caused them a loss. As a result, the Crown brought a motion seeking to have the respondents' claim struck, or, in the alternative, for an order staying the respondents' claim until such time as the validity of the ministerial orders had been determined in an application for judicial review. The Prothonotary ordered that all those portions of the respondents' pleadings that assert their claim in contract were to be struck out on the ground that they disclosed no reasonable cause of action since the Minister could not, by means of contract, fetter his discretion to award fishing quota. As for the balance of the claims, the Prothonotary ordered that they be stayed and gave the respondents time to file a motion seeking an extension of time to commence an application for judicial review.

7 The Prothonotary's decision was appealed to the Federal Court. The Motions Judge set aside the Prothonotary's decision striking the portions of the pleadings asserting a claim in contract, on the basis that this was a complex issue of fact and law which should not be resolved on a motion to strike. With respect to the other claims asserted by the respondents, the Motions Judge was not prepared to find that it was plain and obvious that those claims would fail.

8 The Crown appeals from the Motions Judge's decision on two grounds. The first is that he erred in applying the "plain and obvious" test articulated in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, as this test is not appropriate when the issue is whether to strike a claim for want of jurisdiction. The second is that, notwithstanding the respondents' protestations to the contrary, their claim is a collateral attack on the Minister's licensing decisions whose legality must first be established by means of an application for judicial review.

9 The Crown's argument with respect to the "plain and obvious" test is simply that the Court either has jurisdiction or it does not, therefore the Court must make a positive finding on that issue rather than relying on the "plain and obvious" test. The Crown says that in order to do so, the Court is entitled to look past the causes of action pleaded by the respondents and to determine the "essence" or the "substance" of the respondents' claim. In point of fact, the two arguments advanced by the Crown are but two aspects of the same argument, namely that when one looks past the words of the respondents' claims to their true nature, the respondents are mounting a collateral attack on the Minister's decisions, as a result of which the Court is in a position to make a positive finding on the jurisdictional issue.

10 In my view, for the purposes of Rule 221(1) of the *Federal Courts Rules*, SOR/98-106, the moving party must take the opposing party's pleadings as they find them, and cannot resort to reading into a claim something which is not there. The Crown cannot, by its construction of the respondents' claim, make it say something which it does not say.

11 The Crown's preoccupation with jurisdiction, at this preliminary stage, is, it seems to me, misplaced. This Court's decision in *Grenier* makes it clear that a party cannot attack the legality of an administrative decision except by means of an application for judicial review. A party derives no advantage by commencing an action based on the illegality of an administrative decision without first having had the decision declared illegal because, eventually, *Grenier* will have to be dealt with. No one has an interest in spending thousands of dollars on an action which cannot succeed. If the pleadings do not raise illegality, the Court should not strive to find it for the purposes of forcing litigants into a judicial review application which is inconsistent with the position they have taken in their action.

12 Since the respondents accept that the Minister's decisions were validly made pursuant to the *Fisheries Act*, the action should be allowed to proceed on that basis. Should it become apparent later that the respondents must rely upon the illegality of the Minister's decisions in order to succeed, the issue of the application of *Grenier* can be dealt with at that time.

13 I would dismiss the appeal with costs.

PELLETIER J.A.
NADON J.A.:— I agree.
BLAIS J.A.:— I agree.

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Canada v. Solosky, [1980] 1 S.C.R. 821

Supreme Court Reports

Supreme Court of Canada

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

1979: June 13 / 1979: December 21.

[1980] 1 S.C.R. 821 | [1980] 1 R.C.S. 821

William (Billy) Solosky (Plaintiff), Appellant; and Her Majesty The Queen (Defendant), Respondent.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Prisons — Censorship of prisoners' mail — Right of prison inmates to communicate in confidence with their solicitors — Solicitor-client privilege — Inmate failing to establish entitlement to a declaration — Penitentiary Service Regulations, SOR/62-90 — Canadian Bill of Rights, 1960 (Can.), c. 44, ss. 1(b), (d), 2(c)(ii).

The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court of Canada for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened". The action was dismissed and on appeal to the Federal Court of Appeal the pleadings were amended to request a declaration "..... that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The appeal failed, and at the opening of the appeal in this Court counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law".

In accordance with the Penitentiary Act, R.S.C. 1970, c. P-6, and Regulations thereunder, an institutional head of a penitentiary may order censorship of inmate correspondence to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. The main ground upon which the appellant rested his case was solicitor-client privilege.

Held: The appeal should be dismissed.

Contrary to the views expressed by the Court below, the important issues raised in this case should not be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

There could be no doubt that there was a real, and not a hypothetical, dispute between the parties. The declaration sought was a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order. Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case. The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written. However poorly framed the prayer for relief may be, even as twice amended, the present claim was clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege.

Recent case law has taken the traditional doctrine of solicitor-client privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. However, while there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, the concept has not been stretched far enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. The appellant's suggestion that privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property", was not accepted. Without the evidentiary connection, which the law now requires, the privilege cannot be invoked.

The statutory disciplinary regime, described in this case, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant was seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

In aid of his main submission, appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedom recognized in the Canadian Bill of Rights by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). This argument also failed.

One could depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law. In that context, the Court was faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219.

It was submitted there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution. The third such interpretation was as follows: "he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". This alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

The "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication.

Per Estey J.: As to the above item (iii) in the catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege", any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law.

Cases Cited

[Mellstrom v. Garner, [1970] 1 W.L.R. 603, distinguished; Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd., [1921] 2 A.C. 438; Pyx Granite Co. v. Ministry of Housing and Local Government, [1958] 1 Q.B. 554; Pharmaceutical Society of Great Britain v. Dickson, [1970] A.C. 403; Re Director of Investigation and Research and Shell Canada Ltd. (1975), 22 C.C.C. (2d) 70; Greenough v. Gaskell (1833), 39 E.R. 618; Anderson v. Bank of British Columbia (1876), 2 Ch. 644; Re Director of Investigation and Research and Canada Safeway Ltd. (1972), 26 D.L.R. (3d) 745; Re Presswood et al. and International Chemalloy Corp. (1975), 65 D.L.R. (3d) 228; Re Borden and Elliot and The Queen (1975), 30 C.C.C. (2d) 337; Re BX Development Inc. and The Queen (1976), 31 C.C.C. (2d) 14; Re B and The Queen (1977), 36 C.C.C. (2d) 235, referred to.]

APPEAL from a judgment of the Federal Court of Appeal [[1978] 2 F.C. 632, 86 D.L.R. (3d) 316], dismissing an appeal from a judgment of Addy J. who dismissed the appellant's application for a declaration. Appeal dismissed. Ronald Price, Q.C., and David P. Cole, for the appellant. E. Bowie and J.-Paul Malette, for the respondent.

Solicitor for the plaintiff, appellant: David P. Cole, Toronto. Solicitor for the defendant, respondent: Roger Tassé, Ottawa.

The judgment of Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Pratte and McIntyre JJ. was delivered by

DICKSON J.

DICKSON J.:— This case concerns the censorship of prisoners' mail and the right of an inmate of a federal penitentiary to communicate in confidence with his solicitor. The appellant, imprisoned at Millhaven Institution, commenced an action in the Federal Court for a declaration that "properly identified items of correspondence directed to and received from his solicitor shall henceforth be regarded as privileged correspondence and shall be forwarded to their respective destinations unopened".

I

Prison Disciplinary Regime

The penitentiary authorities rely upon the following statutes and Regulations as authorizing restrictions upon the personal correspondence of prison inmates. Section 660(1) of the Criminal Code, R.S.C. 1970, c. C-34, provides that a sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced. Section 29(1) of the Penitentiary Act, R.S.C. 1970, c. P-6, empowers the Governor in Council to make regulations for the custody, treatment, training, employment, and discipline of inmates, and, generally, for carrying into effect the purposes and provisions of The Penitentiary Act. Section 29(3) authorizes the Commissioner of Penitentiaries to make rules, known as Commissioner's directives, for the custody, treatment, training, employment, and discipline of inmates, and the good government of penitentiaries.

Pursuant to the foregoing, Penitentiary Service Relations SOR/62-90, were passed, which provide in part, as follows:

> Institutional Heads
>
> 1.12(1) The institutional head is responsible for the direction of his staff, the organization, safety and security of his institution and the correctional training of all inmates confined therein.
>
> Visiting and Correspondence

2.17 The visiting and correspondence privileges that may, in accordance with directives, be permitted to inmates shall be such as are, in all the circumstances, calculated to assist in the reformation and rehabilitation of the inmate.

Censorship

2.18 In so far as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

It will be observed then that the Regulations, the validity of which are not challenged by the appellant, expressly recognize the authority of the institutional head of a penitentiary to order censorship of inmate correspondence to the extent considered necessary or desirable for the security of the institution. These Regulations are implemented by Commissioner's Directive No. 219 (as amended following the date of issuance of the statement of claim in these proceedings, but prior to the date of trial). The following paragraphs are pertinent to the present inquiry:

Directive

5.a. Penitentiary staff shall promote and facilitate correspondence between inmates and their families, friends, and other individuals and agencies who can be expected to make a contribution to the inmate's rehabilitation within the institution and to assist in his subsequent and eventual return to the community.

c. Subject to the provisions of paragraph 14 every inmate shall be permitted to correspond with any person, and shall be responsible for the contents of every article of correspondence of which he is the author. There shall be no restriction to the number of letters sent or received by inmates, unless it is evident that there is mass production.

Paragraph 5 d. makes provision for inspection for contraband, in these terms:

d. Subject to the provisions of paragraph 8, every item of correspondence to or from an inmate may be opened by institutional authorities for inspection for contraband.

Censorship, dealt with in para. 7, is defined as any examination (other than for the express purpose of searching for contraband) and includes the reading, reproducing, extracting, or withdrawing of inmate correspondence. Paragraph 7 b. makes the point that censorship in any form is to be avoided, but reserves to the Commissioner of Penitentiaries and to the Institutional Director the authority to censor for one of two purposes, the rehabilitation of the inmate, or the security of the institution. Paragraph 7 b. reads:

> Censorship of correspondence in any form shall be avoided, but nothing herein shall be deemed to limit the authority of the Commissioner to direct, or the Institutional Director to order, censorship of correspondence in any form, to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. (PSR 2.18). Any form of censorship shall be undertaken only with the approval of the Institutional Director.

The Directive seeks to maintain the confidentiality of the contents of correspondence. Paragraph 7 c. states that only authorized staff shall be allowed to read inmate mail, when necessary, and further provides that no comments, other than those required for official duties, shall be made to other members of the staff on the contents of the correspondence.

Paragraph 8 of Directive 219 speaks of "privileged correspondence", defined as "properly identified and addressed items directed to and received from" any of a lengthy list of persons including, among others, members of the Senate, members of the House of Commons, members of provincial legislatures, and provincial ombudsmen. Conspicuous is the absence of any reference to inmates' legal representatives. Privileged correspondence is forwarded to the addressee unopened with the proviso that in exceptional cases, where institutional staff suspect contraband in such privileged correspondence, the Commissioner's approval shall be obtained before it is opened. Paragraph 8 clearly countenances the maintenance of uncensored channels of mail for complaints and grievances. But the restricted listing of destinations assures that the channels through which grievances pass are limited to internal procedures (Solicitor General, Commissioner of Penitentiaries, Correctional Investigator) or political outlets (Members of Parliament and Senators). Lawyers are mentioned in paragraph 10 c. of Directive No. 219, "Use of Telephone and Telegraph", which reads:

> c. In urgent cases where lawyers call their inmate clients, and wish to communicate privately with them, the institutional authorities shall ask the lawyer to leave his name and telephone number and, following verification of the lawyer's identity, a call shall originate from the institution.

For the purposes of trial, an agreed statement of facts was filed. Paragraphs 4 and 5 of the statement are in the following terms:

> 4. Pursuant to section 6 paragraph (b) [s. 7(b), as amended,] of Directive No. 219, John Dowsett, Director of Millhaven Institution has ordered that William (Billy) Solosky's mail be opened and read. This order has been applied to mail originating from his solicitor David Cole.
>
> 5. William (Billy) Solosky's mail is being read because it is John Dowsett's opinion that William (Billy) Solosky's conduct, activities and attitude cause him to believe that attention should be paid to his incoming and outgoing correspondence. Those letters which are deemed to be significant with respect to the security of the institution are being brought to the attention of John Dowsett.

Paragraph 5 of the statement of defence clarifies any obscurity in para. 5 of the agreed statement of facts. The statement of defence reads "The security of the Millhaven Institution has required that the Plaintiff's mail be opened."

II

Judicial History

Mr. Justice Addy, at trial, was of the view that solicitor and client privilege, upon which the appellant founds his case, can only be claimed document by document and that each document is privileged only to the extent it meets the criteria which would support the privilege. Whether a letter does, in fact, contain a privileged communication cannot be determined until it has been opened and read. There is no logical nor legal justification for permitting correspondence which appears to have emanated from, or to be addressed to, a solicitor to enjoy any special aura of protection. Mr. Justice Addy relied upon these propositions in dismissing the appellant's action, with costs. He buttressed his conclusion by the argument that in this situation it would be too easy for a person to obtain envelopes and letterheads bearing the name and title of a real or fictitious solicitor, and equally as easy for a prisoner to camouflage the true identity of an addressee.

The appellant appealed to the Federal Court of Appeal. In that Court, his counsel amended the pleadings to request a declaration "... that henceforth all properly identified items of solicitor-client correspondence should be forwarded to their respective destinations unopened". The revised form of declaration differs little from that appearing in the amended statement of claim. Both are defective, at least to this extent--it is not every item of correspondence passing between solicitor and client to which privilege attaches, for only those in which the client seeks the advice of counsel in his professional capacity, or in which counsel gives advice, are protected. That a privilege may not encompass all solicitor and client communications is clearly illustrated by the correspondence exhibited in the present case. Some of the letters concerned the appellant's parole review. Others merely contained criticism of the administration, information about other inmates, and prison gossip. One letter enclosed a second letter with the request that the second letter be forwarded to a named magazine for publication.

The Federal Court of Appeal dismissed the appeal, holding that a declaration that all correspondence between the appellant and his solicitor be declared privileged would extend considerably the ambit of the solicitor-client privilege as it is generally known and understood. To grant the declaration sought would be to give to the appellant an extension of the privilege afforded to the ordinary citizen. As a second ground for rejecting the appeal, the Court held that by issuing an order relating to correspondence not yet written, the court would be granting relief on the basis of purely hypothetical issues, and in futuro. Assuming jurisdiction, the case was not one where jurisdiction should be asserted.

III

Declaratory Relief

At the opening of the appeal in this Court, counsel for the appellant moved to substitute, for the prayer for relief in the statement of claim, a declaration that the order of the Director of Millhaven Institution that the appellant's mail be opened and read "insofar as it has been applied to mail originating from his solicitor David Cole, and to mail written by the Plaintiff to his solicitor David Cole, is not authorized by law". The amended form of prayer seems to have been conceived with a view to meeting the point, taken by the Federal Court of Appeal, that the relief earlier sought would relate to letters not yet written.

With great respect for the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

The principles which guide the court in exercising jurisdiction to grant declarations have been stated time and again. In the early case of Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd. [[1921] 2 A.C. 438], in which parties to a contract sought assistance in construing it, the Court affirmed that declarations can be granted where real, rather than fictitious or academic, issues are raised. Lord Dunedin set out this test (at p. 448):

> The question must be a real and not a theoretical question, the person raising it must have a real interest to raise it, he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

In Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government [[1958] 1 Q.B. 554], (rev'd [1960] A.C. 260, on other grounds), Lord Denning described the declaration in these general terms (p. 571):

> ... if a substantial question exists which one person has a real interest to raise, and the other to oppose, then the court has a discretion to resolve it by a declaration, which it will exercise if there is good reason for so doing.

The jurisdiction of the court to grant declaratory relief was again stated, in the broadest language, in Pharmaceutical Society of Great Britain v. Dickson [[1970] A.C. 403 (H.L.), a case in which the applicant sought a declaration that a proposed motion of the pharmaceutical society, if passed, would be ultra vires its objects and in unreasonable restraint of trade. In the course of his judgment, Lord Upjohn stated, at p. 433:

> A person whose freedom of action is challenged can always come to the court to have his rights and position clarified, subject always, of course, to the right of the court in exercise of its judicial discretion to refuse relief in the circumstances of the case.

In the instant case, Mellstrom v. Garner [(1970), 1 W.L.R. 603], was cited in the Federal Court of Appeal in support of the proposition that courts will not grant declarations regarding the future. There, a chartered accountant and former partner of the defendant sought a declaration as to the true construction of the agreement by which the partnership had been dissolved. The plaintiff asked whether, having regard to a clause in the agreement, he would be in breach were he to solicit clients or business of the 'continuing partners'. Karminski L.J. held that declarations concerning the future ought to be approached with considerable reserve. Since neither the plaintiff nor the defendants had broken the provisions of the clause in question, nor sought to do so, there was no useful purpose to be gained in granting the declaration. The application was dismissed. That is a very different case from the present one.

As Hudson suggests in his article, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal.L.J. 706:

> The declaratory action is discretionary and the two factors which will influence the court in the exercise of its discretion are the utility of the remedy, if granted, and whether, if it is granted, it will settle the questions at issue between the parties.

The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)

Here there can be no doubt that there is a real and not a hypothetical, dispute between the parties. The declaration sought is a direct and present challenge to the censorship order of the Director of Millhaven Institute. That order, so long as it continues, from the past through the present and into the future, is in controversy. The fact that a declaration today cannot cure past ills, or may affect future rights, cannot of itself, deprive the remedy of its potential utility in resolving the dispute over the Director's continuing order.

Once one accepts that the dispute is real and that the granting of judgment is discretionary, then the only further issue is whether the declaration is capable of having any practical effect in resolving the issues in the case.

The determination of the right of prison inmates to correspond, freely and in confidence with their solicitors, is of great practical importance, although, admittedly, any such determination relates to correspondence not yet written.

However poorly framed the prayer for relief may be, even as twice amended, the present claim is clearly directed to the procedures for handling prison mail and the invocation in relation thereto of solicitor-client privilege. It is not directed to the characterization of specific and individual items of correspondence. If the appellant is entitled to a declaration, it is within this Court's discretion to settle the wording of the declaration: see de Smith, Judicial Review of Administrative Action (3rd ed. 1973, p. 431). Further, s. 50 of the Supreme Court Act allows the Court to make amendments necessary to a determination of the "real issue", without application by the parties.

IV

Solicitor-Client Privilege

As I have indicated, the main ground upon which the appellant rests his case is solicitor-client privilege. The concept of privileged communications between a solicitor and his client has long been recognized as fundamental to the due administration of justice. As Jackett C.J. aptly stated in Re Director of Investigation and Research and Shell Canada Ltd. [(1975), 22 C.C.C. (2d) 70, [1975] F.C. 184], at pp. 78-9:

> ... the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts to his legal advisor might somehow become available to third persons so as to be used against him.

The history of the privilege can be traced to the reign of Elizabeth I (see Berd v. Lovelace [(1577), 21 E.R. 33] and Dennis v. Codrington [(1580), 21 E.R. 53]). It stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation, and finally, any consultation for legal advice, whether litigious or not. The classic statement of the policy grounding the privilege was given by Brougham L.C. in Greenough v. Gaskell [(1833), 39 E.R. 618], at p. 620:

> The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers).
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case.

The rationale was put this way by Jessel M.R. in Anderson v. Bank of British Columbia [(1976), 2 Ch. 644], at p. 649:

> The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have resource to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation.

Wigmore [8 Wigmore, Evidence (McNaughton rev. 1961) para. 2292] framed the modern principle of privilege for solicitor-client communications, as follows:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except the protection be waived.

There are exceptions to the privilege. The privilege does not apply to communications in which legal advice is neither sought nor offered, that is to say, where the lawyer is not contacted in his professional capacity. Also, where the communication is not intended to be confidential, privilege will not attach, O'Shea v. Woods [[1891] P. 286], at p. 289. More significantly, if a client seeks guidance from a lawyer in order to facilitate the commission of a crime or a fraud, the communication will not be privileged and it is immaterial whether the lawyer is an unwitting dupe or knowing participant. The classic case is R. v. Cox and Railton [(1884), 14 Q.B.D. 153], in which Stephen J. had this to say (p. 167): "A communication in furtherance of a criminal purpose does not 'come in the ordinary scope of professional employment'."

Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a court room. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits. See Re Director of Investigation and Research and Canada Safeway Ltd. [(1972), 26 D.L.R. (3d) 745 (B.C.S.C.)]; Re Director of Investigation and Research and Shell Canada Ltd., supra: Re Presswood et al. and International Chemalloy Corp. [(1975), 65 D.L.R. (3d) 228 (Ont. N.C.)], Re Borden and Elliot and The Queen [(1975), 30 C.C.C. (2d) 337], (affirmed on other grounds [(1975), 30 C.C.C. (2d) 345 (Ont. C.A.)]; Re BX Development Inc. and The Queen [(1976), 31 C.C.C. (2d) 14 (B.C.C.A.)]; Re B and The Queen [(1977), 36 C.C.C. (2d) 235 (Ont. Prov. Ct.)].

While there is no question that the Canadian courts have been moving towards a broader concept of solicitor-client privilege, I do not think the concept has been stretched far

> enough to save the appellant's case. Although there has been a move away from treating solicitor-client privilege as a rule of evidence that can only be asserted at the time the privileged material is sought to be introduced as evidence, the move from rigid temporal restrictions has not gone as far as the appellant contends. In the factum of the appellant, it is suggested that the privilege has come to be recognized as a "fundamental principle", more properly characterized as a "rule of property". The cases cited in support of this proposition, however, all involved search warrants that caught documents to which the privilege unquestionably attached. In those cases, such as Re Borden & Elliot and The Queen, supra, the search warrant led to the seizure of documents believed "to afford evidence." If privilege were to attach to the documents, then such material could not afford evidence at trial and hence the evidentiary connection remained. The judgments can be rationalized as merely shifting the time at which the privilege can be asserted. As the comment by Kasting in (1978), 24 McGill L.J. 115, "Recent Developments in the Law of Solicitor-Client Privilege" suggests, the shift away from the strict rule-of-evidence-at-trial approach has taken place by logical extensions. Chassé, in his annotation at (1977), 36 C.R.N.S. 349, The Solicitor-Client Privilege and Search Warrants, asserts that the privilege is being looked upon "as more akin to a rule of property rather than merely as a rule of evidence" (p. 350), but the privilege, in my view, is not yet near a rule of property. That is what the privilege must become if the appellant is to succeed.

There is no suggestion in the materials in the case at bar that the authorities intend to employ the letters or extracts obtained therefrom as evidence in any proceeding of any kind. Much as one might well wish to analogize from the search warrant cases to the censorship order here impugned, as a form of blanket search warrant upon appellant's mail, the order cannot be characterized as being directed to obtaining or affording evidence in any proceeding. Without the evidentiary connection, which the law now requires, the appellant cannot invoke the privilege.

As Mr. Justice Addy notes, privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties. To make the decision as to whether the privilege attaches, the letters must be read by the judge, which requires, at a minimum, that the documents be under the jurisdiction of a court. Finally, the privilege is aimed at improper use or disclosure, and not at merely opening.

The complication in this case flows from the unique position of the inmate. His mail is opened and read, not with a view to its use in a proceeding, but by reason of the exigencies of institutional security. All of this occurs within prison walls and far from a court or quasi-judicial tribunal. It is difficult to see how the privilege can be engaged, unless one wishes totally to transform the privilege into a rule of property, bereft of an evidentiary basis.

In my view, the statutory disciplinary regime, which I have earlier described, does not derogate from the common law doctrine of solicitor and client privilege, as presently conceived, but the appellant is seeking in this appeal something well beyond the limits of the privilege, even as amplified in modern cases.

V

In aid of his main submission, resting upon privilege, counsel for the appellant argued faintly that the Penitentiary Service Regulations and Commissioner's Directive should not be construed and applied so as to abrogate, abridge, or infringe any of the rights or freedoms recognized in the Canadian Bill of Rights by s. 1(b) (the right of the individual to equality before the law and the protection of the law), 1(d) (freedom of speech) and 2(c)(ii) (the right of a person arrested or detained to retain and instruct counsel without delay). The authorities relied upon by counsel were, in the main, breathalyzer cases dealing with the right of a motorist to communicate with his counsel in private and without delay. These, and other cases cited, give little assistance to the resolution of the issue now before the Court, due to the difference in factual context and relevant considerations. The question in this case is whether the appellant's right to retain and instruct counsel is incompatible with the right of prison authorities to prevent threat to the security of the institution. In my view, there is no such incompatibility provided the exercise of authority is not greater than is necessary to support the security interest. This, as I read it, is precisely the effect of para. 7b. of Directive 219.

With respect to s. 1(b) of the Bill, it has been held by this Court that equality before the law does not require "that all federal statutes must apply to all individuals in the same manner. Legislation dealing with a particular class of people is valid if it is enacted for the purpose of achieving a valid federal objective": Martland J., giving the unanimous reasons of this Court in Prata v. Minister of Manpower and Immigration [[1976] 1 S.C.R. 376], at p. 382.

It is difficult to attack the validity of Penitentiary Service Regulation 2.18 or Directive 219 with a freedom of speech argument, having regard to the will of Parliament, as reflected in the Penitentiary Act and in the Penitentiary Service Regulations, which preserves a limited right of censorship by penitentiary authorities in the interests of security and, at the same time, affords inmates a right to communicate freely through uncensored channels with members of Parliament and provincial legislatures, and the many persons listed in para. 8 of Directive 219.

VI

One may depart from the current concept of privilege and approach the case on the broader basis that (i) the right to communicate in confidence with one's legal adviser is a fundamental civil and legal right, founded upon the unique relationship of solicitor and client, and (ii) a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law.

In that context, the Court is faced with the interpretation of the Penitentiary Service Regulations and Commissioner's Directive No. 219. Section 2.18 of the Regulations, as earlier noted, undoubtedly reserves the authority of the institutional head to order censorship of correspondence to the extent considered necessary or desirable for the security of the institution. As a general rule, I do not think it is open to the courts to question the judgment of the institutional head as to what may, or may not, be necessary in order to maintain security within a penitentiary. On the other hand, it is to be noted that Penitentiary Service Regulation 2.18 and Commissioner's Directive No. 219 speak in general terms, in their reference to the reading of correspondence and to other forms of censorship, without express mention of solicitor-client correspondence. The right to privacy in solicitor-client correspondence has not been expressly taken away by the language of the Regulations and the Directive.

Most prisons are sufficiently remote that the mail constitutes the prime means of communication to an inmate's solicitor. Nothing is more likely to have a "chilling" effect upon the frank and free exchange and disclosure of confidences, which should characterize the relationship between inmate and counsel, than knowledge that what has been written will be read by some third person, and perhaps used against the inmate at a later date. I do not understand counsel for the Crown to dispute the importance of these considerations.

The result, as I see it, is that the Court is placed in the position of having to balance the public interest in maintaining the safety and security of a penal institution, its staff and its inmates, with the interest represented by insulating the solicitor-client relationship. Even giving full recognition to the right of an inmate to correspond freely with his legal adviser, and the need for minimum derogation therefrom, the scale must ultimately come down in favour of the public interest. But the interference must be no greater than is essential to the maintenance of security and the rehabilitation of the inmate.

The difficulty is in ensuring that the correspondence between the inmate and his solicitor, whether within the doctrine of solicitor-client privilege or not, is not cloaking the passage of drugs, weapons, or escape plans. There must be some mechanism for verification of authenticity. That seems to be generally accepted. Yet, no one has so far suggested what third party mechanism might be adopted, or by what authority the courts could impose such a mechanism upon penitentiary authorities.

Counsel for the Crown submits there are three alternative interpretations of the scope of Regulations 2.17 and 2.18 which may govern the extent of the authority of the institutional head in dealing with an envelope which appears to have originated from a solicitor, or to be addressed to a solicitor, in circumstances where the institutional head has reason to believe that the unrestricted and unexamined passage of mail to or from the particular inmate in question represents a danger to the safety and security of the institution:

(a) he may nonetheless permit the letter to be delivered unopened and unexamined to the inmate;

(b) he may suspend the inmate's privilege to receive mail, in respect of that letter, pursuant to sections 2.17 and 2.18 of the Penitentiary Service Regulations.

(c) he may order that the envelope be subject to opening and examination to the minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege.

Counsel contends that to interpret the Regulations as requiring the first of these alternatives is to leave the institutional head without the authority he requires to control the potential passage of contraband, or of correspondence which may endanger the safety of the institution, under the guise of confidential communications passing between inmate and solicitor. I agree. I would also reject the second as providing no solution. I agree that the third alternative represents that interpretation of the scope of the Regulations which permits to an inmate the maximum opportunity to communicate with his solicitor through the mails that is consistent with the requirement to maintain the safety and security of the institution.

In my view, the "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege" should be interpreted in such manner that (i) the contents of an envelope may be inspected for contraband; (ii) in limited circumstances, the communication may be read to ensure that it, in fact, contains a confidential communication between solicitor and client written for the purpose of seeking or giving legal advice; (iii) the letter should only be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to determine the bona fides of the communication; (iv) the authorized penitentiary official who examines the envelope, upon ascertaining that the envelope contains nothing in breach of security, is under a duty at law to maintain the confidentiality of the communication. Paragraph 7c. of Directive 219 underlines this point.

The appellant has failed to establish entitlement to a declaration in any of the three forms he has advanced in these proceedings. The appeal must be dismissed. The respondent is entitled to costs in this Court.

The following are the reasons delivered by

ESTEY J.

ESTEY J.:-- I have had the opportunity of reading the reasons for judgment of my brother Dickson and I concur therein. I only wish to add to item (iii) in his catalogue of considerations in the interpretation of the expression "minimum extent necessary to establish whether it is properly the subject of solicitor-client privilege". Item (iii) reads as follows:

(iii) the letter only should be read if there are reasonable and probable grounds for believing the contrary, and then only to the extent necessary to confirm the bona fides of the communication;

In my respectful view, any procedure adopted with reference to the scrutiny of letters passing from solicitor to client should, wherever reasonably possible, recognize the solicitor-client privilege long established in the law. Any mechanics adopted for their examination should, subject only to special circumstances indicating an overriding necessity for intervention by the authorities, safeguard communications flowing under the protection of the privilege so as to ensure that the privilege is left in a practical, workable condition; for example, a covering letter from a solicitor forwarding a sealed communication which the solicitor states to be a communication of legal advice should ordinarily shield the enclosure from examination by the authorities. I would dispose of the appeal as proposed by Dickson J.

Appeal dismissed with costs.

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Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: November 13, 2009;

Judgment: January 29, 2010.

File No.: 33289.

[2010] 1 S.C.R. 44 | [2010] 1 R.C.S. 44 | [2010] S.C.J. No. 3 | [2010] A.C.S. no 3 | 2010 SCC 3

Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police Appellants; v. Omar Ahmed Khadr Respondent, and Amnesty International (Canadian Section, English Branch), Human Rights Watch, University of Toronto, Faculty of Law - International Human Rights Program, David Asper Centre for Constitutional Rights, Canadian Coalition for the Rights of Children, Justice for Children and Youth, British Columbia Civil Liberties Association, Criminal Lawyers' Association (Ontario), Canadian Bar Association, Lawyers Without Borders Canada, Barreau du Québec, Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval, Canadian Civil Liberties Association and National Council for the Protection of Canadians Abroad Interveners

(48 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Application — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing [page45] detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether process in place at Guantanamo Bay at that time violated Canada's international human rights obligations — Whether Canadian Charter of Rights and Freedoms applies to conduct of Canadian state officials alleged to have breached detainee's constitutional rights.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Whether conduct of Canadian officials deprived detainee of his right to liberty and security of person — If so, whether deprivation of detainee's right is in accordance with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Remedy — Request for repatriation — Canadian citizen detained by U.S. authorities at Guantanamo Bay — Canadian officials interviewing detainee knowing that he had been subjected to sleep deprivation and sharing contents of interviews with U.S. authorities — Violation of detainee's right to liberty and security of person guaranteed by Canadian Charter of Rights and Freedoms

— Detainee seeking order that Canada request his repatriation from Guantanamo Bay — Whether remedy sought is just and appropriate in circumstances — Canadian Charter of Rights and Freedoms, s. 24(1).

Courts — Jurisdiction — Crown prerogative over foreign relations — Courts' power to review and intervene on matters of foreign affairs to ensure constitutionality of executive action.

Summary:

K, a Canadian, has been detained by the U.S. military at Guantanamo Bay, Cuba, since 2002, when he was a minor. In 2004, he was charged with war crimes, but the U.S. trial is still pending. In 2003, agents from two Canadian intelligence services, CSIS and DFAIT, questioned K on matters connected to the charges pending against him, and shared the product of these interviews with U.S. authorities. In 2004, a DFAIT official interviewed K again, with knowledge that he had been subjected by U.S. authorities to a sleep deprivation [page46] technique, known as the "frequent flyer program", to make him less resistant to interrogation. In 2008, in *Canada (Justice) v. Khadr* ("*Khadr 2008*"), this Court held that the regime in place at Guantanamo Bay constituted a clear violation of Canada's international human rights obligations, and, under s. 7 of the *Canadian Charter of Rights and Freedoms*, ordered the Canadian government to disclose to K the transcripts of the interviews he had given to CSIS and DFAIT, which it did. After repeated requests by K that the Canadian government seek his repatriation, the Prime Minister announced his decision not to do so. K then applied to the Federal Court for judicial review, alleging that the decision violated his rights under s. 7 of the *Charter*. The Federal Court held that under the special circumstances of this case, Canada had a duty to protect K under s. 7 of the *Charter* and ordered the government to request his repatriation. The Federal Court of Appeal upheld the order, but stated that the s. 7 breach arose from the interrogation conducted in 2004 with the knowledge that K had been subjected to the "frequent flyer program".

Held: The appeal should be allowed in part.

Canada actively participated in a process contrary to its international human rights obligations and contributed to K's ongoing detention so as to deprive him of his right to liberty and security of the person, guaranteed by s. 7 of the *Charter*, not in accordance with the principles of fundamental justice. Though the process to which K is subject has changed, his claim is based upon the same underlying series of events considered in *Khadr 2008*. As held in that case, the *Charter* applies to the participation of Canadian officials in a regime later found to be in violation of fundamental rights protected by international law. There is a sufficient connection between the government's participation in the illegal process and the deprivation of K's liberty and security of the person. While the U.S. is the primary source of the deprivation, it is reasonable to infer from the uncontradicted evidence before the Court that the statements taken by Canadian officials are contributing to K's continued detention. The deprivation of K's right to liberty and security of the person is not in accordance with the principles of fundamental justice. The interrogation of a youth detained without access to counsel, to elicit statements about serious criminal charges while knowing that the youth had been subjected to sleep deprivation and while knowing that the [page47] fruits of the interrogations would be shared with the prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

K is entitled to a remedy under s. 24(1) of the *Charter*. The remedy sought by K -- an order that Canada request his repatriation -- is sufficiently connected to the *Charter* breach that occurred in 2003 and 2004 because of the continuing effect of this breach into the present and its possible effect on K's ultimate trial. While the government must have flexibility in deciding how its duties under the royal prerogative over foreign relations are discharged, the executive is not exempt from constitutional scrutiny. Courts have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown exists; if so, whether its exercise infringes the *Charter* or other constitutional norms; and, where necessary, to give specific direction to the executive branch of the government. Here, the trial judge misdirected himself in ordering the government to request K's repatriation, in view of the constitutional responsibility of the executive to make decisions on matters of foreign affairs and the inconclusive state of the record. The appropriate remedy in this case is to declare that K's *Charter* rights were violated, leaving it to the government to decide how best to respond in light of current information, its responsibility over foreign affairs, and the *Charter*.

Cases Cited

Applied: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; **referred to:** *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *United States of America v. Jawad*, Military Commission, September 24, 2008, online: www.defense.gov/news/Ruling%20D-008.pdf; *R. v. Collins*, [1987] 1 S.C.R. 265; *Re [page48] B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269; *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4) 228; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Gamble*, [1988] 2 S.C.R. 595.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 7, 24(1).

Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22, s. 10.

Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739.

Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

Authors Cited

Canada. Security Intelligence Review Committee. *CSIS's Role in the Matter of Omar Khadr.* Ottawa: The Committee, 2009.

Hogg, Peter W. *Constitutional Law of Canada*, 5 ed. Supp. Scarborough, Ont.: Thomson/Carswell, 2007 (loose-leaf updated 2009, release 1).

History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Nadon, Evans and Sharlow JJ.A.), 2009 FCA 246, 310 D.L.R. (4) 462, 393 N.R. 1, [2009] F.C.J. No. 893 (QL), 2009 CarswellNat 2364, affirming a decision of O'Reilly J., 2009 FC 405, 341 F.T.R. 300, 188 C.R.R. (2d) 342, [2009] F.C.J. No. 462 (QL), 2009 CarswellNat 1206. Appeal allowed in part.

Counsel

Robert J. Frater, *Doreen C. Mueller* and *Jeffrey G. Johnston*, for the appellants.

Nathan J. Whitling and *Dennis Edney*, for the respondent.

Sacha R. Paul, *Vanessa Gruben* and *Michael Bossin*, for the intervener Amnesty International (Canadian Section, English Branch).

John Norris, Brydie Bethell and Audrey MacKlin, for the interveners Human Rights Watch, the University of Toronto, Faculty of Law — International Human Rights Program and the David Asper Centre for Constitutional Rights.

Emily Chan and *Martha MacKinnon*, for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth.

Sujit Choudhry and *Joseph J. Arvay*, *Q.C.*, for the intervener the British Columbia Civil Liberties Association.

Brian H. Greenspan, for the intervener the Criminal Lawyers' Association (Ontario).

Lorne Waldman and *Jacqueline Swaisland*, for the intervener the Canadian Bar Association.

Simon V. Potter, *Pascal Paradis*, *Sylvie Champagne* and *Fannie Lafontaine*, for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval.

Marlys A. Edwardh, *Adriel Weaver* and *Jessica Orkin*, for the intervener the Canadian Civil Liberties Association.

Dean Peroff, *Chris MacLeod* and *H. Scott Fairley*, for the intervener the National Council for the Protection of Canadians Abroad.

The following is the judgment delivered by

THE COURT

I. Introduction

1 Omar Khadr, a Canadian citizen, has been detained by the United States government at Guantanamo Bay, Cuba, for over seven years. The Prime Minister asks this Court to reverse the decision of the Federal Court of Appeal requiring the Canadian government to request the United States to return Mr. Khadr from Guantanamo Bay to Canada.

2 For the reasons that follow, we agree with the courts below that Mr. Khadr's rights under s. 7 of the *Canadian Charter of Rights and Freedoms* were violated. However, we conclude that the order made by the lower courts that the government request Mr. Khadr's return to Canada is not an appropriate remedy for that breach under s. 24(1) of the *Charter*. Consistent with the separation of powers and the well-grounded reluctance of courts to intervene in matters of foreign relations, the proper remedy is to grant Mr. Khadr a declaration that his *Charter* rights have been infringed, while leaving the government a measure of discretion in deciding how best to respond. We would therefore allow the appeal in part.

II. Background

3 Mr. Khadr was 15 years old when he was taken prisoner on July 27, 2002, by U.S. forces in Afghanistan. He was alleged to have thrown a grenade that killed an American soldier in the battle in which he was captured. About three months later, he was transferred to the U.S. military installation at Guantanamo Bay. He was placed in adult detention facilities.

4 On September 7, 2004, Mr. Khadr was brought before a Combatant Status Review Tribunal which affirmed a previous determination that he was an "enemy combatant". He was subsequently charged with war crimes and held for trial before a military commission. In light of a number of procedural delays and setbacks, that trial is still pending.

5 In February and September 2003, agents from the Canadian Security Intelligence Service ("CSIS") and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade ("DFAIT") questioned Mr. Khadr on matters connected to the charges pending against him [page51] and shared the product of these interviews with U.S. authorities. In March 2004, a DFAIT official interviewed Mr. Khadr again, with the knowledge that he had been subjected by U.S. authorities to a sleep deprivation technique, known as the "frequent flyer program", in an effort to make him less resistant to interrogation. During this interview, Mr. Khadr refused to answer questions. In 2005, von Finckenstein J. of the Federal Court issued an interim injunction preventing CSIS and DFAIT agents from further interviewing Mr. Khadr in order "to prevent a potential grave injustice" from occurring: *Khadr v. Canada*, 2005 FC 1076, [2006] 2 F.C.R. 505, at para. 46. In 2008, this Court ordered the Canadian government to disclose to Mr. Khadr the transcripts of the interviews he had given to CSIS and DFAIT in Guantanamo Bay, under s. 7 of the *Charter*: *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125 ("*Khadr 2008*").

6 Mr. Khadr has repeatedly requested that the Government of Canada ask the United States to return him to Canada: in March 2005 during a Canadian consular visit; on December 15, 2005, when a welfare report noted that "[Mr. Khadr] wants his government to bring him back home" (Report of Welfare Visit, Exhibit "L" to Affidavit of Sean Robertson, December 15, 2005 (J.R., vol. IV, at p. 534)); and in a formal written request through counsel on July 28, 2008.

7 The Prime Minister announced his decision not to request Mr. Khadr's repatriation on July 10, 2008, during a media interview. The Prime Minister provided the following response to a journalist's question, posed in French, regarding whether the government would seek repatriation:

> [TRANSLATION] The answer is no, as I said the former Government, and our Government with the notification of the Minister of Justice had considered all these [page52] issues and the situation remains the same... . We keep on looking for [assurances] of good treatment of Mr. Khadr.
>
> (http: //watch.ctv.ca/news/clip65783#clip65783, at 3'3", referred to in Affidavit of April Bedard, August 8, 2008 (J.R., vol. II, at pp. 131-32).)

8 On August 8, 2008, Mr. Khadr applied to the Federal Court for judicial review of the government's "ongoing decision and policy" not to seek his repatriation (Notice of Application filed by the respondent, August 8, 2008 (J.R., vol. II, at p. 113)). He alleged that the decision and policy infringed his rights under s. 7 of the *Charter*, which states:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

9 After reviewing the history of Mr. Khadr's detention and applicable principles of Canadian and international law, O'Reilly J. concluded that in these special circumstances, Canada has a "duty to protect" Mr. Khadr (2009 FC 405, 341 F.T.R. 300). He found that "[t]he ongoing refusal of Canada to request Mr. Khadr's repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*" (para. 92). Also, he held that "[t]o mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr's repatriation to Canada as soon as practicable" (para. 92).

10 The majority judgment of the Federal Court of Appeal (*per* Evans and Sharlow JJ.A.) upheld O'Reilly J.'s order, but defined the s. 7 breach more narrowly. The majority of the Court of Appeal found that it arose from the March 2004 interrogation conducted with the knowledge that Mr. Khadr had been subject to the "frequent flyer program", characterized by the majority as involving cruel and abusive treatment contrary to the principles of fundamental justice: 2009 FCA 246, 310 D.L.R. (4th) 462. Dissenting, Nadon J.A. reviewed the many [page53] steps the government had taken on Mr. Khadr's behalf and held that since the Constitution conferred jurisdiction over foreign affairs on the executive branch of government, the remedy sought was beyond the power of the courts to grant.

III. The Issues

11 Mr. Khadr argues that the government has breached his rights under s. 7 of the *Charter*, and that the appropriate remedy for this breach is an order that the government request the United States to return him to Canada.

12 Mr. Khadr does not suggest that the government is obliged to request the repatriation of all Canadian citizens held abroad in suspect circumstances. Rather, his contention is that the conduct of the government of Canada in connection with his detention by the U.S. military in Guantanamo Bay, and in particular Canada's collaboration with the U.S. government in 2003 and 2004, violated his rights under the *Charter*, and requires as a remedy that the government now request his return to Canada. The issues that flow from this claim may be summarized as follows:

A. Was There a Breach of Section 7 of the *Charter*?

B. Does the *Charter* apply to the conduct of Canadian state officials alleged to have infringed Mr. Khadr's s. 7 *Charter* rights?

C. If so, does the conduct of the Canadian government deprive Mr. Khadr of the right to life, liberty or security of the person?

D. If so, does the deprivation accord with the principles of fundamental justice?

B. Is the Remedy Sought Appropriate and Just in All the Circumstances?

13 We will consider each of these issues in turn.

A. *Was There a Breach of Section 7 of the Charter?*

1. Does the Canadian *Charter* Apply to the Conduct of the Canadian State Officials Alleged to Have Infringed Mr. Khadr's Section 7 *Charter* Rights?

14 As a general rule, Canadians abroad are bound by the law of the country in which they find themselves and cannot avail themselves of their rights under the *Charter.* International customary law and the principle of comity of nations generally prevent the *Charter* from applying to the actions of Canadian officials operating outside of Canada: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 48, *per* LeBel J., citing *United States of America v. Dynar*, [1997] 2 S.C.R. 462, at para. 123. The jurisprudence leaves the door open to an exception in the case of Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations or fundamental human rights norms: *Hape*, at para. 52, *per* LeBel J.; *Khadr 2008*, at para. 18.

15 The question before us, then, is whether the rule against the extraterritorial application of the *Charter* prevents the *Charter* from applying to the actions of Canadian officials at Guantanamo Bay.

16 This question was addressed in *Khadr 2008*, in which this Court held that the *Charter* applied to the actions of Canadian officials operating at Guantanamo Bay who handed the fruits of their interviews over to U.S. authorities. This Court held, at para. 26, that "the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay", given holdings of the Supreme Court of the United [page55] States that the military commission regime then in place constituted a clear violation of fundamental human rights protected by international law: see *Khadr 2008*, at para. 24; *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The principles of fundamental justice thus required the Canadian officials who had interrogated Mr. Khadr to disclose to him the contents of the statements he had given them. The Canadian government complied with this Court's order.

17 We note that the regime under which Mr. Khadr is currently detained has changed significantly in recent years. The U.S. Congress has legislated and the U.S. courts have acted with the aim of bringing the military processes at Guantanamo Bay in line with international law. (The *Detainee Treatment Act of 2005*, Pub. L. 109-148, 119 Stat. 2739, prohibited inhumane treatment of detainees and required interrogations to be performed according to the Army field manual. The *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2600, attempted to legalize the Guantanamo regime after the U.S. Supreme Court's ruling in *Hamdan v. Rumsfeld*. However, on June 12, 2008, in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the U.S. Supreme Court held that Guantanamo Bay detainees have a constitutional right to *habeas corpus*, and struck down the provisions of the *Military Commissions Act of 2006* that suspended that right.)

18 Though the process to which Mr. Khadr is subject has changed, his claim is based upon the same underlying series of events at Guantanamo Bay (the interviews and evidence-sharing of 2003 and 2004) that we considered in *Khadr 2008*. We are satisfied that the rationale in *Khadr 2008* for applying the *Charter* to the actions of Canadian officials at Guantanamo Bay governs this case as well.

[page56]

2. Does the Conduct of the Canadian Government Deprive Mr. Khadr of the Right to Life, Liberty or Security of the Person?

19 The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).

20 The record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him (CSIS Document, Exhibit "U" to Affidavit of Lt. Cdr. William Kuebler, November 7, 2003 (J.R., vol. II, at p. 280); Interview Summary, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at p. 289); Interview Summary, Exhibit "BB" to Affidavit of Lt. Cdr. William Kuebler, February 17, 2003 (J.R., vol. III, at p. 292); Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)). A report of the Security Intelligence Review Committee titled *CSIS's Role in the Matter of Omar Khadr* (July 8, 2009), further indicated that CSIS assessed the interrogations of Mr. Khadr as being "highly successful, as evidenced by the quality intelligence information" elicited from Mr. Khadr (p. 13). These statements were shared with U.S. authorities and were summarized in U.S. investigative reports (Report of Investigative [page57] Activity, Exhibit "AA" to Affidavit of Lt. Cdr. William Kuebler, February 24, 2003 (J.R., vol. III, at pp. 289 ff.)). Pursuant to the relaxed rules of evidence under the U.S. *Military Commissions Act of 2006*, Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained: see *United States of America v. Jawad*, Military Commission, September 24, 2008, D-008 Ruling on Defense Motion to Dismiss - Torture of the Detainee (online: http: //www.defense.gov/news/Ruling%20D-008.pdf). The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr (Interview Summary, Exhibit "DD" to Affidavit of Lt. Cdr. William Kuebler, April 20, 2004 (J.R., vol. III, at p. 296)).

21 An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

[page58]

3. Does the Deprivation Accord With the Principles of Fundamental Justice?

22 We have concluded that the conduct of the Canadian government is sufficiently connected to the denial of Mr. Khadr's liberty and security of the person. This alone, however, does not establish a breach of Mr. Khadr's s. 7 rights under the *Charter*. To establish a breach, Mr. Khadr must show that this deprivation is not in accordance with the principles of fundamental justice.

23 The principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503. They are informed by Canadian experience and jurisprudence, and take into account Canada's obligations and values, as expressed in the various sources of international human rights law by which Canada is bound. In *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 46, the Court (Abella J. for the majority) restated the criteria for identifying a new principle of fundamental justice in the following manner:

(1) It must be a legal principle.

(2) There must be a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate.

(3) It must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

24 We conclude that Canadian conduct in connection with Mr. Khadr's case did not conform to the principles of fundamental justice. That conduct may be briefly reviewed. The statements taken by CSIS and DFAIT were obtained through participation in a regime which was known at the time to have refused detainees the right to challenge the legality of detention by way of *habeas corpus.* It was also known that Mr. Khadr was 16 years old at the time [page59] and that he had not had access to counsel or to any adult who had his best interests in mind. As held by this Court in *Khadr 2008*, Canada's participation in the illegal process in place at Guantanamo Bay clearly violated Canada's binding international obligations (*Khadr 2008*, at paras. 23-25; *Hamdan v. Rumsfeld*). In conducting their interviews, CSIS officials had control over the questions asked and the subject matter of the interviews (Transcript of cross-examination on Affidavit of Mr. Hooper, Exhibit "GG" to Affidavit of Lt. Cdr. William Kuebler, March 2, 2005 (J.R., vol. III, p. 313, at p. 22)). Canadian officials also knew that the U.S. authorities would have full access to the contents of the interrogations (as Canadian officials sought no restrictions on their use) by virtue of their audio and video recording (*CSIS's Role in the Matter of Omar Khadr*, at pp. 11-12). The purpose of the interviews was for intelligence gathering and not criminal investigation. While in some contexts there may be an important distinction between those interviews conducted for the purpose of intelligence gathering and those conducted in criminal investigations, here, the distinction loses its significance. Canadian officials questioned Mr. Khadr on matters that may have provided important evidence relating to his criminal proceedings, in circumstances where they knew that Mr. Khadr was being indefinitely detained, was a young person and was alone during the interrogations. Further, the March 2004 interview, where Mr. Khadr refused to answer questions, was conducted knowing that Mr. Khadr had been subjected to three weeks of scheduled sleep deprivation, a measure described by the U.S. Military Commission in *Jawad* as designed to "make [detainees] more compliant and break down their resistance to interrogation" (para. 4).

25 This conduct establishes Canadian participation in state conduct that violates the principles of fundamental justice. Interrogation of a youth, [page60] to elicit statements about the most serious criminal charges while detained in these conditions and without access to counsel, and while knowing that the fruits of the interrogations would be shared with the U.S. prosecutors, offends the most basic Canadian standards about the treatment of detained youth suspects.

26 We conclude that Mr. Khadr has established that Canada violated his rights under s. 7 of the *Charter.*

B. *Is the Remedy Sought Appropriate and Just in All the Circumstances?*

27 In previous proceedings (*Khadr 2008*), Mr. Khadr obtained the remedy of disclosure of the material gathered by Canadian officials against him through the interviews at Guantanamo Bay. The issue on this appeal is whether the breach of s. 7 of the *Charter* entitles Mr. Khadr to the remedy of an order that Canada request of the United States that he be returned to Canada. Two questions arise at this stage: (1) Is the remedy sought sufficiently connected to the breach? and (2) Is the remedy sought precluded by the fact that it touches on the Crown prerogative power over foreign affairs?

28 The judge at first instance held that the remedy sought was open to him. The Federal Court of Appeal held that he did not abuse his remedial discretion. On the basis of our answer to the second of the foregoing questions, we conclude that the trial judge, on the record before us, erred in the exercise of his discretion in granting the remedy sought.

29 First, is the remedy sought sufficiently connected to the breach? We have concluded that the Canadian government breached Mr. Khadr's s. 7 rights in 2003 and 2004 through its participation [page61] in the then-illegal military regime at Guantanamo Bay. The question at this point is whether the remedy now being sought -- an order that the Canadian government ask the United States to return Mr. Khadr to Canada -- is appropriate and just in the circumstances.

30 An appropriate and just remedy is "one that meaningfully vindicates the rights and freedoms of the claimants": *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 55. The first hurdle facing Mr. Khadr, therefore, is to establish a sufficient connection between the breaches of s. 7 that occurred in 2003 and 2004 and the order sought in these judicial review proceedings. In our view, the sufficiency of this connection is established by the continuing effect of these breaches into the present. Mr. Khadr's *Charter* rights were breached when Canadian officials contributed to his detention by virtue of their interrogations at Guantanamo Bay knowing Mr. Khadr was a youth, did not have access to legal counsel or *habeas corpus* at that time and, at the time of the interview in March 2004, had been subjected to improper treatment by the U.S. authorities. As the information obtained by Canadian officials during the course of their interrogations may be used in the U.S. proceedings against Mr. Khadr, the effect of the breaches cannot be said to have been spent. It continues to this day. As discussed earlier, the material that Canadian officials gathered and turned over to the U.S. military authorities may form part of the case upon which he is currently being held. The evidence before us suggests that the material produced was relevant and useful. There has been no suggestion that it does not form part of the case against Mr. Khadr or that it will not be put forward at his ultimate trial. We therefore find that the breach of Mr. Khadr's s. 7 *Charter* rights remains ongoing and that the remedy sought could potentially vindicate those rights.

[page62]

31 The acts that perpetrated the *Charter* breaches relied on in this appeal lie in the past. But their impact on Mr. Khadr's liberty and security continue to this day and may redound into the future. The impact of the breaches is thus perpetuated into the present. When past acts violate present liberties, a present remedy may be required.

32 We conclude that the necessary connection between the breaches of s. 7 and the remedy sought has been established for the purpose of these judicial review proceedings.

33 Second, is the remedy sought precluded by the fact that it touches on the Crown prerogative over foreign affairs? A connection between the remedy and the breach is not the only consideration. As stated in *Doucet-Boudreau*, an appropriate and just remedy is also one that "must employ means that are legitimate within the framework of our constitutional democracy" (para. 56) and must be a "judicial one which vindicates the right while invoking the function and powers of a court" (para. 57). The government argues that courts have no power under the Constitution of Canada to require the executive branch of government to do anything in the area of foreign policy. It submits that the decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations, including the right to speak freely with a foreign state on all such matters: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 1-19.

34 The prerogative power is the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown": *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, *per* Duff C.J., quoting A. V. Dicey, *Introduction to the Study [page63] of the Law of the Constitution* (8th ed. 1915), at p. 420. It is a limited source of non-statutory administrative power accorded by the common law to the Crown: Hogg, at p. 1-17.

35 The prerogative power over foreign affairs has not been displaced by s. 10 of the *Department of Foreign Affairs and International Trade Act*, R.S.C. 1985, c. E-22, and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government: *Black v. Canada (Prime Minister)* (2001), 199 D.L.R. (4th) 228 (Ont. C.A.). We therefore agree with O'Reilly J.'s implicit finding (paras. 39, 40 and 49) that the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations.

36 In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* (*Operation Dismantle*) or other constitutional norms (*Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539).

37 The limited power of the courts to review exercises of the prerogative power for constitutionality reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution. This said, judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions [page64] within a range of constitutional options. The government must have flexibility in deciding how its duties under the power are to be discharged: see, e.g., *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at paras. 101-2. But it is for the courts to determine the legal and constitutional limits within which such decisions are to be taken. It follows that in the case of refusal by a government to abide by constitutional constraints, courts are empowered to make orders ensuring that the government's foreign affairs prerogative is exercised in accordance with the constitution: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283.

38 Having concluded that the courts possess a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action, the final question is whether O'Reilly J. misdirected himself in exercising that power in the circumstances of this case (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at paras. 117-18). (In fairness to the trial judge, we note that the government proposed no alternative (trial judge's reasons, at para. 78).) If the record and legal principle support his decision, deference requires we not interfere. However, in our view that is not the case.

39 Our first concern is that the remedy ordered below gives too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests. For the following reasons, we conclude that the appropriate remedy is to declare that, on the record before the Court, Canada infringed Mr. Khadr's s. 7 rights, and to leave it to the government to decide how best to respond to this judgment in light of [page65] current information, its responsibility for foreign affairs, and in conformity with the *Charter*.

40 As discussed, the conduct of foreign affairs lies with the executive branch of government. The courts, however, are charged with adjudicating the claims of individuals who claim that their *Charter* rights have been or will be violated by the exercise of the government's discretionary powers: *Operation Dismantle*.

41 In some situations, courts may give specific directions to the executive branch of the government on matters touching foreign policy. For example, in *Burns*, the Court held that it would offend s. 7 to extradite a fugitive from Canada without seeking and obtaining assurances from the requesting state that the death penalty would not be imposed. The Court gave due weight to the fact that seeking and obtaining those assurances were matters of Canadian foreign relations. Nevertheless, it ordered that the government seek them.

42 The specific facts in *Burns* justified a more specific remedy. The fugitives were under the control of Canadian officials. It was clear that assurances would provide effective protection against the prospective *Charter* breaches: it was entirely within Canada's power to protect the fugitives against possible execution. Moreover, the Court noted that no public purpose would be served by extradition without assurances that would not be substantially served by extradition with assurances, and that there was nothing to suggest that seeking such assurances would undermine Canada's good relations with other states: *Burns*, at paras. 125 and 136.

43 The present case differs from *Burns*. Mr. Khadr is not under the control of the Canadian [page66] government; the likelihood that the proposed remedy will be effective is unclear; and the impact on Canadian foreign relations of a repatriation request cannot be properly assessed by the Court.

44 This brings us to our second concern: the inadequacy of the record. The record before us gives a necessarily incomplete picture of the range of considerations currently faced by the government in assessing Mr. Khadr's request. We do not know what negotiations may have taken place, or will take place, between the U.S. and Canadian governments over the fate of Mr. Khadr. As observed by Chaskalson C.J. in *Kaunda v. President of the Republic of South Africa*, [2004] ZACC 5, 136 I.L.R. 452, at para. 77: "The timing of representations if they are to be made, the language in which they should be couched, and the sanctions (if any) which should follow if such representations are rejected are matters with which courts are ill-equipped to deal." It follows that in these circumstances, it would not be appropriate for the Court to give direction as to the diplomatic steps necessary to address the breaches of Mr. Khadr's *Charter* rights.

45 Though Mr. Khadr has not been moved from Guantanamo Bay in over seven years, his legal predicament continues to evolve. During the hearing of this appeal, we were advised by counsel that the U.S. Department of Justice had decided that Mr. Khadr will continue to face trial by military commission, though other Guantanamo detainees will now be tried in a federal court in New York. How this latest development will affect Mr. Khadr's situation and any ongoing negotiations between the United States and Canada over his possible repatriation is unknown. But it signals caution in the exercise of the Court's remedial jurisdiction.

46 In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, [page67] and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief. A declaration of unconstitutionality is a discretionary remedy: *Operation Dismantle*, at p. 481, citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821. It has been recognized by this Court as "an effective and flexible remedy for the settlement of real disputes": *R. v. Gamble*, [1988] 2 S.C.R. 595, at p. 649. A court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it. Such is the case here.

47 The prudent course at this point, respectful of the responsibilities of the executive and the courts, is for this Court to allow Mr. Khadr's application for judicial review in part and to grant him a declaration advising the government of its opinion on the records before it which, in turn, will provide the legal framework for the executive to exercise its functions and to consider what actions to take in respect of Mr. Khadr, in conformity with the *Charter*.

IV. Conclusion

48 The appeal is allowed in part. Mr. Khadr's application for judicial review is allowed in part. This Court declares that through the conduct of Canadian officials in the course of interrogations in 2003-2004, as established on the evidence before us, Canada actively participated in a process contrary to Canada's international human rights obligations and contributed to Mr. Khadr's ongoing detention so as to deprive him of his right to liberty and security of the person guaranteed by s. 7 of the *Charter*, contrary to the principles of fundamental justice. Costs are awarded to Mr. Khadr.

Appeal allowed in part with costs to the respondent.

Solicitors:

Solicitor for the appellants: Department of Justice, Ottawa.

Solicitors for the respondent: Parlee McLaws, Edmonton.

Solicitors for the intervener Amnesty International (Canadian Section, English Branch): Thompson Dorfman Sweatman, Winnipeg.

Solicitors for the interveners Human Rights Watch, the University of Toronto, Faculty of Law -- International Human Rights Program and the David Asper Centre for Constitutional Rights: John Norris, Brydie Bethell and Audrey Macklin, Toronto.

Solicitor for the interveners the Canadian Coalition for the Rights of Children and Justice for Children and Youth: Justice for Children and Youth Services, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Vancouver.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Greenspan Humphrey Lavine, Toronto.

Solicitors for the intervener the Canadian Bar Association: Waldman & Associates, Toronto.

Solicitors for the interveners Lawyers Without Borders Canada, Barreau du Québec and Groupe d'étude en droits et libertés de la Faculté de droit de l'Université Laval: McCarthy Tétrault, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Marlys Edwardh Barristers Professional Corporation, Toronto.

Solicitors for the intervener the National Council for the Protection of Canadians Abroad: Theall Group, Toronto; Amsterdam & Peroff, Toronto.

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Canadian Society for the Advancement of Science in Public Policy v. British Columbia (Provincial Health Officer), [2022] B.C.J. No. 780

British Columbia Judgments

British Columbia Supreme Court

Vancouver, British Columbia

S.R. Coval J.

Heard: April 7, 2022.

Judgment: May 4, 2022.

Docket: S2110229

Registry: Vancouver

[2022] B.C.J. No. 780 | 2022 BCSC 724

IN THE MATTER CONCERNING the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241; and the Public Health Act, S.B.C. 2008, c. 28 Between Canadian Society for the Advancement of Science in Public Policy, and Kipling Warner, Petitioners, and Dr. Bonnie Henry in her capacity as Provincial Health Officer, for the Province of British Columbia, Respondent

(74 paras.)

Counsel

Counsel for the Petitioners: P.H. Furtula.

Counsel for the Respondent: J. Gibson, A.C. Bjornson.

Table of Contents

INTRODUCTION

PARTIES

BACKGROUND FACTS

- Emergency Powers under the PHA
- The Impugned Orders
- Reconsideration Request
- The Petition

GOVERNING LAW

ANALYSIS AND FINDINGS

- The Society's Public Interest Standing

Serious Justiciable Issue

Genuine Interest

Reasonable and Effective Means

Conclusion

Mr. Warner's Private Interest Standing
Substitute Petitioners

CONCLUSION

Reasons for Judgment

S.R. COVAL J.

Introduction

1 The respondent applies to dismiss this Petition on the basis that the petitioners lack legal standing. The petitioners argue, in response, that the Canadian Society for the Advancement of Science in Public Policy ("CSASPP") has public interest standing and Mr. Warner has private interest standing.

2 The Petition challenges public health orders made under the *Public Health Act*, S.B.C. 2008, c. 28 [*PHA*], requiring two COVID-19 vaccinations for healthcare providers in wide-ranging healthcare facilities across British Columbia.

3 It alleges that the impugned orders fail to provide reasonable exemptions and accommodations for persons with religious objections, vaccination risks, immunity from prior infection, and recent negative COVID-19 testing. It seeks to set aside the orders for infringing the *Charter* rights of unvaccinated healthcare workers, and as an unreasonable exercise of statutory powers contrary to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*].

4 The respondent, the Provincial Health Officer, Dr. Bonnie Henry ("PHO"), submits that the orders are reasonable, precautionary public health measures. Implemented to limit transmission in higher-risk public settings, they protect public health, vulnerable populations, and functioning of the healthcare system.

5 For the reasons that follow, I find that CSASPP has public interest standing to bring the Petition. Mr. Warner does not, however, have private interest standing to do so, and his claims are therefore dismissed.

Parties

6 CSASPP is a not-for-profit society incorporated under the *Societies Act,* S.B.C. 2015, c. 18.

7 With a head-office in Vancouver, it describes itself as a non-partisan, secular organization, advocating for the development and advancement of science in the formation of public policy in British Columbia.

8 Mr. Warner, a British Columbia resident, is a software engineer and the executive director of CSASPP. He describes CSASPP's directors, officers, donors, and patrons as drawn from diverse communities across the political spectrum.

9 He deposes that, when the impugned healthcare vaccination requirements were ordered, CSASPP was contacted by more than a thousand self-identified healthcare workers in British Columbia, including many registered nurses, concerned about the medical justification for the vaccination mandates and the threat of losing their jobs.

10 As the Public Health Officer under s. 64 of the *PHA*, Dr. Henry is the Province's senior public health official. In that role, she has led the public health response to the emergencies created by the transmission of the novel coronavirus SARS-CoV-2 and the illness known as COVID-19.

Background Facts

Emergency Powers under the PHA

11 On March 18, 2020, the Minister of Public Safety declared a state of emergency throughout British Columbia because of the COVID-19 pandemic. The declaration expired on June 30, 2021.

12 On March 17, 2020, Dr. Henry issued a notice, under s. 52(2) of the *PHA,* that the transmission of the infectious SARS-CoV-2 virus constituted a "regional event" under s. 51. The *PHA* defines "regional event" as an "immediate and significant risk to public health throughout a region or the province".

13 Under s. 52, the notice enabled the PHO to exercise the "emergency powers" in Part 5 of the *PHA*. These powers include the issuance of orders for persons to do anything that the PHO reasonably believes is necessary "to prevent or stop a health hazard, or mitigate the harm or prevent further harm from a health hazard". They include the power to prohibit a class of persons from entering a particular place (*PHA,* ss. 31(1)(b), 39(3)).

The Impugned Orders

14 The Petition challenges three sets of orders, issued and updated by the PHO under the *PHA* emergency powers (the "Impugned Orders"):

(i) *Covid-19 Vaccination Status Information and Preventative Measures* order of September 9, 2021, September 27, 2021 ("Vaccination Status Order");

(ii) *Residential Care Covid-19 Preventative Measures* order of October 21, 2021 ("Residential Care Order"); and

(iii) *Hospital and Community (Health Care and other Services) Covid-19 Vaccination Status Information and Preventative Measures* order of October 21, 2021 ("Hospital Order").

15 Broadly speaking, the Impugned Orders mandate that, as of mid-October 2021, only double-vaccinated persons may provide healthcare services in a wide-range of British Columbia healthcare settings, including long-term care facilities, hospitals and community care settings.

Reconsideration Request

16 By letter to the PHO of November 8, 2021, pursuant to s. 43 of the *PHA*, the petitioners requested a reconsideration of the Impugned Orders ("Reconsideration Request") on behalf of a broad class of healthcare workers in British Columbia.

17 Section 43(1) of the *PHA* says in part:

> **Reconsideration of orders**
>
> **43** (1) A person affected by an order, or the variance of an order, may request the health officer who issued the order or made the variance to reconsider the order or variance if the person
>
> (a) has additional relevant information that was not reasonably available to the health officer when the order was issued or varied,
>
> (b) has a proposal that was not presented to the health officer when the order was issued or varied but, if implemented, would
>
> (c) meet the objective of the order, and

(ii) be suitable as the basis of a written agreement under section 38 *[may make written agreements]*, or

(c) requires more time to comply with the order.

18 The Reconsideration Request contained a lengthy critique of the Impugned Orders from Dr. J. Kettner, Chief Medical Officer of Health and Chief Public Health Officer for the Province of Manitoba from 1999 to 2012. Arguing that the Impugned Orders failed to comply with generally accepted principles of public health governance and the *Charter*, it contained voluminous research, submissions regarding the principles governing public health orders, and examples of less restrictive measures in other jurisdictions.

19 The Reconsideration Request proposed, among other things, alternative approaches to satisfy the objectives of the Impugned Orders, including the following:

i. Natural immunity through a positive RT-PCR or rapid antigen test result demonstrating recovery from COVID-19, issued no less than 11 days and no more than 6 months after the date on which a person first tested positive (e.g. France).

ii. Negative PCR or antigen test less than 48 hours prior to attendance at a facility (e.g. Alberta).

iii. Single vaccination after contracting COVID-19 after an interval of at least 21 days following the illness (e.g. Quebec).

iv. Documentation from a physician or registered nurse providing medical reason for not being fully vaccinated (e.g. Ontario).

20 On November 9, 2021, under *PHA s.* 54(1)(h), the PHO issued a variance, with retroactive effect, halting s. 43 reconsideration requests except for medical reasons ("Reconsideration Variance").

21 The evidence filed on behalf of the PHO suggests that, due to hundreds of s. 43 requests, the Reconsideration Variance was necessary to protect public health until there was a significant reduction in transmissions, serious disease, and strain on the public health care system.

22 Section 54(1)(h) says:

> **General emergency powers**
>
> **54** (1) A health officer may, in an emergency, do one or more of the following:
>
> ...
>
> (h) not reconsider an order under section 43 *[reconsideration of orders]*, not review an order under section 44 *[review of orders]* or not reassess an order under section 45 *[mandatory reassessment of orders]*;

23 By letter of January 17, 2022, relying on the Reconsideration Variance, the PHO declined to respond to the Reconsideration Request because it sought exemption from the Impugned Orders on non-medical grounds ("Reconsideration Response").

The Petition

24 The Petition alleges that the materials in the Reconsideration Request demonstrate the *Charter* violations and unreasonableness of the Impugned Orders.

25 It seeks a declaration that the Impugned Orders are of no force and effect for unjustifiably infringing the following rights and freedoms of unvaccinated healthcare workers:

* section 2(a) (freedom of conscience and religion);

* section 2(b) (freedom of thought, belief, opinion and expression);

* section 7 (life, liberty and security of the person); and

* section 15(1) (equality rights).

26 It seeks orders, under the *JRPA,* quashing and setting aside the Impugned Orders, or declaring them *ultra vires*, as unreasonable or exceeding the PHO's statutory authority.

27 The petitioners also challenge the Reconsideration Response as an unreasonable refusal to consider the Reconsideration Request.

Governing Law

28 Public interest standing permits public-spirited litigants to prosecute issues of general interest and importance, thereby causing courts to fulfill their "constitutional role of scrutinizing the legality of government action, striking it down when it is unlawful and thus establishing and enforcing the rule of law" (*Council of Canadians with Disabilities v. British Columbia (Attorney General),* 2020 BCCA 241, [*CCD*], para. 2).1

29 Challenges to standing focus on whether "the public interest litigant is an appropriate party to advance a justiciable claim, not on the detail of intended trial evidence or the claim's ultimate prospect of success" (*CCD,* para. 87).

30 The litigant has the onus to demonstrate that public interest standing is warranted in the circumstances. The assessment focuses on three factors identified in *Canada (Minister of Justice) v. Borowski*, [1981] 2 S.C.R. 575 [*Borowski*]:

(i) does the claim raise a serious justiciable issue?

(ii) is the plaintiff directly affected by the action or does the plaintiff have a genuine interest in its outcome? and

(iii) is the action a reasonable and effective means to bring the claim to court?

31 The assessment should be flexible and generous, to serve the underlying purposes of upholding the legality principle and providing access to justice, particularly so for vulnerable and marginalized citizens broadly affected by legislation of questionable constitutional validity (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45 [*Downtown Eastside*], paras. 31, 51).

32 On the other side of the balance are the limiting factors of allocation of scarce judicial resources, screening of "busybody" litigants, and obtaining the viewpoints of those who are actually most directly impacted by the issues in question. For these reasons, a party with private interest standing is generally preferred to a public interest litigant seeking to advance a duplicative claim (*Downtown Eastside*, para. 37; *CCD*, paras. 71, 79-80, 83).

Analysis and Findings

The Society's Public Interest Standing

33 I turn to consider whether the Society satisfies the *Borowski* factors.

Serious Justiciable Issue

34 A serious justiciable issue is one that is appropriate for judicial determination and clearly not frivolous.

35 Justiciability asks whether the case suits the court's place in our constitutional system of government: *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49 [*Auditor General*] at 90-

91. Ultimately, the answer "depends on the appreciation by the judiciary of its own position in the constitutional scheme" (*Auditor General* at 91).

36 So long as the pleading reveals at least one serious issue, it will usually be unnecessary to examine every pleaded claim for the purpose of standing (*Downtown Eastside,* para. 42; *CCD*, paras. 90, 94).

37 The petitioners argue that challenges such as this -- to the constitutionality and legality of legislation -- are always considered justiciable (*CCD*, para 90). They say serious issues are raised by questioning the "circumvention of the legislature ... in the name of public health," to achieve goals normally achieved through the "legislative process, which is transparent, public, and fosters democratic debate."

38 The PHO argues the Petition "discloses no adjudicative facts and so is non-justiciable". The Petition, the PHO says, is devoid of any meaningful particulars permitting the inquiry sought (*CCD,* paras. 104, 107). The PHO relies on *Beaudoin v. British Columbia*, 2021 BCSC 512 [*Beaudoin*], to argue that the Reconsideration Request raises no serious issue, as in that case a similar request for reconsideration based on similar evidence from Dr. Kettner was ruled inadmissible.

39 Regarding justiciability, the Petition challenges state action based on legislatively-delegated discretionary powers. In my view, the petitioners are correct that whether those actions comply with the *Charter* and *JRPA* are clearly questions suitable for judicial determination (*CCD*, para 90).

40 Regarding a serious issue, the Impugned Orders directly impact members of a defined and identifiable group in a serious way that, at least on the surface, relates to their *Charter* rights. CSASPP alleges that its alternative proposals reflect a superior approach, taken in other Provinces and elsewhere around the world, much less intrusive on healthcare workers' *Charter* rights. In my view, this raises substantial questions that meet the threshold of "clearly not frivolous."

41 I do not accept the PHO's argument that *Beaudoin* shows there is no serious issue to be tried regarding the Reconsideration Response. In *Beaudoin,* the reconsideration materials were ruled inadmissible because the petitioners did not challenge the reconsideration decision. In this case, however, CSASPP seeks to impugn the PHO's Reconsideration Response.2

42 In *Beaudoin*, religious leaders challenged the PHO's prohibition of certain religious gatherings, for allegedly violating the *Charter* rights of freedoms of religion, expression, assembly and association. After the petition was filed, the PHO reconsidered the impugned orders and issued a conditional variance allowing outdoor worship services subject to certain conditions.

43 The petitioners challenged only the PHO's initial orders, however, not the decision responding to their reconsideration request. Chief Justice Hinkson ruled the reconsideration materials inadmissible for that reason:

> [79] Moreover, as the religious petitioners have chosen not to amend their petition to seek judicial review of Dr. Henry's reconsideration decision, the main evidence they seek to rely on, namely the affidavits of Dr. Warren and Dr. Kettner, is not admissible on this petition because that evidence was not before Dr. Henry when she made the G&E Orders. ...
>
> [102] Had the religious petitioners amended their petition to seek judicial review of Dr. Henry's decision to grant them a variance to her G&E Orders, then the "record of proceeding" would include all of the information before Dr. Henry when she made her decision on the variance (but not before her when she issued the G&E Orders). But then the review would be of only her variance decision, not the G&E Orders.

44 Overall, the serious justiciable issue factor supports standing.

Genuine Interest

45 The genuine interest factor asks if a litigant has a real stake in the proceedings or is engaged with the issues in question (*CCD*, para. 98). Its purpose is to achieve "concrete adverseness", and thereby ensure sharp debate, thorough argument, and economical use of judicial resources. A litigant's engagement is assessed by its reputation, continuing interest, and link with the claim (*Downtown Eastside,* paras. 29, 43).

46 CSASPP claims genuine interest, based on its membership, purposes, and Reconsideration Request. While not tracking personal information about its approximately 170 current members, it estimates at least 41 work in the healthcare field in British Columbia based on participation in its confidential forum for healthcare issues.

47 The purposes described in CSASPP's constitution of January 14, 2021 are:

> To challenge the provincial COVID-19 measures instituted in British Columbia.
>
> To advocate and promote the development and advancement of science in public policy in British Columbia.

48 Its constitution of October 12, 2021 revised the purposes to include the following:

> (a) To improve health outcomes of people by advocating for the development and implementation of government and public health policy initiatives to be based on research conducting using the scientific method;
>
> (b) To improve access to information on pandemic and epidemic threats and events;
>
> ...
>
> (d) To oppose the dissemination of information that is not based on research conducted according to the scientific method;
>
> ...
>
> (f) To promote critical thinking and public discussion that includes the widest possible expression of opinions and viewpoints in all public policy debates or discussion, regardless of the level of government of Canada or of any province or territory therein.

49 The PHO submits that CSASPP has no history of involvement in the issues raised by the Petition, and the evidence connecting its membership to healthcare is vague and weak. The PHO says CSASPP is merely a "purpose-built anti-COVID-19 measures entity".

50 The PHO relies on *Atkins v. Anmore (Village)*, 2014 BCSC 2402, a petition to quash municipal bylaws brought by a petitioner in her capacity "as a citizen of the municipality" (para. 5). Justice Williams found this insufficient for a genuine interest in the validity of the bylaws and declined public interest standing:

> [35] ... the petitioner has [not] established that she has an interest that is materially different than any other member of the community. While it may be inferred that she brings these proceedings in some role that is supported by the two councillors, that, in my view, does not provide the basis for a finding of the type of interest that the jurisprudence suggests is necessary.

51 In my view, creating a society committed to one side of an issue is not sufficient to create a genuine stake for purposes of standing. As in *Atkins,* the members of such a group are obviously interested in the issue but do not necessarily have a stake different from the community generally.

52 The genuine interest factor is concerned not just with a genuine stake in an issue, however, but also with engagement. Engagement tests for "concrete adverseness" and economical use of judicial resources (*CCD*, para. 98; *Downtown Eastside*, paras. 29, 43).

53 In my view, CSASPP's Reconsideration Request and allegations regarding the Reconsideration Response show an engaged, concrete adverseness counting in favour of standing. Also counting somewhat in favour is the evidence, albeit vague and inferential, of CSASPP's stake based on the healthcare workers amongst its membership.

54 Overall, the genuine interest factor supports standing.

Reasonable and Effective Means

55 This third *Borowski* factor is concerned with "whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court".

56 The circumstances that the court should consider in making this inquiry include (*Downtown Eastside*, paras. 51-52):

(a) The plaintiff's capacity to bring forward a claim and "whether the issue will be presented in a sufficiently concrete and well-developed factual setting";

(b) Whether the case transcends the interests of those most directly affected by the challenged law or action;

(c) Whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination; and

(d) The potential impact of the proceedings on the rights of others who are equally or more directly affected, especially where private and public interests may come into conflict.

57 The petitioners submit they have the necessary resources and expertise to prosecute the claim. They point to Dr. Kettner's report and the other materials in their Reconsideration Request. They say the importance of their case transcends the interests of individual healthcare workers and concerns society's interest in having healthcare decisions made in accordance with scientific research.

58 The PHO argues the petition is not a reasonable and effective way to bring the issue before the courts. It says that directly impacted healthcare workers are better suited to challenge the Impugned Orders. As stated by Dickson J.A. in *CCD*, "all other relevant considerations being equal, a plaintiff with private interest standing will usually be preferred over a public interest litigant seeking to advance a duplicative claim in a separate action" (para. 83).

59 As discussed in the hearing, numerous individual healthcare workers, allegedly having lost their jobs due to being unvaccinated, are challenging the Impugned Orders in another proceeding that is also in its early stages: *Tatlock v. Attorney General for the Province of British Columbia*, Vancouver Registry Court File No. S-222427.

60 Given the *Tatlock* proceedings, CSASPP's standing appears unnecessary for access to justice for impacted healthcare workers. Nevertheless, guided by Crowell J.'s flexible, purposive approach in *Downtown Eastside*, CSASPP's petition appears to be a reasonable and effective means of bringing forward the evidence and claims regarding the Reconsideration Request and Response. It appears that no similar issue is being pursued in *Tatlock*.

61 In my view, subject to the comments above about the shortcomings in its pleadings, the Petition represents a reasonable and effective means to bring forward the important and complex healthcare issues in the Reconsideration Request that transcend the interests of those directly involved.

62 Overall, the reasonable and effective means factor supports standing.

Conclusion

63 In my view, all three *Borowski* factors support CSASPP's public interest standing particularly given its role in the Reconsideration Request.

Mr. Warner's Private Interest Standing

64 Private interest standing is based on personal and direct interest in an issue by virtue of its impact on the party. It arises if the party has a private right at stake, or was specially impacted by the issue beyond the effect on the general public (*Downtown Eastside*, para. 1).

65 The PHO argues that Mr. Warner is a software engineer, without any apparent connection to healthcare, and his evidence discloses no actual personal or direct interest in the issues.

66 In argument, Mr. Warner withdrew his claim to public interest standing and argued only for private interest standing. His evidence of the personal impact of the Impugned Orders is limited to this:

> ... my ability to access medical services in a timely manner has been affected. For example, I have been on the waitlist for approximately one year for surgery related to a sports injury.

67 In my view, Mr. Warner offers no evidentiary basis, beyond this unsupported, conclusory statement, to suggest any right at stake, or any personal or special impact from the Impugned Orders. There is nothing, for example, to suggest his wait for surgery was unusual or impacted by the Impugned Orders.

68 In my view, for these reasons he does not satisfy the requirements for private interest standing.

Substitute Petitioners

69 The petitioners brought a back-up application, in case both were denied standing, to substitute, as petitioners, two healthcare workers who allege losing their jobs due to the Impugned Orders.

70 The PHO did not dispute the private interest standing of these two healthcare workers, but opposed their substitution because it fundamentally altered the pleadings and record. The PHO's position was therefore that, if standing were denied to the petitioners, the substitutes should commence new proceedings.

71 Having found CSASPP to have public interest standing, I will not decide this alternative application to substitute these two petitioners.

Conclusion

72 CSASPP is found to have public interest standing.

73 Mr. Warner is found not to have private interest standing and his claims are dismissed.

74 Costs of the application are in the cause unless the parties wish to speak to them.

S.R. COVAL J.

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1 Leave to appeal granted by the Supreme Court of Canada, 2021 CanLII 24821.

2 At least for purposes of this application, the Reconsideration Request and Response appear central to CSASPP's case. They are prominent in the Petition, Part 2: Factual Basis, and CSASPP's evidence and argument at the hearing. The PHO acknowledged in argument that the petitioners' written submissions sought to impugn, by judicial review, the Reconsideration Response.

Having said that, I make no findings about the adequacy of CSASPP's current pleadings regarding the Reconsideration Request and Response. As the PHO points out, they are not referred to in the Petition, Part 1: Orders Sought, and are only indirectly referred to in Part 3: Legal Basis.

End of Document

Carter v. Canada (Attorney General), [2015] 1 S.C.R. 331

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner and Gascon JJ.

Heard: October 15, 2014;

Judgment: February 6, 2015.

File No.: 35591.

[2015] 1 S.C.R. 331 | [2015] 1 R.C.S. 331 | [2015] S.C.J. No. 5 | [2015] A.C.S. no 5 | 2015 SCC 5

Lee Carter, Hollis Johnson, William Shoichet, British Columbia Civil Liberties Association and Gloria Taylor, Appellants; v. Attorney General of Canada, Respondent. And Lee Carter, Hollis Johnson, William Shoichet, British Columbia Civil Liberties Association and Gloria Taylor, Appellants; v. Attorney General of Canada and Attorney General of British Columbia, Respondents, and Attorney General of Ontario, Attorney General of Quebec, Council of Canadians with Disabilities, Canadian Association for Community Living, Christian Legal Fellowship, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario, Association for Reformed Political Action Canada, Physicians' Alliance against Euthanasia, Evangelical Fellowship of Canada, Christian Medical and Dental Society of Canada, Canadian Federation of Catholic Physicians' Societies, Dying With Dignity, Canadian Medical Association, Catholic Health Alliance of Canada, Criminal Lawyers' Association (Ontario), Farewell Foundation for the Right to Die, Association québécoise pour le droit de mourir dans la dignité, Canadian Civil Liberties Association, Catholic Civil Rights League, [page332] Faith and Freedom Alliance, Protection of Conscience Project, Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society, Canadian Unitarian Council, Euthanasia Prevention Coalition and Euthanasia Prevention Coalition - British Columbia, Interveners.

(148 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Division of powers — Interjurisdictional immunity — Criminal Code provisions prohibiting physician-assisted dying — Whether prohibition interferes with protected core of provincial jurisdiction over health — Constitution Act, 1867, ss. 91(27), 92(7), (13), (16).

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Fundamental justice — Competent adult with grievous and irremediable medical condition causing enduring suffering consenting to termination of life with physician assistance — Whether Criminal Code provisions prohibiting physician-assisted dying infringe s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Criminal Code, R.S.C. 1985, c. C-46, ss. 14, 241(b).

Constitutional law — Charter of Rights — Remedy — Constitutional exemption — Availability — Constitutional challenge of Criminal Code provisions prohibiting physician-assisted dying seeking declaration of invalidity of provisions and free-standing constitutional exemption for claimants — Whether

constitutional exemption [page333] under s. 24(1) of Canadian Charter of Rights and Freedoms should be granted.

Courts — Costs — Special costs — Principles governing exercise of courts' discretionary power to grant special costs on full indemnity basis — Trial judge awarding special costs to successful plaintiffs on basis that award justified by public interest, and ordering Attorney General intervening as of right to pay amount proportional to participation in proceedings — Whether special costs should be awarded to cover entire expense of bringing case before courts — Whether award against Attorney General justified.

Summary:

Section 241(*b*) of the *Criminal Code* says that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14 says that no person may consent to death being inflicted on them. Together, these provisions prohibit the provision of assistance in dying in Canada. After T was diagnosed with a fatal neurodegenerative disease in 2009, she challenged the constitutionality of the *Criminal Code* provisions prohibiting assistance in dying. She was joined in her claim by C and J, who had assisted C's mother in achieving her goal of dying with dignity by taking her to Switzerland to use the services of an assisted suicide clinic; a physician who would be willing to participate in physician-assisted dying if it were no longer prohibited; and the British Columbia Civil Liberties Association. The Attorney General of British Columbia participated in the constitutional litigation as of right.

The trial judge found that the prohibition against physician-assisted dying violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition and concluded that this infringement is not justified under s. 1 of the *Charter*. She declared the prohibition unconstitutional, granted a one-year suspension of invalidity and provided T with a constitutional exemption. She awarded special costs in favour of the plaintiffs on the ground that this was justified by the public interest in resolving the legal issues raised by the case, and awarded 10 percent of the costs against the Attorney General of British Columbia in light of the full and active role it assumed in the proceedings.

[page334]

The majority of the Court of Appeal allowed the appeal on the ground that the trial judge was bound to follow this Court's decision in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, where a majority of the Court upheld the blanket prohibition on assisted suicide. The dissenting judge found no errors in the trial judge's assessment of *stare decisis*, her application of s. 7 or the corresponding analysis under s. 1. However, he concluded that the trial judge was bound by the conclusion in *Rodriguez* that any s. 15 infringement was saved by s. 1.

Held: The appeal should be allowed. Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. The declaration of invalidity is suspended for 12 months. Special costs on a full indemnity basis are awarded against Canada throughout. The Attorney General of British Columbia will bear responsibility for 10 percent of the costs at trial on a full indemnity basis and will pay the costs associated with its presence at the appellate levels on a party-and-party basis.

The trial judge was entitled to revisit this Court's decision in *Rodriguez*. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate. Here, both conditions were met. The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*.

[page335]

The prohibition on assisted suicide is, in general, a valid exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*, and it does not impair the protected core of the provincial jurisdiction over health. Health is an area of concurrent jurisdiction, which suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and the focus of the legislation. On the basis of the record, the interjurisdictional immunity claim cannot succeed.

Insofar as they prohibit physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that causes enduring and intolerable suffering, ss. 241(*b*) and 14 of the *Criminal Code* deprive these adults of their right to life, liberty and security of the person under s. 7 of the *Charter*. The right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Here, the prohibition deprives some individuals of life, as it has the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. The rights to liberty and security of the person, which deal with concerns about autonomy and quality of life, are also engaged. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The prohibition denies people in this situation the right to make decisions concerning their bodily integrity and medical care and thus trenches on their liberty. And by leaving them to endure intolerable suffering, it impinges on their security of the person.

The prohibition on physician-assisted dying infringes the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. The object of the prohibition is not, broadly, to preserve life whatever the circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness. Since a total ban on assisted suicide clearly helps achieve this object, individuals' rights are not deprived arbitrarily. However, the prohibition catches people outside the class of protected persons. It follows that the limitation on their [page336] rights is in at least some cases not connected to the objective and that the prohibition is thus overbroad. It is unnecessary to decide whether the prohibition also violates the principle against gross disproportionality.

Having concluded that the prohibition on physician-assisted dying violates s. 7, it is unnecessary to consider whether it deprives adults who are physically disabled of their right to equal treatment under s. 15 of the *Charter*.

Sections 241(*b*) and 14 of the *Criminal Code* are not saved by s. 1 of the *Charter*. While the limit is prescribed by law and the law has a pressing and substantial objective, the prohibition is not proportionate to the objective. An absolute prohibition on physician-assisted dying is rationally connected to the goal of protecting the vulnerable from taking their life in times of weakness, because prohibiting an activity that poses certain risks is a rational method of curtailing the risks. However, as the trial judge found, the evidence does not support the contention that a blanket prohibition is necessary in order to substantially meet the government's objective. The trial judge made no palpable and overriding error in concluding, on the basis of evidence from scientists, medical practitioners, and others who are familiar with end-of-life decision-making in Canada and abroad, that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. It was also open to her to conclude that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. The absolute prohibition is therefore not minimally impairing. Given this conclusion, it is not necessary to weigh the impacts of the law on protected rights against the beneficial effect of the law in terms of the greater public good.

The appropriate remedy is not to grant a free-standing constitutional exemption, but rather to issue a declaration of invalidity and to suspend it for 12 months. Nothing in this declaration would compel physicians to provide assistance in dying. The *Charter* rights of patients and [page337] physicians will need to be reconciled in any legislative and regulatory response to this judgment.

The appellants are entitled to an award of special costs on a full indemnity basis to cover the entire expense of bringing this case before the courts. A court may depart from the usual rule on costs and award special costs where two criteria are met. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not been previously resolved or that they transcend individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. Finally, only those costs that are shown to be reasonable and prudent will be covered by the award of special costs. Here, the trial judge did not err in awarding special costs in the truly exceptional circumstances of this case. It was also open to her to award 10 percent of the costs against the Attorney General of British Columbia in light of the full and active role it played in the proceedings. The trial judge was in the best position to determine the role taken by that Attorney General and the extent to which it shared carriage of the case.

Cases Cited

Distinguished: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; **applied:** *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; **disapproved:** *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28; **referred to:** *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Pretty v. United Kingdom*, No. 2346/02, ECHR 2002-III; *Fleming v. Ireland*, [2013] IESC 19; *R. (on the application of Nicklinson) v. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256; [page338] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181; *R. v. Parker* (2000), 49 O.R. (3d) 481; *Fleming v. Reid* (1991), 4 O.R. (3d) 74; *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417; *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350; *R. v. Swain*, [1991] 1 S.C.R. 933; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Hegeman v. Carter*, 2008 NWTSC 48, 74 C.P.C. (6th) 112; *Polglase v. Polglase* (1979), 18 B.C.L.R. 294.

Statutes and Regulations Cited

Act respecting end-of-life care, CQLR, c. S-32.0001 [not yet in force].

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Constitution Act, 1867, ss. 91, 92.

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1985, c. C-46, ss. 14, 21, 22, 212(1)(*j*), 222, 241.

Authors Cited

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Newbury and Saunders JJ.A.), 2013 BCCA 435, 51 B.C.L.R. (5th) 213, [page339] 302 C.C.C. (3d) 26, 365 D.L.R. (4th) 351, 293 C.R.R. (2d) 109, 345 B.C.A.C. 232, 589 W.A.C. 232, [2014] 1 W.W.R. 211, [2013] B.C.J. No. 2227 (QL), 2013 CarswellBC 3051 (WL Can.), setting aside decisions of Smith J., 2012 BCSC 886, 287 C.C.C. (3d) 1, 261 C.R.R. (2d) 1, [2012] B.C.J. No. 1196 (QL), 2012 CarswellBC 1752 (WL Can.); and 2012 BCSC 1587, 271 C.R.R. (2d) 224, [2012] B.C.J. No. 2259 (QL), 2012 CarswellBC 3388 (WL Can.). Appeal allowed.

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[page340]

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Robert W. Staley, *Ranjan K. Agarwal*, *Jack R. Maslen* and *Philip H. Horgan*, for the interveners the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project.

Angus M. Gunn, *Q.C.*, and *Duncan A. W. Ault*, for the intervener the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society.

Tim Dickson and *Ryan J. M. Androsoff*, for the intervener the Canadian Unitarian Council.

Hugh R. Scher, for the interveners the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition -- British Columbia.

[page341]

TABLE OF CONTENTS

			Paragraph
I.	Introduction	1	
II.	Background	5	
III.	Statutory Provisions	19	
IV.	Judicial History	22	

A. *British Columbia Supreme Court, 2012 BCSC 886, 287 C.C.C. (3d) 1* *22*

B. *British Columbia Court of Appeal, 2013 BCCA 435, 51 B.C.L.R. (5th) 213* 34

V. Issues on Appeal 40

VI. Was the Trial Judge Bound by *Rodriguez*? 42

VII. Does the Prohibition Interfere With the "Core" of the Provincial Jurisdiction Over Health? 49

VIII. Section 7 54

A. *Does the Law Infringe the Right to Life, Liberty and Security of the Person?* 57

  (1) Life 57

  (2) Liberty and Security of the Person 64

  (3) Summary on Section 7: Life, Liberty and Security of the Person 70

B. *The Principles of Fundamental Justice* 71

(1) Arbitrariness 83

[page342]

(2) Overbreadth 85

(3) Gross Disproportionality 89

(4) Parity 91

IX. Does the Prohibition on Assisted Suicide Violate Section 15 of the *Charter*? 93

X. Section 1 94

(1) Rational Connection 99

(2) Minimal Impairment 102

(a) *Canada's Challenge to the Facts* 108

(b) *The Fresh Evidence* 110

(c) *The Feasibility of Safeguards and the Possibility of a "Slippery Slope"* 114

(3) Deleterious Effects and Salutary Benefits 122

XI. Remedy 124

A. *The Court of Appeal's Proposed Constitutional Exemption* *124*

B. *Declaration of Invalidity* 126

XII. Costs 133

XIII. Conclusion 147

The following is the judgment delivered by

THE COURT

I. Introduction

1 It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously and irremediably ill cannot [page343] seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel.

2 The question on this appeal is whether the criminal prohibition that puts a person to this choice violates her *Charter* rights to life, liberty and security of the person (s. 7) and to equal treatment by and under the law (s. 15). This is a question that asks us to balance competing values of great importance. On the one hand stands the autonomy and dignity of a competent adult who seeks death as a response to a grievous and irremediable medical condition. On the other stands the sanctity of life and the need to protect the vulnerable.

3 The trial judge found that the prohibition violates the s. 7 rights of competent adults who are suffering intolerably as a result of a grievous and irremediable medical condition. She concluded that this infringement is not justified under s. 1 of the *Charter*. We agree. The trial judge's findings were based on an exhaustive review of the extensive record before her. The evidence supports her conclusion that the violation of the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter* is severe. It also supports her finding that a properly administered regulatory regime is capable of protecting the vulnerable from abuse or error.

4 We conclude that the prohibition on physician-assisted dying is void insofar as it deprives a competent adult of such assistance where (1) the person affected clearly consents to the termination of life; and (2) the person has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is [page344] intolerable to the individual in the circumstances of his or her condition. We therefore allow the appeal.

II. Background

5 In Canada, aiding or abetting a person to commit suicide is a criminal offence: see s. 241(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46. This means that a person cannot seek a physician-assisted death. Twenty-one years ago, this Court upheld this blanket prohibition on assisted suicide by a slim majority: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. Sopinka J., writing for five justices, held that the prohibition did not violate s. 7 of the *Canadian Charter of Rights and Freedoms*, and that if it violated s. 15, this was justified under s. 1, as there was "no halfway measure that could be relied upon with assurance" to protect the vulnerable (p. 614). Four justices disagreed. McLachlin J. (as she then was), with L'Heureux-Dubé J. concurring, concluded that the prohibition violated s. 7 of the *Charter* and was not justified under s. 1. Lamer C.J. held that the prohibition violated s. 15 of the *Charter* and was not saved under s. 1. Cory J. agreed that the prohibition violated both ss. 7 and 15 and could not be justified.

6 Despite the Court's decision in *Rodriguez*, the debate over physician-assisted dying continued. Between 1991 and 2010, the House of Commons and its committees debated no less than six private member's bills seeking to decriminalize assisted suicide. None was passed. While opponents to legalization emphasized the inadequacy of safeguards and the potential to devalue human life, a vocal minority spoke in favour of reform, highlighting the importance of dignity and autonomy and the limits of palliative care in addressing suffering. The Senate considered the matter as well, issuing a report on assisted suicide and euthanasia in 1995. The [page345] majority expressed concerns about the risk of abuse under a permissive regime and the need for respect for life. A minority supported an exemption to the prohibition in some circumstances.

7 More recent reports have come down in favour of reform. In 2011, the Royal Society of Canada published a report on end-of-life decision-making and recommended that the *Criminal Code* be modified to permit assistance in dying in some circumstances. The Quebec National Assembly's Select Committee on Dying with Dignity issued a report in 2012, recommending amendments to legislation to recognize medical aid in dying as appropriate end-of-life care (now codified in *An Act respecting end-of-life care*, CQLR, c. S-32.0001 (not yet in force)).

8 The legislative landscape on the issue of physician-assisted death has changed in the two decades since *Rodriguez*. In 1993 Sopinka J. noted that no other Western democracy expressly permitted assistance in dying. By 2010, however, eight jurisdictions permitted some form of assisted dying: the Netherlands, Belgium, Luxembourg, Switzerland, Oregon, Washington, Montana, and Colombia. The process of legalization began in 1994, when Oregon, as a result of a citizens' initiative, altered its laws to permit medical aid in dying for a person suffering from a terminal disease. Colombia followed in 1997, after a decision of the constitutional court. The Dutch Parliament established a regulatory regime for assisted dying in 2002; Belgium quickly adopted a similar regime, with Luxembourg joining in 2009. Together, these regimes have produced a body of evidence about the practical and legal workings of physician-assisted death and the efficacy of safeguards for the vulnerable.

[page346]

9 Nevertheless, physician-assisted dying remains a criminal offence in most Western countries, and a number of courts have upheld the prohibition on such assistance in the face of constitutional and human rights challenges: see, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); *Pretty v. United Kingdom*, No. 2346/02, ECHR 2002-III; and *Fleming v. Ireland*, [2013] IESC 19. In a recent decision, a majority of the Supreme Court of the United Kingdom accepted that the absolute prohibition on assisted dying breached the claimants' rights, but found the evidence on safeguards insufficient; the court concluded that Parliament should be given an opportunity to debate and amend the legislation based on the court's provisional views (see *R*. *(on the application of Nicklinson) v. Ministry of Justice*, [2014] UKSC 38, [2014] 3 All E.R. 843).

10 The debate in the public arena reflects the ongoing debate in the legislative sphere. Some medical practitioners see legal change as a natural extension of the principle of patient autonomy, while others fear derogation from the principles of medical ethics. Some people with disabilities oppose the legalization of assisted dying, arguing that it implicitly devalues their lives and renders them vulnerable to unwanted assistance in dying, as medical professionals assume that a disabled patient "leans towards death at a sharper angle than the acutely ill - but otherwise non-disabled - patient" (2012 BCSC 886, 287 C.C.C. (3d) 1, at para. 811). Other people with disabilities take the opposite view, arguing that a regime which permits control over the manner of one's death respects, rather than threatens, their autonomy and dignity, and that the legalization of physician-assisted suicide will protect them by establishing stronger safeguards and oversight for end-of-life medical care.

11 The impetus for this case arose in 2009, when Gloria Taylor was diagnosed with a fatal neurodegenerative disease, amyotrophic lateral sclerosis (or ALS), which causes progressive muscle [page347] weakness. ALS patients first lose the ability to use their hands and feet, then the ability to walk, chew, swallow, speak and, eventually, breathe. Like Sue Rodriguez before her, Gloria Taylor did "not want to die slowly, piece by piece" or "wracked with pain," and brought a claim before the British Columbia Supreme Court challenging the constitutionality of the *Criminal Code* provisions that prohibit assistance in dying, specifically ss. 14, 21, 22, 222, and 241. She was joined in her claim by Lee Carter and Hollis Johnson, who had assisted Ms. Carter's mother, Kathleen ("Kay") Carter, in achieving her goal of dying with dignity by taking her to Switzerland to use the services of DIGNITAS, an assisted-suicide clinic; Dr. William Shoichet, a physician from British Columbia who would be willing to participate in physician-assisted dying if it were no longer prohibited; and the British Columbia Civil Liberties Association, which has a long-standing interest in patients' rights and health policy and has conducted advocacy and education with respect to end-of-life choices, including assisted suicide.

12 By 2010, Ms. Taylor's condition had deteriorated to the point that she required a wheelchair to go more than a short distance and was suffering pain from muscle deterioration. She required home support for assistance with the daily tasks of living, something that she described as an assault on her privacy, dignity, and self-esteem. She continued to pursue an independent life despite her illness, but found that she was steadily losing the ability to participate fully in that life. Ms. Taylor informed her family and friends of a desire to obtain a physician-assisted death. She did not want to "live in a bedridden state, stripped of dignity and independence", she said; nor did she want an "ugly death". This is how she explained her desire to seek a physician-assisted death:

> I do not want my life to end violently. I do not want my mode of death to be traumatic for my family members. I [page348] want the legal right to die peacefully, at the time of my own choosing, in the embrace of my family and friends.
>
> I know that I am dying, but I am far from depressed. I have some down time - that is part and parcel of the experience of knowing that you are terminal. But there is still a lot of good in my life; there are still things, like special times with my granddaughter and family, that bring me extreme joy. I will not waste any of my remaining time being depressed. I intend to get every bit of happiness I can wring from what is left of my life so long as it remains a life of quality; but I do not want to live a life without quality. There will come a point when I will know that enough is enough. I cannot say precisely when that time will be. It is not a question of "when I can't walk" or "when I can't talk." There is no pre-set trigger moment. I just know that, globally, there

> will be some point in time when I will be able to say - "this is it, this is the point where life is just not worthwhile." When that time comes, I want to be able to call my family together, tell them of my decision, say a dignified good-bye and obtain final closure - for me and for them.
>
> My present quality of life is impaired by the fact that I am unable to say for certain that I will have the right to ask for physician-assisted dying when that "enough is enough" moment arrives. I live in apprehension that my death will be slow, difficult, unpleasant, painful, undignified and inconsistent with the values and principles I have tried to live by... .
>
> ...
>
> ... What I fear is a death that negates, as opposed to concludes, my life. I do not want to die slowly, piece by piece. I do not want to waste away unconscious in a hospital bed. I do not want to die wracked with pain.

13 Ms. Taylor, however, knew she would be unable to request a physician-assisted death when the time came, because of the *Criminal Code* prohibition and the fact that she lacked the financial resources to travel to Switzerland, where assisted suicide is legal and available to non-residents. This [page349] left her with what she described as the "cruel choice" between killing herself while she was still physically capable of doing so, or giving up the ability to exercise any control over the manner and timing of her death.

14 Other witnesses also described the "horrible" choice faced by a person suffering from a grievous and irremediable illness. The stories in the affidavits vary in their details: some witnesses described the progression of degenerative illnesses like motor neuron diseases or Huntington's disease, while others described the agony of treatment and the fear of a gruesome death from advanced-stage cancer. Yet running through the evidence of all the witnesses is a constant theme - that they suffer from the knowledge that they lack the ability to bring a peaceful end to their lives at a time and in a manner of their own choosing.

15 Some describe how they had considered seeking out the traditional modes of suicide but found that choice, too, repugnant:

> I was going to blow my head off. I have a gun and I seriously considered doing it. I decided that I could not do that to my family. It would be horrible to put them through something like that... . I want a better choice than that.

A number of the witnesses made clear that they - or their loved ones - had considered or in fact committed suicide earlier than they would have chosen to die if physician-assisted death had been available to them. One woman noted that the conventional methods of suicide, such as carbon monoxide asphyxiation, slitting of the wrists or overdosing on street drugs, would require that she end her life "while I am still able bodied and capable of taking my life, well ahead of when I actually need to leave this life".

16 Still other witnesses described their situation in terms of a choice between a protracted or painful [page350] death and exposing their loved ones to prosecution for assisting them in ending their lives. Speaking of himself and his wife, one man said: "We both face this reality, that we have only two terrible and imperfect options, with a sense of horror and loathing."

17 Ms. Carter and Mr. Johnson described Kay Carter's journey to assisted suicide in Switzerland and their role in facilitating that process. Kay was diagnosed in 2008 with spinal stenosis, a condition that results in the progressive compression of the spinal cord. By mid-2009, her physical condition had deteriorated to the point that she required assistance with virtually all of her daily activities. She had extremely limited mobility and suffered from chronic pain. As her illness progressed, Kay informed her family that she did not wish to live out her life as an "ironing board", lying flat in bed. She asked her daughter, Lee Carter, and her daughter's husband, Hollis Johnson, to support and assist her in arranging an assisted suicide in Switzerland, and to travel there with her for that purpose. Although aware that assisting Kay could expose them both to prosecution in Canada, they agreed to assist her. In early 2010, they attended a clinic in Switzerland operated by DIGNITAS, a Swiss "death with dignity" organization. Kay took the prescribed dose of sodium pentobarbital while surrounded by her family, and passed away within 20 minutes.

18 Ms. Carter and Mr. Johnson found the process of planning and arranging for Kay's trip to Switzerland difficult, in part because their activities had to be kept secret due to the potential for criminal sanctions. While they have not faced prosecution in Canada following Kay's death, Ms. Carter and Mr. Johnson are of the view that Kay ought to have been able to obtain a physician-assisted suicide at home, surrounded by her family and friends, rather than undergoing the stressful and expensive [page351] process of arranging for the procedure overseas. Accordingly, they joined Ms. Taylor in pressing for the legalization of physician-assisted death.

III. Statutory Provisions

19 The appellants challenge the constitutionality of the following provisions of the *Criminal Code*:

> **14.** No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.
>
> **21.** (1) Every one is a party to an offence who
>
> ...
>
> (*b*) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> ...
>
> (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.
>
> **22.** (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.
>
> **222.** (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.
>
> [page352]
>
> (2) Homicide is culpable or not culpable.
>
> (3) Homicide that is not culpable is not an offence.
>
> (4) Culpable homicide is murder or manslaughter or infanticide.
>
> (5) A person commits culpable homicide when he causes the death of a human being,
>
> (*a*) by means of an unlawful act;
>
> ...
>
> **241.** Every one who
>
> (*a*) counsels a person to commit suicide, or
>
> (*b*) aids or abets a person to commit suicide,

> whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

20 In our view, two of these provisions are at the core of the constitutional challenge: s. 241(*b*), which says that everyone who aids or abets a person in committing suicide commits an indictable offence, and s. 14, which says that no person may consent to death being inflicted on them. It is these two provisions that prohibit the provision of assistance in dying. Sections 21, 22, and 222 are only engaged so long as the provision of assistance in dying is itself an "unlawful act" or offence. Section 241(*a*) does not contribute to the prohibition on assisted suicide.

21 The *Charter* states:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IV. Judicial History

A. *British Columbia Supreme Court, 2012 BCSC 886, 287 C.C.C. (3d) 1*

22 The action was brought by way of summary trial before Smith J. in the British Columbia Supreme Court. While the majority of the evidence was presented in affidavit form, a number of the expert witnesses were cross-examined, both prior to trial and before the trial judge. The record was voluminous: the trial judge canvassed evidence from Canada and from the permissive jurisdictions on medical ethics and current end-of-life practices, the risks associated with assisted suicide, and the feasibility of safeguards.

23 The trial judge began by reviewing the current state of the law and practice in Canada regarding end-of-life care. She found that current unregulated end-of-life practices in Canada - such as the administration of palliative sedation and the withholding or withdrawal of lifesaving or life-sustaining medical treatment - can have the effect of hastening death and that there is a strong societal consensus that these practices are ethically acceptable (para. 357). After considering the evidence of physicians and ethicists, she found that the "preponderance of the evidence from ethicists is that there is no ethical distinction between physician-assisted death and other end-of-life practices whose outcome is highly likely to be death" (para. 335). Finally, she found that there are qualified Canadian physicians who would find it ethical to assist a patient in dying if that act were not prohibited by law (para. 319).

24 Based on these findings, the trial judge concluded that, while there is no clear societal consensus on physician-assisted dying, there is a strong consensus that it would only be ethical with respect to voluntary adults who are competent, informed, grievously and irremediably ill, and where the assistance is "clearly consistent with the patient's wishes and best interests, and [provided] in order to relieve suffering" (para. 358).

25 The trial judge then turned to the evidence from the regimes that permit physician-assisted dying. She reviewed the safeguards in place in each jurisdiction and considered the effectiveness of each regulatory regime. In each system, she found general compliance with regulations, although she noted some room for improvement. The evidence from Oregon and the Netherlands showed that a system can be designed to protect the socially vulnerable. Expert evidence established that the "predicted abuse and disproportionate impact on vulnerable populations has not materialized" in Belgium, the Netherlands, and Oregon (para. 684). She concluded that

> although none of the systems has achieved perfection, empirical researchers and practitioners who have experience in those systems are of the view that they work well in protecting patients from abuse while allowing competent patients to choose the timing of their deaths. [para. 685]

While stressing the need for caution in drawing conclusions for Canada based on foreign experience, the trial judge found that "weak inference[s]" could be drawn about the effectiveness of safeguards and the potential degree of compliance with any permissive regime (para. 683).

26 Based on the evidence from the permissive jurisdictions, the trial judge also rejected the argument that the legalization of physician-assisted dying would impede the development of palliative care in the country, finding that the effects of a permissive regime, while speculative, would "not necessarily be negative" (para. 736). Similarly, she concluded that any changes in the physician-patient relationship following legalization "could prove to be neutral or for the good" (para. 746).

27 The trial judge then considered the risks of a permissive regime and the feasibility of implementing safeguards to address those risks. After reviewing the evidence tendered by physicians and experts in patient assessment, she concluded that physicians were capable of reliably assessing patient competence, including in the context of life-and-death decisions (para. 798). She found that it was possible to detect coercion, undue influence, and ambivalence as part of this assessment process (paras. 815, 843). She also found that the informed consent standard could be applied in the context of physician-assisted death, so long as care was taken to "ensure a patient is properly informed of her diagnosis and prognosis" and the treatment options described included all reasonable palliative care interventions (para. 831). Ultimately, she concluded that the risks of physician-assisted death "can be identified and very substantially minimized through a carefully-designed system" that imposes strict limits that are scrupulously monitored and enforced (para. 883).

28 Having reviewed the copious evidence before her, the trial judge concluded that the decision in *Rodriguez* did not prevent her from reviewing the constitutionality of the impugned provisions, because (1) the majority in *Rodriguez* did not address the right to life; (2) the principles of overbreadth and gross disproportionality had not been identified at the time of the decision in *Rodriguez* [page356] and thus were not addressed in that decision; (3) the majority only "assumed" a violation of s. 15; and (4) the decision in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, represented a "substantive change" to the s. 1 analysis (para. 994). The trial judge concluded that these changes in the law, combined with the changes in the social and factual landscape over the past 20 years, permitted her to reconsider the constitutionality on the prohibition on physician-assisted dying.

29 The trial judge then turned to the *Charter* analysis. She first asked whether the prohibition violated the s. 15 equality guarantee. She found that the provisions imposed a disproportionate burden on persons with physical disabilities, as only they are restricted to self-imposed starvation and dehydration in order to take their own lives (para. 1076). This distinction, she found, is discriminatory, and not justified under s. 1. While the objective of the prohibition - the protection of vulnerable persons from being induced to commit suicide at a time of weakness - is pressing and substantial and the means are rationally connected to that purpose, the prohibition is not minimally impairing. A "stringently limited, carefully monitored system of exceptions" would achieve Parliament's objective:

> Permission for physician-assisted death for grievously ill and irremediably suffering people who are competent, fully informed, non-ambivalent, and free from coercion or duress, with stringent and well-enforced safeguards, could achieve that objective in a real and substantial way. [para. 1243]

30 Turning to s. 7 of the *Charter*, which protects life, liberty and security of the person, the trial judge found that the prohibition impacted all three [page357] interests. The prohibition on seeking physician-assisted dying deprived individuals of liberty, which encompasses "the right to non-interference by the state with fundamentally important and personal medical decision-making" (para. 1302). In addition, it also impinged on Ms. Taylor's security of the person by restricting her control over her bodily integrity. While the trial judge rejected a "qualitative" approach to the right to life, concluding that the right to life is only engaged by a threat of death, she concluded that Ms. Taylor's right to life was engaged insofar as the prohibition might force her to take her life earlier than she otherwise would if she had access to a physician-assisted death.

31 The trial judge concluded that the deprivation of the claimants' s. 7 rights was not in accordance with the principles of fundamental justice, particularly the principles against overbreadth and gross disproportionality. The prohibition was broader than necessary, as the evidence showed that a system with properly designed and administered safeguards offered a less restrictive means of reaching the government's objective. Moreover, the "very severe" effects of the absolute prohibition in relation to its salutary effects rendered it grossly disproportionate (para. 1378). As with the s. 15 infringement, the trial judge found the s. 7 infringement was not justified under s. 1.

32 In the result, the trial judge declared the prohibition unconstitutional, granted a one-year suspension of invalidity, and provided Ms. Taylor with a constitutional exemption for use during the one-year period of the suspension. Ms. Taylor passed away prior to the appeal of this matter, without accessing the exemption.

33 In a separate decision on costs (2012 BCSC 1587, 271 C.R.R. (2d) 224), the trial judge ordered an award of special costs in favour of the plaintiffs. The issues in the case were "complex and [page358] momentous" (para. 87) and the plaintiffs could not have prosecuted the case without assistance from pro bono counsel; an award of special costs would therefore promote the public interest in encouraging experienced counsel to take on *Charter* litigation on a pro bono basis. The trial judge ordered the Attorney General of British Columbia to pay 10 percent of the costs, noting that she had taken a full and active role in the proceedings. Canada was ordered to pay the remaining 90 percent of the award.

B. *British Columbia Court of Appeal, 2013 BCCA 435, 51 B.C.L.R. (5th) 213*

34 The majority of the Court of Appeal, per Newbury and Saunders JJ.A., allowed Canada's appeal on the ground that the trial judge was bound to follow this Court's decision in *Rodriguez*. The majority concluded that neither the change in legislative and social facts nor the new legal issues relied on by the trial judge permitted a departure from *Rodriguez*.

35 The majority read *Rodriguez* as implicitly rejecting the proposition that the prohibition infringes the right to life under s. 7 of the *Charter*. It concluded that the post-*Rodriguez* principles of fundamental justice - namely overbreadth and gross disproportionality - did not impose a new legal framework under s. 7. While acknowledging that the reasons in *Rodriguez* did not follow the analytical methodology that now applies under s. 7, the majority held that this would not have changed the result.

36 The majority also noted that *Rodriguez* disposed of the s. 15 equality argument (which only two judges in that case expressly considered) by holding that any rights violation worked by the prohibition was justified as a reasonable limit under s. 1 of the *Charter*. The decision in *Hutterian [page359] Brethren* did not represent a change in the law under s. 1. Had it been necessary to consider s. 1 in relation to s. 7, the majority opined, the s. 1 analysis carried out under s. 15 likely would have led to the same conclusion - the "blanket prohibition" under s. 241 of the *Criminal Code* was justified (para. 323). Accordingly, the majority concluded that "the trial judge was bound to find that the plaintiffs' case had been authoritatively decided by *Rodriguez*" (para. 324).

37 Commenting on remedy in the alternative, the majority of the Court of Appeal suggested the reinstatement of the free-standing constitutional exemption eliminated in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, instead of a declaration of invalidity, as a suspended declaration presented the spectre of a legislative vacuum.

38 The majority denied the appellants their costs, given the outcome, but otherwise would have approved the trial judge's award of special costs. In addition, the majority held that costs should not have been awarded against British Columbia.

39 Finch C.J.B.C., dissenting, found no errors in the trial judge's assessment of *stare decisis*, her application of s.

7, or the corresponding analysis under s. 1. However, he concluded that the trial judge was bound by Sopinka J.'s conclusion that any s. 15 infringement was saved by s. 1. While he essentially agreed with her s. 7 analysis, he would have accepted a broader, qualitative scope for the right to life. He agreed with the trial judge that the prohibition was not minimally impairing, and concluded that a "carefully regulated scheme" could meet Parliament's objectives (para. 177); therefore, the breach of s. 7 could not be justified under s. 1. [page360] He would have upheld the trial judge's order on costs.

V. Issues on Appeal

40 The main issue in this case is whether the prohibition on physician-assisted dying found in s. 241(*b*) of the *Criminal Code* violates the claimants' rights under ss. 7 and 15 of the *Charter*. For the purposes of their claim, the appellants use "physician-assisted death" and "physician-assisted dying" to describe the situation where a physician provides or administers medication that intentionally brings about the patient's death, at the request of the patient. The appellants advance two claims: (1) that the prohibition on physician-assisted dying deprives competent adults, who suffer a grievous and irremediable medical condition that causes the person to endure physical or psychological suffering that is intolerable to that person, of their right to life, liberty and security of the person under s. 7 of the *Charter*; and (2) that the prohibition deprives adults who are physically disabled of their right to equal treatment under s. 15 of the *Charter*.

41 Before turning to the *Charter* claims, two preliminary issues arise: (1) whether this Court's decision in *Rodriguez* can be revisited; and (2) whether the prohibition is beyond Parliament's power because physician-assisted dying lies at the core of the provincial jurisdiction over health.

VI. Was the Trial Judge Bound by *Rodriguez*?

42 The adjudicative facts in *Rodriguez* were very similar to the facts before the trial judge. Ms. Rodriguez, like Ms. Taylor, was dying of ALS. [page361] She, like Ms. Taylor, wanted the right to seek a physician's assistance in dying when her suffering became intolerable. The majority of the Court, per Sopinka J., held that the prohibition deprived Ms. Rodriguez of her security of the person, but found that it did so in a manner that was in accordance with the principles of fundamental justice. The majority also assumed that the provision violated the claimant's s. 15 rights, but held that the limit was justified under s. 1 of the *Charter*.

43 Canada and Ontario argue that the trial judge was bound by *Rodriguez* and not entitled to revisit the constitutionality of the legislation prohibiting assisted suicide. Ontario goes so far as to argue that "vertical *stare decisis*" is a *constitutional* principle that requires all lower courts to rigidly follow this Court's *Charter* precedents unless and until this Court sets them aside.

44 The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).

45 Both conditions were met in this case. The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide.

[page362]

46 The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. The majority of this Court in *Rodriguez* acknowledged the argument that the impugned laws were "over-inclusive" when discussing the principles of fundamental justice (see p. 590).

However, it did not apply the principle of overbreadth as it is currently understood, but instead asked whether the prohibition was "arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition" (p. 595). By contrast, the law on overbreadth, now explicitly recognized as a principle of fundamental justice, asks whether the law interferes with some conduct that has no connection to the law's objectives (*Bedford*, at para. 101). This different question may lead to a different answer. The majority's consideration of overbreadth under s. 1 suffers from the same defect: see *Rodriguez*, at p. 614. Finally, the majority in *Rodriguez* did not consider whether the prohibition was grossly disproportionate.

47 The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the widespread acceptance of a moral or ethical distinction between passive and active euthanasia (pp. 605-7); (2) the lack of any "halfway measure" that could protect the vulnerable (pp. 613-14); and (3) the "substantial consensus" in Western countries that a blanket prohibition is necessary to protect against the slippery slope (pp. 601-6 and 613). The record before the trial judge in this case contained evidence that, if accepted, was capable of undermining each of these conclusions (see [page363] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 136, per Rothstein J.).

48 While we do not agree with the trial judge that the comments in *Hutterian Brethren* on the s. 1 proportionality doctrine suffice to justify reconsideration of the s. 15 equality claim, we conclude it was open to the trial judge to reconsider the s. 15 claim as well, given the fundamental change in the facts.

VII. Does the Prohibition Interfere With the "Core" of the Provincial Jurisdiction Over Health?

49 The appellants accept that the prohibition on assisted suicide is, in general, a valid exercise of the federal criminal law power under s. 91(27) of the *Constitution Act, 1867*. However, they say that the doctrine of interjurisdictional immunity means that the prohibition cannot constitutionally apply to physician-assisted dying, because it lies at the core of the provincial jurisdiction over health care under s. 92(7), (13) and (16) of the *Constitution Act, 1867*, and is therefore beyond the legislative competence of the federal Parliament.

50 The doctrine of interjurisdictional immunity is premised on the idea that the heads of power in ss. 91 and 92 are "exclusive", and therefore each have a "minimum and unassailable" core of content that is immune from the application of legislation enacted by the other level of government (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 33-34). To succeed in their argument on this point, the appellants must show that the prohibition, insofar as it extends to physician-assisted dying, impairs the "protected core" of the provincial jurisdiction over health: [page364] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, at para. 131.

51 This Court rejected a similar argument in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134. The issue in that case was "whether the delivery of health care services constitutes a protected core of the provincial power over health care in s. 92(7), (13) and (16) ... and is therefore immune from federal interference" (para. 66). The Court concluded that it did not (per McLachlin C.J.):

> ... Parliament has power to legislate with respect to federal matters, notably criminal law, that touch on health. For instance, it has historic jurisdiction to prohibit medical treatments that are dangerous, or that it perceives as "socially undesirable" behaviour: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. Morgentaler*, [1993] 3 S.C.R. 463. The federal role in the domain of health makes it impossible to precisely define what falls in or out of the proposed provincial "core". Overlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread. [para. 68]

52 The appellants and the Attorney General of Quebec (who intervened on this point) say that it is possible to describe a precise core for the power over health, and thereby to distinguish *PHS*. The appellants' proposed core is described as a power to deliver necessary medical treatment for which there is no alternative treatment capable of meeting a patient's needs (A.F., at para. 43). Quebec takes a slightly different approach, defining the core as the power to establish the kind of health care offered to patients and supervise the process of consent required for that care (I.F., at para. 7).

[page365]

53 We are not persuaded by the submissions that *PHS* is distinguishable, given the vague terms in which the proposed definitions of the "core" of the provincial health power are couched. In our view, the appellants have not established that the prohibition on physician-assisted dying impairs the core of the provincial jurisdiction. Health is an area of concurrent jurisdiction; both Parliament and the provinces may validly legislate on the topic: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 32; *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 142. This suggests that aspects of physician-assisted dying may be the subject of valid legislation by both levels of government, depending on the circumstances and focus of the legislation. We are not satisfied on the record before us that the provincial power over health excludes the power of the federal Parliament to legislate on physician-assisted dying. It follows that the interjurisdictional immunity claim cannot succeed.

VIII. Section 7

54 Section 7 of the *Charter* states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

55 In order to demonstrate a violation of s. 7, the claimants must first show that the law interferes with, or deprives them of, their life, liberty or security of the person. Once they have established that s. 7 is engaged, they must then show that the deprivation in question is not in accordance with the principles of fundamental justice.

56 For the reasons below, we conclude that the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position, and that it does so in a manner that is overbroad and thus is not in [page366] accordance with the principles of fundamental justice. It therefore violates s. 7.

A. *Does the Law Infringe the Right to Life, Liberty and Security of the Person?*

(1) Life

57 The trial judge found that the prohibition on physician-assisted dying had the effect of forcing some individuals to take their own lives prematurely, for fear that they would be incapable of doing so when they reached the point where suffering was intolerable. On that basis, she found that the right to life was engaged.

58 We see no basis for interfering with the trial judge's conclusion on this point. The evidence of premature death was not challenged before this Court. It is therefore established that the prohibition deprives some individuals of life.

59 The appellants and a number of the interveners urge us to adopt a broader, qualitative approach to the right to life. Some argue that the right to life is not restricted to the preservation of life, but protects quality of life and therefore a right to die with dignity. Others argue that the right to life protects personal autonomy and fundamental notions of self-determination and dignity, and therefore includes the right to determine whether to take one's own life.

60 In dissent at the Court of Appeal, Finch C.J.B.C. accepted the argument that the right to life protects more than physical existence (paras. 84-89). In his view, the life interest is "intimately connected to the way a person values his or her lived experience. The point at which the meaning of life is lost, when life's positive attributes are so diminished as to render life valueless, ... is an intensely personal decision which 'everyone' has the right to make for him or herself" (para. 86). Similarly, in his dissent in *Rodriguez*, Cory J. accepted that the right to life included a right to die with dignity, on [page367] the ground that "dying is an integral part of living" (p. 630).

61 The trial judge, on the other hand, rejected the "qualitative" approach to the right to life. She concluded that the right to life is only engaged when there is a threat of death as a result of government action or laws. In her words, the right to life is limited to a "right not to die" (para. 1322 (emphasis in original)).

62 This Court has most recently invoked the right to life in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, where evidence showed that the lack of timely health care could result in death (paras. 38 and 50, per Deschamps J.; para. 123, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.), and in *PHS*, where the clients of Insite were deprived of potentially lifesaving medical care (para. 91). In each case, the right was only engaged by the threat of death. In short, the case law suggests that the right to life is engaged where the law or state action imposes death or an increased risk of death on a person, either directly or indirectly. Conversely, concerns about autonomy and quality of life have traditionally been treated as liberty and security rights. We see no reason to alter that approach in this case.

63 This said, we do not agree that the existential formulation of the right to life *requires* an absolute prohibition on assistance in dying, or that individuals cannot "waive" their right to life. This would create a "duty to live", rather than a "right to life", and would call into question the legality of any consent to the withdrawal or refusal of lifesaving or life-sustaining treatment. The sanctity of life is one of our most fundamental societal values. Section 7 is rooted in a profound respect for the value of human life. But s. 7 also encompasses life, liberty and security of the person during the passage to death. It is for this reason that the sanctity of [page368] life "is no longer seen to require that all human life be preserved at all costs" (*Rodriguez*, at p. 595, per Sopinka J.). And it is for this reason that the law has come to recognize that, in certain circumstances, an individual's choice about the end of her life is entitled to respect. It is to this fundamental choice that we now turn.

(2) Liberty and Security of the Person

64 Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects "the right to make fundamental personal choices free from state interference": *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses "a notion of personal autonomy involving ... control over one's bodily integrity free from state interference" (*Rodriguez*, at pp. 587-88, per Sopinka J., referring to *R. v. Morgentaler*, [1988] 1 S.C.R. 30) and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55-57; *Chaoulli*, at para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

65 The trial judge concluded that the prohibition on assisted dying limited Ms. Taylor's s. 7 right to liberty and security of the person, by interfering with "fundamentally important and personal medical decision-making" (para. 1302), imposing pain and psychological stress and depriving her of control over her bodily integrity (paras. 1293-94). She found that the prohibition left people like Ms. Taylor to suffer physical or psychological pain [page369] and imposed stress due to the unavailability of physician-assisted dying, impinging on her security of the person. She further noted that seriously and irremediably ill persons were "denied the opportunity to make a choice that may be very important to their sense of dignity and personal integrity" and that is "consistent with their lifelong values and that reflects their life's experience" (para. 1326).

66 We agree with the trial judge. An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.

67 The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are - and should be - free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 [page370] (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

68 In *Blencoe*, a majority of the Court held that the s. 7 liberty interest is engaged "where state compulsions or prohibitions affect important and fundamental life choices" (para. 49). In *A.C.*, where the claimant sought to refuse a potentially lifesaving blood transfusion on religious grounds, Binnie J. noted that we may "instinctively recoil" from the decision to seek death because of our belief in the sanctity of human life (para. 219). But his response is equally relevant here: it is clear that anyone who seeks physician-assisted dying because they are suffering intolerably as a result of a grievous and irremediable medical condition "does so out of a deeply personal and fundamental belief about how they wish to live, or cease to live" (*ibid.*). The trial judge, too, described this as a decision that, for some people, is "very important to their sense of dignity and personal integrity, that is consistent with their lifelong values and that reflects their life's experience" (para. 1326). This is a decision that is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person. As noted above, s. 7 recognizes the value of life, but it also honours the role that autonomy and dignity play at the end of that life. We therefore conclude that ss. 241(*b*) and 14 of the *Criminal Code*, insofar as they prohibit physician-assisted dying for competent adults who seek such assistance as a result of a grievous and irremediable medical condition that [page371] causes enduring and intolerable suffering, infringe the rights to liberty and security of the person.

69 We note, as the trial judge did, that Lee Carter and Hollis Johnson's interest in liberty may be engaged by the threat of criminal sanction for their role in Kay Carter's death in Switzerland. However, this potential deprivation was not the focus of the arguments raised at trial, and neither Ms. Carter nor Mr. Johnson sought a personal remedy before this Court. Accordingly, we have confined ourselves to the rights of those who seek assistance in dying, rather than of those who might provide such assistance.

(3) Summary on Section 7: Life, Liberty and Security of the Person

70 For the foregoing reasons, we conclude that the prohibition on physician-assisted dying deprived Ms. Taylor and others suffering from grievous and irremediable medical conditions of the right to life, liberty and security of the person. The remaining question under s. 7 is whether this deprivation was in accordance with the principles of fundamental justice.

B. *The Principles of Fundamental Justice*

71 Section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person - laws do this all the time - but rather that the state will not do so in a way that violates the principles of fundamental justice.

72 Section 7 does not catalogue the principles of fundamental justice to which it refers. Over the course of 32 years of *Charter* adjudication, this [page372] Court has worked to define the minimum constitutional requirements that a law that trenches on life, liberty or security of the person must meet (*Bedford*, at para. 94). While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object.

73 Each of these potential vices involves comparison with the object of the law that is challenged (*Bedford*, at para. 123). The first step is therefore to identify the object of the prohibition on assisted dying.

74 The trial judge, relying on *Rodriguez*, concluded that the object of the prohibition was to protect vulnerable persons from being induced to commit suicide at a time of weakness (para. 1190). All the parties except Canada accept this formulation of the object.

75 Canada agrees that the prohibition is intended to protect the vulnerable, but argues that the object of the prohibition should also be defined more broadly as simply "the preservation of life" (R.F., at paras 66, 108, and 109). We cannot accept this submission.

76 First, it is incorrect to say that the majority in *Rodriguez* adopted "the preservation of life" as the object of the prohibition on assisted dying. Justice Sopinka refers to the preservation of life when discussing the objectives of s. 241(*b*) (pp. 590, 614). However, he later clarifies this comment, stating that "[s]ection 241(*b*) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide" (p. 595). Sopinka J. then goes on to note that this purpose is "grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken" (*ibid.*). His remarks about the "preservation of life" in *Rodriguez* are best understood as a reference to an [page373] animating social value rather than as a description of the specific object of the prohibition.

77 Second, defining the object of the prohibition on physician-assisted dying as the preservation of life has the potential to short-circuit the analysis. In *RJR-MacDonald*, this Court warned against stating the object of a law "too broadly" in the s. 1 analysis, lest the resulting objective immunize the law from challenge under the *Charter* (para. 144). The same applies to assessing whether the principles of fundamental justice are breached under s. 7. If the object of the prohibition is stated broadly as "the preservation of life", it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate. The outcome is to this extent foreordained.

78 Finally, the jurisprudence requires the object of the impugned law to be defined precisely for the purposes of s. 7. In *Bedford*, Canada argued that the bawdy-house prohibition in s. 210 of the *Code* should be defined broadly as to "deter prostitution" for the purposes of s. 7 (para. 131). This Court rejected this argument, holding that the object of the prohibition should be confined to measures directly targeted by the law (para. 132). That reasoning applies with equal force in this case. Section 241(*b*) is not directed at preserving life, or even at preventing suicide - attempted suicide is no longer a crime. Yet Canada asks us to posit that the object of the prohibition is to preserve life, whatever the circumstances. This formulation goes beyond the ambit of the provision itself. The direct target of the measure is the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness.

79 Before turning to the principles of fundamental justice at play, a general comment is in order. [page374] In determining whether the deprivation of life, liberty and security of the person is in accordance with the principles of fundamental justice under s. 7, courts are not concerned with competing social interests or public benefits conferred by the impugned law. These competing moral claims and broad societal benefits are more appropriately considered at the stage of justification under s. 1 of the *Charter* (*Bedford*, at paras. 123 and 125).

80 In *Bedford*, the Court noted that requiring s. 7 claimants "to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7" (para. 127; see also *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at paras. 21-22). A claimant under s. 7 must show that the state has deprived them of their life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice. They should not be tasked with also showing that these principles are "not overridden by a valid state or communal interest in these circumstances": T. J. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995), 74 *Can. Bar Rev*. 446, at p. 449. As this Court stated in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:

> It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter* ... .

81 In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (the "*Motor Vehicle Reference*"), Lamer J. (as he then was) explained that the principles of fundamental justice are derived from the essential elements of our system of justice, which is itself founded on a belief in the dignity and worth of every human person. To deprive a person of constitutional [page375] rights arbitrarily or in a way that is overbroad or grossly disproportionate diminishes that worth and dignity. If a law operates in this way, it asks the right claimant to "serve as a scapegoat" (*Rodriguez*, at p. 621, per McLachlin J.). It imposes a deprivation via a process that is "fundamentally unfair" to the rights claimant (*Charkaoui*, at para. 22).

82 This is not to say that such a deprivation cannot be *justified* under s. 1 of the *Charter*. In some cases the government, for practical reasons, may only be able to meet an important objective by means of a law that has some fundamental flaw. But this does not concern us when considering whether s. 7 of the *Charter* has been breached.

(1) Arbitrariness

83 The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford*, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.

84 The object of the prohibition on physician-assisted dying is to protect the vulnerable from ending their life in times of weakness. A total ban on assisted suicide clearly helps achieve this object. Therefore, individuals' rights are not limited arbitrarily.

(2) Overbreadth

85 The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object: *Bedford*, at paras. 101 [page376] and 112-13. Like the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population. A law that is drawn broadly to target conduct that bears no relation to its purpose "in order to make enforcement more practical" may therefore be overbroad (see *Bedford*, at para. 113). The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled.

86 Applying this approach, we conclude that the prohibition on assisted dying is overbroad. The object of the law, as discussed, is to protect vulnerable persons from being induced to commit suicide at a moment of weakness. Canada conceded at trial that the law catches people outside this class: "It is recognised that not every person who wishes to commit suicide is vulnerable, and that there may be people with disabilities who have a considered, rational and persistent wish to end their own lives" (trial reasons, at para. 1136). The trial judge accepted that Ms. Taylor was such a person - competent, fully informed, and free from coercion or duress (para. 16). It follows that the limitation on their rights is in at least some cases not connected to the objective of protecting *vulnerable* persons. The blanket prohibition sweeps conduct into its ambit that is unrelated to the law's objective.

87 Canada argues that it is difficult to conclusively identify the "vulnerable", and that therefore it cannot be said that the prohibition is overbroad. Indeed, Canada asserts, "every person is *potentially* vulnerable" from a legislative perspective (R.F., at para. 115 (emphasis in original)).

[page377]

88 We do not agree. The situation is analogous to that in *Bedford*, where this Court concluded that the prohibition on living on the avails of prostitution in s. 212(1)(*j*) of the *Criminal Code* was overbroad. The law in that case punished everyone who earned a living through a relationship with a prostitute, without distinguishing between those who would assist and protect them and those who would be at least potentially exploitive of them. Canada there as here argued that the line between exploitative and non-exploitative relationships was blurry, and that, as a result, the provision had to be drawn broadly to capture its targets. The Court concluded that that argument is more appropriately addressed under s. 1 (paras. 143-44).

(3) Gross Disproportionality

89 This principle is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure. As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant. The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law (*Bedford*, at para. 125). The standard is high: the law's object and its impact may be incommensurate without reaching the standard for *gross* disproportionality (*Bedford*, at para. 120; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 47).

90 The trial judge concluded that the prohibition's negative impact on life, liberty and security of the person was "very severe" and therefore grossly disproportionate to its objective (para. 1378). We agree that the impact of the prohibition is severe: it imposes unnecessary suffering on affected individuals, deprives them of the ability to determine what to do with their bodies and how those bodies [page378] will be treated, and may cause those affected to take their own lives sooner than they would were they able to obtain a physician's assistance in dying. Against this it is argued that the object of the prohibition - to protect vulnerable persons from being induced to commit suicide at a time of weakness - is also of high importance. We find it unnecessary to decide whether the prohibition also violates the principle against gross disproportionality, in light of our conclusion that it is overbroad.

(4) Parity

91 The appellants ask the Court to recognize a new principle of fundamental justice, the principle of parity, which would require that offenders committing acts of comparable blameworthiness receive sanctions of like severity. They say the prohibition violates this principle because it punishes the provision of physician assistance in dying with the highest possible criminal sanction (for culpable homicide), while exempting other comparable end-of-life practices from any criminal sanction.

92 Parity in the sense invoked by the appellants has not been recognized as a principle of fundamental justice in this Court's jurisprudence to date. Given our conclusion that the deprivation of Ms. Taylor's s. 7 rights is not in accordance with the principle against overbreadth, it is unnecessary to consider this argument and we decline to do so.

IX. Does the Prohibition on Assisted Suicide Violate Section 15 of the *Charter*?

93 Having concluded that the prohibition violates s. 7, it is unnecessary to consider this question.

X. Section 1

94 In order to justify the infringement of the appellants' s. 7 rights under s. 1 of the *Charter*, [page379] Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103.

95 It is difficult to justify a s. 7 violation: see *Motor Vehicle Reference*, at p. 518; *G. (J.)*, at para. 99. The rights protected by s. 7 are fundamental, and "not easily overridden by competing social interests" (*Charkaoui*, at para. 66). And it is hard to justify a law that runs afoul of the principles of fundamental justice and is thus inherently flawed (*Bedford*, at para. 96). However, in some situations the state may be able to show that the public good - a matter not considered under s. 7, which looks only at the impact on the rights claimants - justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.

96 Here, the limit is prescribed by law, and the appellants concede that the law has a pressing and substantial objective. The question is whether the government has demonstrated that the prohibition is proportionate.

97 At this stage of the analysis, the courts must accord the legislature a measure of deference. Proportionality does not require perfection: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 78. Section 1 only requires that the limits be "reasonable". This Court has emphasized that there may be a number of possible solutions to a particular social problem, and suggested that a "complex regulatory [page380] response" to a social ill will garner a high degree of deference (*Hutterian Brethren*, at para. 37).

98 On the one hand, as the trial judge noted, physician-assisted death involves complex issues of social policy and a number of competing societal values. Parliament faces a difficult task in addressing this issue; it must weigh and balance the perspective of those who might be at risk in a permissive regime against that of those who seek assistance in dying. It follows that a high degree of deference is owed to Parliament's decision to impose an absolute prohibition on assisted death. On the other hand, the trial judge also found - and we agree - that the absolute prohibition could not be described as a "complex regulatory response" (para. 1180). The degree of deference owed to Parliament, while high, is accordingly reduced.

(1) Rational Connection

99 The government must show that the absolute prohibition on physician-assisted dying is rationally connected to the goal of protecting the vulnerable from being induced to take their own lives in times of weakness. The question is whether the means the law adopts are a rational way for the legislature to pursue its objective. If not, rights are limited for no good reason. To establish a rational connection, the government need only show that there is a causal connection between the infringement and the benefit sought "on the basis of reason or logic": *RJR-MacDonald*, at para. 153.

100 We agree with Finch C.J.B.C. in the Court of Appeal that, where an activity poses certain risks, prohibition of the activity in question is a rational method of curtailing the risks (para. 175). We therefore conclude that there is a rational connection between the prohibition and its objective.

101 The appellants argue that the *absolute* nature of the prohibition is not logically connected to the object of the provision. This is another way [page381] of saying that the prohibition goes too far. In our view, this argument is better dealt with in the inquiry into minimal impairment. It is clearly rational to conclude that a law that bars all persons from accessing assistance in suicide will protect the vulnerable from being induced to commit suicide at a time of weakness. The means here are logically connected with the objective.

(2) Minimal Impairment

102 At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the legislative goal" (*Hutterian Brethren*, at para. 53). The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner" (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state's object.

103 The question in this case comes down to whether the absolute prohibition on physician-assisted dying, with its heavy impact on the claimants' s. 7 rights to life, liberty and security of the person, is the least drastic means of achieving the legislative objective. It was the task of the trial judge to determine whether a regime less restrictive of life, liberty and security of the person could address the risks associated with physician-assisted dying, or whether Canada was right to say that the risks could not adequately be addressed through the use of safeguards.

104 This question lies at the heart of this case and was the focus of much of the evidence at trial. In assessing minimal impairment, the trial judge heard evidence from scientists, medical practitioners, and others who were familiar with end-of-life decision-making in Canada and abroad. She also heard extensive evidence from each of the jurisdictions where physician-assisted dying is legal or regulated. In the trial judge's view, an absolute prohibition would [page382] have been necessary if the evidence showed that physicians were unable to reliably assess competence, voluntariness, and non-ambivalence in patients; that physicians fail to understand or apply the informed consent requirement for medical treatment; or if the evidence from permissive jurisdictions showed abuse of patients, carelessness, callousness, or a slippery slope, leading to the casual termination of life (paras. 1365-66).

105 The trial judge, however, expressly rejected these possibilities. After reviewing the evidence, she concluded that a permissive regime with properly designed and administered safeguards was capable of protecting vulnerable people from abuse and error. While there are risks, to be sure, a carefully designed and managed system is capable of adequately addressing them:

> My review of the evidence in this section, and in the preceding section on the experience in permissive jurisdictions, leads me to conclude that the risks inherent in permitting physician-assisted death can be identified and very substantially minimized through a carefully-designed system imposing stringent limits that are scrupulously monitored and enforced. [para. 883]

106 The trial judge found that it was feasible for properly qualified and experienced physicians to reliably assess patient competence and voluntariness, and that coercion, undue influence, and ambivalence could all be reliably assessed as part of that process (paras. 795-98, 815, 837, and 843). In reaching this conclusion, she particularly relied on the evidence on the application of the informed consent standard in other medical decision-making in Canada, including end-of-life decision-making (para. 1368). She concluded that it would be possible for physicians to apply the informed consent standard to patients who seek assistance in dying, adding the caution that physicians should ensure that patients are properly informed of their diagnosis and prognosis and the range of available options [page383] for medical care, including palliative care interventions aimed at reducing pain and avoiding the loss of personal dignity (para. 831).

107 As to the risk to vulnerable populations (such as the elderly and disabled), the trial judge found that there was no evidence from permissive jurisdictions that people with disabilities are at heightened risk of accessing physician-assisted dying (paras. 852 and 1242). She thus rejected the contention that unconscious bias by physicians would undermine the assessment process (para. 1129). The trial judge found there was no evidence of inordinate impact on socially vulnerable populations in the permissive jurisdictions, and that in some cases palliative care actually improved post-legalization (para. 731). She also found that while the evidence suggested that the law had both negative and positive impacts on physicians, it did support the conclusion that physicians were better able to provide overall end-of-life treatment once assisted death was legalized (para. 1271). Finally, she found no compelling evidence that a permissive regime in Canada would result in a "practical slippery slope" (para. 1241).

(a) *Canada's Challenge to the Facts*

108 Canada says that the trial judge made a palpable and overriding error in concluding that safeguards would minimize the risk associated with assisted dying. Canada argues that the trial judge's conclusion that the level of risk was acceptable flies in the face of her acknowledgment that some of the evidence on safeguards was weak, and that there was evidence of a lack of compliance with safeguards in permissive jurisdictions. Canada also says the trial judge erred by relying on cultural differences between Canada and other countries in finding that problems experienced elsewhere were not likely to occur in Canada.

[page384]

109 We cannot accede to Canada's submission. In *Bedford*, this Court affirmed that a trial judge's findings on social and legislative facts are entitled to the same degree of deference as any other factual findings (para. 48). In our view, Canada has not established that the trial judge's conclusion on this point is unsupported, arbitrary, insufficiently precise or otherwise in error. At most, Canada's criticisms amount to "pointing out conflicting evidence", which is not sufficient to establish a palpable and overriding error (*Tsilhqot'in Nation*, at para. 60). We see no reason to reject the conclusions drawn by the trial judge. They were reasonable and open to her on the record.

(b) *The Fresh Evidence*

110 Rothstein J. granted Canada leave to file fresh evidence on developments in Belgium since the time of the trial. This evidence took the form of an affidavit from Professor Etienne Montero, a professor in bioethics and an expert on the practice of euthanasia in Belgium. Canada says that Professor Montero's evidence demonstrates that issues with compliance and with the expansion of the criteria granting access to assisted suicide inevitably arise, even in a system of ostensibly strict limits and safeguards. It argues that this "should give pause to those who feel very strict safeguards will provide adequate protection: paper safeguards are only as strong as the human hands that carry them out" (R.F., at para. 97).

111 Professor Montero's affidavit reviews a number of recent, controversial, and high-profile cases of assistance in dying in Belgium which would not fall within the parameters suggested in these reasons, such as euthanasia for minors or persons with psychiatric disorders or minor medical conditions. Professor Montero suggests that these cases demonstrate that a slippery slope is at work in Belgium. In his view, "[o]nce euthanasia is allowed, [page385] it becomes very difficult to maintain a strict interpretation of the statutory conditions."

112 We are not convinced that Professor Montero's evidence undermines the trial judge's findings of fact. First, the trial judge (rightly, in our view) noted that the permissive regime in Belgium is the product of a very different medico-legal culture. Practices of assisted death were "already prevalent and embedded in the medical culture" prior to legalization (para. 660). The regime simply regulates a common pre-existing practice. In the absence of a comparable history in Canada, the trial judge concluded that it was problematic to draw inferences about the level of physician compliance with legislated safeguards based on the Belgian evidence (para. 680). This distinction is relevant both in assessing the degree of physician compliance and in considering evidence with regards to the potential for a slippery slope.

113 Second, the cases described by Professor Montero were the result of an oversight body exercising discretion in the interpretation of the safeguards and restrictions in the Belgian legislative regime - a discretion the Belgian Parliament has not moved to restrict. These cases offer little insight into how a Canadian regime might operate.

(c) *The Feasibility of Safeguards and the Possibility of a "Slippery Slope"*

114 At trial Canada went into some detail about the risks associated with the legalization of physician-assisted dying. In its view, there are many possible sources of error and many factors that can render a patient "decisionally vulnerable" and thereby give rise to the risk that persons without a rational and considered desire for death will in fact end up dead. It points to cognitive impairment, depression or other mental illness, coercion, undue influence, psychological or emotional manipulation, systemic prejudice (against the elderly or people with disabilities), and the possibility of ambivalence [page386] or misdiagnosis as factors that may escape detection or give rise to errors in capacity assessment. Essentially, Canada argues that, given the breadth of this list, there is no reliable way to identify those who are vulnerable and those who are not. As a result, it says, a blanket prohibition is necessary.

115 The evidence accepted by the trial judge does not support Canada's argument. Based on the evidence regarding assessment processes in comparable end-of-life medical decision-making in Canada, the trial judge concluded that vulnerability can be assessed on an individual basis, using the procedures that physicians apply in their assessment of informed consent and decisional capacity in the context of medical decision-making more generally. Concerns about decisional capacity and vulnerability arise in all end-of-life medical decision-making. Logically speaking, there is no reason to think that the injured, ill, and disabled who have the option to refuse or to request withdrawal of lifesaving or life-sustaining treatment, or who seek palliative sedation, are less vulnerable or less susceptible to biased decision-making than those who might seek more active assistance in dying. The risks that Canada describes are already part and parcel of our medical system.

116 As the trial judge noted, the individual assessment of vulnerability (whatever its source) is implicitly condoned for life-and-death decision-making in Canada. In some cases, these decisions are governed by advance directives, or made by a substitute decision-maker. Canada does not argue that the risk in those circumstances requires an absolute prohibition (indeed, there is currently no federal regulation of such practices). In *A.C.*, Abella J. adverted to the potential vulnerability of adolescents who are faced with life-and-death decisions about medical treatment (paras. 72-78). Yet, this Court [page387] implicitly accepted the viability of an individual assessment of decisional capacity in the context of that case. We accept the trial judge's conclusion that it is possible for physicians, with due care and attention to the seriousness of the decision involved, to adequately assess decisional capacity.

117 The trial judge, on the basis of her consideration of various regimes and how they operate, found that it is possible to establish a regime that addresses the risks associated with physician-assisted death. We agree with the trial judge that the risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards.

118 Canada also argues that the permissive regulatory regime accepted by the trial judge "accepts too much risk", and that its effectiveness is "speculative" (R.F., at para. 154). In effect, Canada argues that a blanket prohibition should be upheld unless the appellants can demonstrate that an alternative approach eliminates all risk. This effectively reverses the onus under s. 1, requiring the claimant whose rights are infringed to prove less invasive ways of achieving the prohibition's object. The burden of establishing minimal impairment is on the government.

119 The trial judge found that Canada had not discharged this burden. The evidence, she concluded, did not support the contention that a blanket prohibition was necessary in order to substantially meet the government's objectives. We agree. A theoretical or speculative fear cannot justify an absolute prohibition. As Deschamps J. stated in *Chaoulli*, at para. 68, the claimant "d[oes] not have the burden of disproving every fear or every threat", nor can the government meet its burden simply by asserting an adverse impact on the public. Justification under s. 1 is a process of demonstration, not intuition or [page388] automatic deference to the government's assertion of risk (*RJR-MacDonald*, at para. 128).

120 Finally, it is argued that without an absolute prohibition on assisted dying, Canada will descend the slippery slope into euthanasia and condoned murder. Anecdotal examples of controversial cases abroad were cited in support of this argument, only to be countered by anecdotal examples of systems that work well. The resolution of the issue before us falls to be resolved not by competing anecdotes, but by the evidence. The trial judge, after an exhaustive review of the evidence, rejected the argument that adoption of a regulatory regime would initiate a descent down a slippery slope into homicide. We should not lightly assume that the regulatory regime will function defectively, nor should we assume that other criminal sanctions against the taking of lives will prove impotent against abuse.

121 We find no error in the trial judge's analysis of minimal impairment. We therefore conclude that the absolute prohibition is not minimally impairing.

(3) Deleterious Effects and Salutary Benefits

122 This stage of the *Oakes* analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good. Given our conclusion that the law is not minimally impairing, it is not necessary to go on to this step.

123 We conclude that s. 241(*b*) and s. 14 of the *Criminal Code* are not saved by s. 1 of the *Charter*.

XI. Remedy

A. *The Court of Appeal's Proposed Constitutional Exemption*

124 The majority at the Court of Appeal suggested that this Court consider issuing a free-standing constitutional exemption, rather than a declaration of invalidity, should it choose to reconsider *Rodriguez*. The majority noted that the law does not currently provide an avenue for relief from a "generally sound law" that has an extraordinary effect on a small number of individuals (para. 326). It also expressed concern that it might not be possible for Parliament to create a fully rounded, well-balanced alternative policy within the time frame of any suspension of a declaration of invalidity (para. 334).

125 In our view, this is not a proper case for a constitutional exemption. We have found that the prohibition infringes the claimants' s. 7 rights. Parliament must be given the opportunity to craft an appropriate remedy. The concerns raised in *Ferguson* about stand-alone constitutional exemptions are equally applicable here: issuing such an exemption would create uncertainty, undermine the rule of law, and usurp Parliament's role. Complex regulatory regimes are better created by Parliament than by the courts.

B. *Declaration of Invalidity*

126 We have concluded that the laws prohibiting a physician's assistance in terminating life (*Criminal Code*, s. 241(*b*) and s. 14) infringe Ms. Taylor's s. 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under s. 1 of the *Charter*. To the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void by operation of s. 52 of the *Constitution Act, 1982*. It is for Parliament and the provincial legislatures to [page390] respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons.

127 The appropriate remedy is therefore a declaration that s. 241(*b*) and s. 14 of the *Criminal Code* are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. "Irremediable", it should be added, does not require the patient to undertake treatments that are not acceptable to the individual. The scope of this declaration is intended to respond to the factual circumstances in this case. We make no pronouncement on other situations where physician-assisted dying may be sought.

128 We would suspend the declaration of invalidity for 12 months.

129 We would not accede to the appellants' request to create a mechanism for exemptions during the period of suspended validity. In view of the fact that Ms. Taylor has now passed away and that none of the remaining litigants seeks a personal exemption, this is not a proper case for creating such an exemption mechanism.

130 A number of the interveners asked the Court to account for physicians' freedom of conscience and religion when crafting the remedy in this case. The Catholic Civil Rights League, the Faith and Freedom Alliance, the Protection of Conscience Project, and the Catholic Health Alliance of Canada all expressed concern that physicians who object to medical assistance in dying on moral grounds may be obligated, based on a duty to act in their patients' best interests, to participate in physician-assisted dying. They ask us [page391] to confirm that physicians and other health-care workers cannot be compelled to provide medical aid in dying. They would have the Court direct the legislature to provide robust protection for those who decline to support or participate in physician-assisted dying for reasons of conscience or religion.

131 The Canadian Medical Association reports that its membership is divided on the issue of assisted suicide. The Association's current policy states that it supports the right of all physicians, within the bounds of the law, to follow their conscience in deciding whether or not to provide aid in dying. It seeks to see that policy reflected in any legislative scheme that may be put forward. While acknowledging that the Court cannot itself set out a comprehensive regime, the Association asks us to indicate that any legislative scheme must legally protect both those physicians who choose to provide this new intervention to their patients, along with those who do not.

132 In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians' colleges, Parliament, and the provincial legislatures. However, we note - as did Beetz J. in addressing the topic of physician participation in abortion in *Morgentaler* - that a physician's decision to participate in assisted dying is a matter of conscience and, in some cases, of religious belief (pp. 95-96). In making this observation, we do not wish to pre-empt the legislative and regulatory response to this judgment. Rather, we underline that the *Charter* rights of patients and physicians will need to be reconciled.

XII. Costs

133 The appellants ask for special costs on a full indemnity basis to cover the entire expense of bringing this case before the courts.

134 The trial judge awarded the appellants special costs exceeding $1,000,000, on the ground that this was justified by the public interest in resolving the legal issues raised by the case. (Costs awarded on the usual party-and-party basis would not have exceeded about $150,000.) In doing so, the trial judge relied on *Victoria (City) v. Adams*, 2009 BCCA 563, 100 B.C.L.R. (4th) 28, at para. 188, which set out four factors for determining whether to award special costs to a successful public interest litigant: (1) the case concerns matters of public importance that transcend the immediate interests of the parties, and which have not been previously resolved; (2) the plaintiffs have no personal, proprietary or pecuniary interest in the litigation that would justify the proceeding on economic grounds; (3) the unsuccessful parties have a superior capacity to bear the cost of the proceedings; and (4) the plaintiffs did not conduct the litigation in an abusive, vexatious or frivolous manner. The trial judge found that all four criteria were met in this case.

135 The Court of Appeal saw no error in the trial judge's reasoning on special costs, given her judgment on the merits. However, as the majority overturned the trial judge's decision on the merits, it varied her costs order accordingly. The majority ordered each party to bear its own costs.

136 The appellants argue that special costs, while exceptional, are appropriate in a case such as this, where the litigation raises a constitutional issue of high public interest, is beyond the plaintiffs' means, and was not conducted in an abusive or vexatious manner. Without such awards, they argue, plaintiffs will not be able to bring vital issues of importance to all Canadians before the courts, to the detriment of justice and other affected Canadians.

137 Against this, we must weigh the caution that "[c]ourts should not seek on their own to bring an alternative and extensive legal aid system into being": *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 44. With this concern in mind, we are of the view that *Adams* sets the threshold for an award of special costs too low. This Court has previously emphasized that special costs are only available in "exceptional" circumstances: *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17, at para. 48. The test set out in *Adams* would permit an award of special costs in cases that do not fit that description. Almost all constitutional litigation concerns "matters of public importance". Further, the criterion that asks whether the unsuccessful party has a superior capacity to bear the cost of the proceedings will always favour an award against the government. Without more, special costs awards may become routine in public interest litigation.

138 Some reference to this Court's jurisprudence on advance costs may be helpful in refining the criteria for special costs on a full indemnity basis. This Court set the test for an award of advance costs in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371. LeBel J. identified three criteria necessary to justify that departure from the usual rule of costs:

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial - in short, the litigation would be unable to proceed if the order were not made.
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient [page394] merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases. [para. 40]

139 The Court elaborated on this test in *Little Sisters*, emphasizing that issues of public importance will not in themselves "automatically entitle a litigant to preferential treatment with respect to costs" (para. 35). The standard is a high one: only "rare and exceptional" cases will warrant such treatment (para. 38).

140 In our view, with appropriate modifications, this test serves as a useful guide to the exercise of a judge's discretion on a motion for special costs in a case involving public interest litigants. First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.

141 Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs.

142 Finally, we note that an award of special costs does not give the successful litigant the right [page395] to burden the defendant with any and all expenses accrued during the course of the litigation. As costs awards are meant to "encourage the reasonable and efficient conduct of litigation" (*Okanagan Indian Band*, at para. 41), only those costs that are shown to be reasonable and prudent will be covered by the award.

143 Having regard to these criteria, we are not persuaded the trial judge erred in awarding special costs to the appellants in the truly exceptional circumstances of this case. We would order the same with respect to the proceedings in this Court and in the Court of Appeal.

144 The final question is whether the trial judge erred in awarding 10 percent of the costs against the Attorney General of British Columbia. The trial judge acknowledged that it is unusual for courts to award costs against an Attorney General who intervenes in constitutional litigation as of right. However, as the jurisprudence reveals, there is no firm rule against it: see, e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Hegeman v. Carter*, 2008 NWTSC 48, 74 C.P.C. (6th) 112; and *Polglase v. Polglase* (1979), 18 B.C.L.R. 294 (S.C.).

145 In her reasons on costs, the trial judge explained that counsel for British Columbia led evidence, cross-examined the appellants' witnesses, and made written and oral submissions on most of the issues during the course of the trial. She also noted that British Columbia took an active role in pre-trial proceedings. She held that an

Attorney General's responsibility for costs when involved in constitutional litigation as of right varies with the role the Attorney General assumes in the litigation. Where the Attorney General assumes the role of a party, the court may find the Attorney General liable for costs in the same manner as a party (para. 96). She concluded that the Attorney General of British Columbia had taken a full and active role in the proceedings and should therefore be liable for costs [page396] in proportion to the time British Columbia took during the proceedings.

146 We stress, as did the trial judge, that it will be unusual for a court to award costs against Attorneys General appearing before the court as of right. However, we see no reason to interfere with the trial judge's decision to do so in this case or with her apportionment of responsibility between the Attorney General of British Columbia and the Attorney General of Canada. The trial judge was best positioned to determine the role taken by British Columbia and the extent to which it shared carriage of the case.

XIII. Conclusion

147 The appeal is allowed. We would issue the following declaration, which is suspended for 12 months:

> Section 241(*b*) and s. 14 of the *Criminal Code* unjustifiably infringe s. 7 of the *Charter* and are of no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition.

148 Special costs on a full indemnity basis are awarded against Canada throughout. The Attorney General of British Columbia will bear responsibility for 10 percent of the costs at trial on a full indemnity basis and will pay the costs associated with its presence at the appellate levels on a party-and-party basis.

Appeal allowed with costs.

Solicitors:

Solicitors for the appellants: Farris, Vaughan, Wills & Murphy, Vancouver; Davis, Vancouver.

[page397]

Solicitor for the respondent the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the respondent the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the interveners the Council of Canadians with Disabilities and the Canadian Association for Community Living: Bakerlaw, Toronto.

Solicitors for the intervener the Christian Legal Fellowship: Miller Thomson, Calgary.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario: Paliare Roland Rosenberg Rothstein, Toronto; Canadian HIV/AIDS Legal Network, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Solicitor for the intervener the Association for Reformed Political Action Canada: Association for Reformed Political Action Canada, Ottawa.

Solicitors for the intervener the Physicians' Alliance against Euthanasia: Norton Rose Fulbright Canada, Montréal.

Solicitors for the intervener the Evangelical Fellowship of Canada: Geoffrey Trotter Law Corporation, Vancouver.

Solicitors for the interveners the Christian Medical and Dental Society of Canada and the Canadian Federation of Catholic Physicians' Societies: Vincent Dagenais Gibson, Ottawa.

Solicitors for the intervener Dying With Dignity: Sack Goldblatt Mitchell, Toronto.

[page398]

Solicitors for the intervener the Canadian Medical Association: Polley Faith, Toronto.

Solicitors for the intervener the Catholic Health Alliance of Canada: Vincent Dagenais Gibson, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

Solicitors for the interveners the Farewell Foundation for the Right to Die and Association québécoise pour le droit de mourir dans la dignité: Gratl & Company, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Borden Ladner Gervais, Toronto.

Solicitors for the interveners the Catholic Civil Rights League, the Faith and Freedom Alliance and the Protection of Conscience Project: Bennett Jones, Toronto; Philip H. Horgan, Toronto.

Solicitors for the intervener the Alliance of People With Disabilities Who are Supportive of Legal Assisted Dying Society: Borden Ladner Gervais, Vancouver and Ottawa.

Solicitors for the intervener the Canadian Unitarian Council: Farris, Vaughan, Wills & Murphy, Vancouver.

Solicitors for the interveners the Euthanasia Prevention Coalition and the Euthanasia Prevention Coalition - British Columbia: Scher Law Professional Corporation, Toronto.

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Dalex Co. v. Schwartz Levitsky Feldman, [1994] O.J. No. 1388

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Epstein J.

Heard: April 14, 1994.

Judgment: June 24, 1994.

Action No. 93-CQ-43386

[1994] O.J. No. 1388 | 19 O.R. (3d) 463 | 23 C.C.L.I. (2d) 294 | 48 A.C.W.S. (3d) 1117

Between Dalex Co. Limited, Plaintiff, and Schwartz Levitsky Feldman, Michael B. Simonetta, Saul M. Muskat, Alan Page, Kai Chang and Anthony Valerie, Defendants

(21 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds — Failure to disclose a cause of action or defence — Scandalous, frivolous or vexatious — Damages — Deductions -- insurance proceeds.

Motion to strike certain paragraphs contained in the defendants' statement of defence and counter-claim. The action was against the partners of an accounting firm for damages arising from, inter alia, breach of contract and negligence. Of the four impugned paragraphs, the first two disputed the insurance benefits and tax recoveries that the plaintiff had obtained as a result of the alleged malfeasance of the defendant while the fourth one, as the foundation for a claim of punitive damages, alleged that the plaintiffs and their counsel had breached an implied undertaking not to use information obtained in the course of the action for an ulterior purpose. The plaintiffs contended that the first two paragraphs failed to disclose a reasonable defence while the other two were scandalous, frivolous and vexatious.
HELD: Motion allowed in part.

Only the paragraph pleading a reduction of the plaintiff's loss due to insurance proceeds received was struck as disclosing no reasonable defence. Payments received by the plaintiff under an insurance policy taken out and maintained by it could not be the basis for a reduction of the liability of a defendant and it was immaterial whether or not the insurer exercised its right of subrogation. However, the same did not apply for tax recoveries. The court was not satisfied that the use of the materials received by the plaintiffs from the defendants prior to the commencement of the proceedings would not be accepted by the trial judge as a factual underpinning for the defendants' claim to punitive damages.

STATUTES, REGULATIONS AND RULES CITED:

Ontario Rules of Civil Procedure, Rule 21.01(1)(b).
Kathryn L. Knight, for the Plaintiff. A. Pettingill, for the Defendants.

EPSTEIN J.

1 In this motion the plaintiff seeks to strike certain paragraphs contained in the defendants' statement of defence and counterclaim. The paragraphs under attack can generally be described as follows:

I. No Reasonable Defence

  (a) a paragraph pleading that insurance benefits received by the plaintiff should be taken into consideration in determining the defendants' obligation to the plaintiff, if any (para. 68);

  (b) a paragraph pleading that the plaintiff's tax treatment of the loss should be taken into consideration in determining the defendants' obligation, if any, to the plaintiff (para. 67);

II. Scandalous, Frivolous and Vexatious

  (c) paragraphs referring to the involvement of plaintiff's counsel in the circumstances giving rise to the action (paras. 76-82); and

  (d) paragraphs alleging that the plaintiff and its counsel have breached an implied undertaking not to use information obtained in the course of the action for an ulterior purpose (paras. 83-88 and 90).

2 The issue is: do the impugned paragraphs constitute proper pleading? Do they raise legitimate issues to be considered at trial or are they otherwise frivolous and vexatious?

3 The action is against the partners of an accounting firm for damages arising from breach of contract, negligence, negligent misrepresentation, and exemplary and punitive damages. The plaintiff is a corporation that formerly engaged the services of the defendants for its accounting and auditing needs. From 1989 into 1992, the plaintiff's controller defrauded the plaintiff of over $600,000. Simply put, the plaintiff takes the position in this action that had it not been for the defendants' failure to audit, monitor and supervise the plaintiff's financial situation, the losses from the controller's theft would and should have been discovered and prevented.

4 I start with the proposition, advanced by the defendants, that although the Court has inherent jurisdiction to strike out a pleading as disclosing no legally tenable position, such power should be exercised sparingly and only when there is no doubt that no cause of action or defence exists. In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our Courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended (see: Krause v. Chrysler Canada Limited, [1970] 3 O.R. 135 (H.C.J.)).

5 It is also fairly common ground that no pleaded fact that is relevant can be scandalous. I refer to the often quoted decision of Duryea v. Kaufman (1910), 21 O.L.R. 161, where Justice Riddell stated at p. 168:

> ... No pleading can be said to be embarrassing if it alleges only facts which may be proved the opposite party may be perplexed, astonished, startled, confused, troubled, annoyed, taken aback, and worried by such a pleading but in a legal sense he cannot be 'embarrassed.' But no pleading should set out a fact which would not be allowed to be proved that is embarrassing: Stratford Gas Co. v. Gordon (1892), 14 P.R. 407; Heugh v. Chamberlain (1877), 25 W.R. 742; Knowles v. Roberts (1888), 38 Ch. D. 263. Even if a pleading set out a fact that is not necessary to be proved, still, if it can be proved, the pleading will not be embarrassing. Anything which can have any effect at all in determining the rights of the parties can be proved, and consequently can be pleaded but the Court will not allow any fact to be alleged which is wholly immaterial and can have no effect upon the result: Rock v. Pursell (1887), 84 L.T.J. 45.

6 I accept these two propositions as correct statements of the law governing challenges to pleadings on the basis of no tenable cause of action or defence or as being scandalous, frivolous or embarrassing. I proceed to examine the impugned paragraphs using these tests.

1. (a) Insurance Proceeds - No Tenable Defence

7 The paragraph of the statement of defence and counterclaim sought to be struck out is as follows:

68. The defendants further plead that there have been certain insurance monies payable to and collected by Dalex, arising out of the defalcations, which have further reduced the loss.

8 The plaintiff argues that this paragraph does not constitute a proper or relevant pleading based on the proposition that recovery in tort is dependent on the plaintiff's establishing injury and loss resulting from an act of misfeasance or nonfeasance on the part of the tortfeasor. A tortfeasor should not, and in fact cannot, benefit from the sacrifice made by a plaintiff in obtaining an insurance policy.

9 The plaintiff relies upon a recent decision of the Supreme Court of Canada in a trilogy of cases known as Cunningham v. Wheeler, [1994] 1 S.C.R. 359.

10 In the actual Cunningham v. Wheeler case, the plaintiff was injured in a car accident. While he was off work he collected disability benefits pursuant to a collective agreement. These benefits were considered part of the plaintiff's annual remuneration. Benefits received from the defendants did not have to be paid to the employer or to the disability insurer. The trial judge held that the payments received by the plaintiff as a result of his employment should not be deducted in calculating the amount payable by the defendants for the wages lost by the plaintiff due to his injuries as the plaintiff had established that he had paid for these benefits as part of his wage package.

11 The Court of Appeal reversed the judgment. It determined that since there was no subrogation right, the plan was not in the nature of private insurance and the funds received should be deducted from the damage award. The Supreme Court of Canada allowed the appeal on the basis of its finding that the benefits received were in the nature of a private insurance policy.

12 In the second case of Cooper v. Miller, the plaintiff also suffered injuries from a car accident. Under a collective agreement, she received short-term disability benefits which she funded, in part, through payroll deductions. Again, she was not obliged to repay these benefits to the employer or insurance carrier. The trial judge, Court of Appeal, and Supreme Court of Canada all held that the plaintiff's benefits should not be deducted from her recovery for lost wages from the defendant, even though there was no subrogation provision, as she had bought and partially paid for the insurance.

13 Finally, in Shanks v. McNee, another motor vehicle accident case, the plaintiff received both short-term and long-term disability benefits. There was some form of contribution by the employee to the cost of each plan. There was a subrogation clause in the long-term disability plan but not in the short-term. The benefits received by the plaintiff were not deducted from the amount the defendants were ordered to pay pursuant to the judgment at trial. The Court of Appeal reversed the trial judge only in respect of the short-term disability payments since there was no direct contribution by the employee and there was no subrogation with respect to those benefits. The Supreme Court of Canada dismissed the defendants' appeal concerning the deductibility of the long-term benefits.

14 Three principles emerge from the decision of the Supreme Court of Canada in this trilogy of cases. They are as follows:

1. The general proposition is that the plaintiff in a tort action is not entitled to a double recovery for any loss arising from an injury;
2. An exception to this general principle is the "insurance exception". To qualify, the plaintiff must show that the benefits received were in the nature of an insurance, i.e., some type of consideration must have been given up by the plaintiff in return for the benefit. Generally, subrogation is not relevant to a consideration of the deductibility of the benefits if they are found to be in the nature of insurance.
3. If the benefits do not fall within the insurance exception, then they must be deducted from the damages recovered, unless the third party who paid the benefits has the right of subrogation.

15 It is the plaintiff's submission that since the pleading itself refers to the plaintiff's recovery of insurance monies, it is clear that the case falls within the insurance exception and no deduction is permitted by law. If there is any doubt, it is also clear that the insurance company covering the plaintiff from theft by an employee has a right of subrogation at common law and most probably contractual as well. Using the Cunningham v. Wheeler rationale, it would appear that there can be no deduction from any amount found to be owing by the defendants to take into account insurance monies received by the plaintiff.

16 The defendants argue that the ratio established by the Cunningham v. Wheeler trilogy pertains only to employment cases. Since there has been no decision strictly on point other than in the discrete area of employment situations, the door remains open for refinement or development of the law involving the deductibility of insurance benefits received by a plaintiff from damages owed by defendants in other types of cases. As a result, the defendants submit that their pleading in this respect should be allowed to stand to enable them to argue that the law as set out by the Supreme Court of Canada in Cunningham v. Wheeler should not apply to the type of fact situation in this case.

17 I cannot accept this position for two reasons. First, even though the Cunningham v. Wheeler trilogy involved only employment situations, the Court in no way indicated an intention to confine the law concerning the deductibility of insurance benefits to those types of cases. I refer to statements such as that of Cory J. at p. 400 where he says without qualification that the proceeds of insurance should not be deducted from a plaintiff's damages. This statement follows a lengthy list of Canadian cases in which that principle of law has been consistently applied, some of which involve situations other than wage loss claims (see: Dawson v. Sawatzky, [1946] 1 W.W.R. 33 (Sask. C.A.); Canadian Pacific Ltd. v. Gill Principle, [1973] S.C.R. 654.)

18 The decision in Cunningham v. Wheeler does not, admittedly, contain a specific statement that the non-deductibility of insurance benefits received by the plaintiff from the calculation of the tortfeasor's obligation applies to a non-wage loss situation. However, in my view, the overall wording of the decision and the underlying rationale for the propositions listed above present a bar to the pleading proposed by the defendants in accordance with the test set out in Krause v. Chrysler, supra.

19 The second reason I would apply Cunningham v. Wheeler to this fact situation, relates to the Supreme Court of Canada's comments on the importance of the doctrine of subrogation on these types of situations. In my opinion, to restrict the principle of nondeductibility of insurance proceeds to employment situations would effectively destroy the doctrine of subrogation in respect of other types of tort claims for losses that are covered by insurance.

20 Subrogation operates where the insured has a legally enforceable right against a party other than the insurer to recover the amount of loss. Where the insured has a right in tort to recover damages from a negligent tortfeasor, the insurer is said to be subrogated to such a right so that the insured party cannot retain both the insurance money and the damages recovered from the third party. The following principles are relevant:

1. The right of subrogation does not arise unless and until the insurers have admitted the insured's claim and have paid the sum payable under the policy.
2. The right of subrogation only arises on contracts of indemnity. Where the insured would be paid twice for the pecuniary loss, the insurer has the right of subrogation. All insurance contracts are presumed to be contracts of indemnity, unless otherwise specified.
3. The rights to which the insurers are subrogated must, as a general rule, be enforced in the name of the insured. The mere fact of subrogation does not entitle them to enforce such rights in their own names.
4. The insurer has the right to pursue the insured's rights in the insured's name against any defendant who caused the loss. If the insured has already exercised the right against the third party and recovered the value of the loss, the insurer may seek reimbursement from the insured.
5. The right of subrogation is independent of statute or the express terms of the policy, although it may be modified by the express terms of the statute or the contract: Castellain v. Preston (1883), 11 Q.B.D. 380 (C.A.); Baer, "Rethinking Basic Concepts of Insurance Law" (1987), L.S.U.C. Special Lectures, p. 210.

21 To permit a tortfeasor to advance insurance proceeds as a defence in the reduction of damages conflicts with the doctrine of subrogation. If the plaintiff's damages were reduced by the amount received from the insurer, the insurer could not recover from the defendant the monies it paid to the plaintiff because the insurer is restricted to suing in the name of the plaintiff and in respect of the plaintiff's rights. The insurer could not be reimbursed by the plaintiff because the plaintiff would only have been awarded damages after deducting the insurance proceeds.

22 The superficial answer may be to allow the case to go to trial to enable the trial judge to examine the evidence as to what was paid under the insurance policy and as to the extent that a right of subrogation was exercised. This would be consistent with the reasoning of McLachlin J. in her dissent in Cunningham v. Wheeler and the majority in the previous decision of the court in Ratych v. Bloomer (1990), 39 O.A.C. 103 (S.C.C.).

23 McLachlin J., in her dissent in Cunningham v. Wheeler, suggested that subrogation is exercised very rarely in the wage benefits context. This would explain her comments about subrogation, in the decisions which she expressly stated are restricted to the wage benefits context, at pp. 386-387:

> The argument that it makes sense for the tortfeasor to pay damages for wage losses already indemnified by others succeeds only if the employer or insurer who pays the wage benefit recovers the damages allocated to lost wages from the employee by way of subrogation. In this case there is no double recovery. The burden is properly placed on the tortfeasor rather than the employer or insurance company. The latter result, unlike the result of double payment to the plaintiff, is defensible economically and in justice. For this reason, Ratych v. Bloomer suggested that where subrogation is exercised, no deduction for double recovery need be made. (emphasis added)

And at p. 388:

> The rare exercise of the right of subrogation suggests that the best approach is a regime of deductibility of employment plan benefits, subject to the plaintiff's right to claim the benefits if it is established that they will be paid over to the subrogated third party. In that case, the plaintiff would hold the recovered monies in trust on behalf of the subrogated insurer or employer: Ratych, supra, at p. 978. (emphasis added)

24 Cory J. in Cunningham v. Wheeler takes the contrary view, at p. 415:

25 Generally, subrogation has no relevance in a consideration of the deductibility of the disability benefits, if they are found to be in the nature of insurance. ... However, if the third party who paid the benefits has a right of subrogation then there should not be any deduction. It does not matter whether the right of subrogation is exercised or not. The exercise of the right is a matter that rests solely between the plaintiff and the third party. The failure to exercise the right cannot in any way affect the defendant's liability for damages. However, different considerations might well apply in a situation where the third party has formally released its subrogation right. (emphasis added)

26 Pursuant to Cory J.'s view of subrogation in Cunningham v. Wheeler, it is irrelevant whether the insurer actually exercises its right of subrogation. If the right of subrogation is paramount whether it is exercised or not, then the defence that there has been payment under the insurance policy must be irrelevant.

27 There has been previous judicial consideration of the relevance of the insurance benefits paid to the plaintiff to the determination of the defendant's obligations. In Pickin et al. v. Hesk and Lawrence, [1954] O.R. 713 (Ont. C.A.), the court stated as follows, at pp. 724-725:

> ... The trial judge seems to have had the opinion that because there was no evidence of insurance this action would not lie. The question of insurance or no insurance was entirely irrelevant. The only issue in this action was whether the plaintiffs had been damnified by the defendants. If they have been paid under a contract of indemnity between them and their insurers then in this action they are only nominal plaintiffs and the action is brought in their names for the benefit of their insurers. If they have not been paid then they are suing in their own right. (emphasis added)

28 Where a pleading discloses no reasonable cause of action or defence it should be struck: Rule 21.01(1)(b) of the Rules of Civil Procedure. Whether the decision in Cunningham v. Wheeler acts as a direct bar to the pleadings at issue because of the insurance proceeds exception or as a result of its comments on the doctrine of subrogation, the Supreme Court of Canada has stated the law in a way that, in my view, renders paragraph 68 of the statement of defence and counterclaim legally untenable and it therefore should be struck from the pleading.

(b) Tax Recovery

29 The paragraph that the plaintiff seeks to have struck is as follows:

> 67. The Defendants further plead that Dalex is entitled to and has made certain tax recoveries as a result of the fraudulent conduct of William Young. Such recoveries have significantly reduced the loss.

30 The plaintiff's submission is that tax recovery is a matter between the state and the individual and does not affect the damages due to the plaintiff from the defendants. If the plaintiff receives an unexpected windfall, that is a matter to be dealt with through legislation. The application of the current Income Tax Act should not affect the rights and obligations between the plaintiff and the defendants.

31 Again, the plaintiff looks to the Supreme Court of Canada trilogy of decisions in Cunningham v. Wheeler, supra, for support. In one of the trilogy of cases, Shanks v. McNee, an issue arose over the fact that damages were intended to replace lost wages but that damages, unlike wages, would not be taxed. The defendants argued that their liability to the plaintiff should be reduced in order that the plaintiff not be over-compensated.

32 In dealing with this issue, Cory J. observed that Canadian courts have consistently held that damage awards in personal injury cases should be calculated without taking into account any such tax advantage, whereas in other countries tax is taken into account. The Supreme Court of Canada used the trilogy to renew its support for ignoring the impact of tax, agreeing with the conclusion of the Ontario Law Reform Commission that "should the impact of the Income Tax Act be regarded as overgenerous to plaintiffs, the legislation may be amended by Parliament." (at pp. 417-418)

33 At first blush it would appear that paragraph 67 of the statement of defence and counterclaim should be struck on the basis of similar reasoning to that applied to the paragraph involving insurance proceeds. However, on closer examination, in my opinion, the paragraph should stand.

34 Unlike the jurisprudence involving the treatment of insurance proceed which included cases other than wage loss claims, the jurisprudence involving the tax deduction claimed by the defendants in Shanks v. McNee all appear to involve the income tax treatment of damages assessed for impairment of earning capacity. In these cases, damages were awarded to restore the plaintiff to the extent possible to the position in which he or she would have been but for the defendant's wrongdoing. Such damages would therefore represent compensation for loss of earning capacity and not for loss of earnings. In the case of personal injuries (as in each of these cases making up the trilogy), the plaintiff has lost some or all of his capital equipment necessary to earn an income and is not taxable according to the generally accepted taxation principles.

35 Since the wording of the Supreme Court of Canada in the trilogy appears to restrict the irrelevance of tax to earnings in personal injury cases and since the rationale for the decision in respect of tax cannot logically be applied to the case at bar I find that the Supreme Court of Canada has not definitively closed the door to the defendants' argument. Further, the plaintiff has not been able to refer me to any other case that clearly bars a defendant from claiming a reduction in damages payable by reason of the very business losses claimed in the action. Therefore, the defendants ought to be entitled to pursue this argument. The plaintiff's claim to have paragraph 67 of the statement of defence and counterclaim struck is dismissed.

II. (a) Retainer of the Defendants by Robert Staley - Scandalous, Frivolous and Vexatious

36 The plaintiff argued that reference in the pleading to a separate retainer of the accountants by one of the plaintiff's lawyers was vexatious and an abuse. The defendants conceded that any such references were in error and agreed to amend the pleading to correct these errors.

37 Any other reference to Mr. Staley does not fall into the category of a fact essential to the defence or counterclaim and in my view is designed to lay the foundation for a motion to remove from the record, the plaintiff's solicitors. This is an improper motive, is embarrassing and an abuse. Accordingly, the defendants must amend their pleading to remove all references to Mr. Staley.

II. (b) Breach of Undertaking Justifying Punitive Damages Scandalous, Frivolous and Vexatious

38 I finally turn to the defendants' claim in their counterclaim for punitive damages. The factual underpinning pleaded in support of this claim involves an alleged breach of an implied undertaking not to use information obtained in the course of an action for any ulterior purpose. Specifically, the defendants plead that counsel for the plaintiff requested information from their records supposedly to assist in the prosecution of the civil action against the former controller but really intending to use the data in an action against these defendants.

39 The plaintiff agrees that such a request was made but states that the materials were never provided. The plaintiff further argues that the implied undertaking applies to information and documents produced by a litigant during the discovery process and does not apply to the plaintiff's receipt of documents from its own accountant. The implied undertaking is designed to protect parties to litigation and the process itself by encouraging and facilitating full production without fear of ulterior purpose or use. At the time the request was made, the plaintiff and the defendants had no lis between them and therefore had no relationship which would give rise to an implied undertaking.

40 It is on this basis that the plaintiff urges me to find that the paragraphs in which this issue is addressed be struck as being scandalous, frivolous and vexatious, meant to embarrass the plaintiff and artificially bolster the defendants' claim for punitive damages.

41 The defendants candidly admit that the facts, as pleaded, do not come within the parameters of the law of implied undertaking as it currently exists in Ontario. However, they go on to submit that they out to be permitted to advance arguments that the law of implied undertaking ought to be extended to hold that information provided to a litigant by an expert retained to assist the litigant in an action, and which information the expert was obliged to provide to the litigant by the terms of its retainer, ought not to be used for the collateral purpose of suing that expert in a separate action.

42 I return to the words of Justice Riddell in Duryea v. Kaufman, set out earlier in this decision. Can it be said, without doubt, at this stage, that any evidence concerning the source and use of these materials would not be accepted by the trial judge as a factual underpinning for the defendants' claim to punitive damages?

43 I do not believe that this aspect of the defendants' pleading should be struck at this stage thereby precluding any opportunity for them to establish the factual basis to enable them to recover under this head of damage. Rather, I am of the view that the case should proceed to trial with this part of the pleading intact so that the issues can be determined by the evidence presented at that time.

44 It may be that there is no decided case extending the implied undertaking to the circumstances of this case. On the other hand, no decision has been brought to my attention that presents itself gas a complete bar to such a finding. I believe it would be inappropriate at this early stage to deprive the defendants of this possible opportunity.

45 Accordingly, the plaintiff's attempt to have the implied undertaking allegations struck from paragraphs 82 to 88 and 90 is dismissed.

46 The defendants will have ten days from the date of entry of this order to amend their pleading to remove paragraph 68 and to remove all references to Mr. Staley anywhere in the pleading.

47 Success has been divided. There will be no order as to costs. Costs incurred in the appearance before Master Garfield are fixed at $200.00 to be paid by the plaintiff in any event of the cause.

EPSTEIN J.

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Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Wilson, La Forest, Sopinka, Gonthier, Cory and McLachlin JJ.

1990: March 2.

File No.: 21063.

[1990] 1 S.C.R. 279 | [1990] 1 R.C.S. 279 | [1990] S.C.J. No. 17 | [1990] A.C.S. no 17

Yvon Dumont, Roy Chartrand, Ron Erikson, Claire Riddle, Billyjo de la Ronde, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme, Earl Henderson, Manitoba Metis Federation Inc., suing on their behalf and on behalf of all other descendants of Metis persons entitled to land and other rights under Sections 31 and 32 of the Manitoba Act, 1870, and the Native Council of Canada Inc., appellants; v. The Attorney General of Canada, respondent; and The Attorney General of Manitoba, defendant.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Practice — Pleadings — Striking out — Statement of claim seeking declaration that various federal and provincial statutes unconstitutional — Whether statement of claim properly struck out.

Cases Cited

Referred to: Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735.

Statutes and Regulations Cited

Constitution Act, 1871, 34 & 35 Vict., c. 28 (U.K.) [reprinted in R.S.C., 1985, App. II, No. 11]. Manitoba Act, 1870, S.C. 1870, c. 3 [reprinted in R.S.C., 1985, App. II, No. 8].

APPEAL from a judgment of the Manitoba Court of Appeal (1988), 52 Man. R. (2d) 291, 52 D.L.R. (4th) 25, [1988] 5 W.W.R. 193, [1988] 3 C.N.L.R. 39, setting aside a judgment of [page280] Barkman J. (1987), 48 Man. R. (2d) 4, [1987] 2 C.N.L.R. 85, dismissing respondent's application to strike appellants' statement of claim. Appeal allowed. Thomas R. Berger and James R. Aldridge, for the appellants Dumont et al. Victor S. Savino, for the appellant the Native Council of Canada Inc. I.G. Whitehall, Q.C., and W. Burnham, for the respondent. Robert Houston, Q.C., for the Attorney General of Manitoba.

Solicitor for the appellants Dumont et al.: Thomas R. Burger, Vancouver. Solicitors for the appellant the Native Council of Canada Inc.: Savino & Company, Winnipeg. Solicitor for the respondent: John C. Tait, Ottawa.

The judgment of the Court was delivered orally by

THE CHIEF JUSTICE

1 We are all of the view that this appeal succeeds. The judgment of the Court will be delivered by Justice Wilson.

WILSON J.

2 The members of the Court are all of the view that the test laid down in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, for striking out a statement of claim is not met in this case. It cannot be said that the outcome of the case is "plain and obvious" or "beyond doubt".

3 Issues as to the proper interpretation of the relevant provisions of the Manitoba Act, 1870 and the Constitution Act, 1871 and the effect of the impugned ancillary legislation upon them would appear to be better determined at trial where a proper factual base can be laid.

4 The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the Manitoba Act, 1870 is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case.

5 We see no reason, therefore, why the action should not proceed to trial. The appeal is accordingly allowed and the order of the Court of Appeal [page281] striking out the appellants' claim against the Attorney General of Canada is set aside.

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No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

JOINT APPLICATION RECORD – VOLUME 3

Application to Strike Proceedings

Counsel for the Plaintiffs: **Rocco Galati**	Rocco Galati Professional Law Corporation 1062 College Street, Lower Level Toronto, ON M6H 1A9 Fax: 416-530-8129 Email: rocco@idirect.com
Counsel for Vancouver Island Health Authority and Providence Health Care ("Heathy Authority Defendants"): **Timothy J. Wedge**	Carfa Lawton LLP 6th Floor – 395 Waterfront Crescent Victoria, BC V8T 5K7 Fax: 250-381-7804 Email: twedge@carlaw.ca

--Continued Next Page--

Date, and Time of Hearing: May 31, 2022 at 10:00 am
Place of Hearing: Vancouver, British Columbia
Time Estimate: 1 day
Joint Application Record Prepared By:
Attorney General of British Columbia

Counsel for Her Majesty the Queen in Right of British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, and Mike Farnworth, Minister of Public Safety and Solicitor General ("Provincial Defendants"): **Mark Witten**	Ministry of Attorney General Legal Services Branch 1301-865 Hornby Street Vancouver, BC V6Z 2G3 Fax: 604-660-6797 Email: mark.witten@gov.bc.ca
Counsel for the Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("Canada") **Olivia French and Andrea Gatti**	Attorney General of Canada Department of Justice Canada British Columbia Regional Office 900-840 Howe Street Vancouver, BC C6Z 2S9 Fax: 604-666-1462 Email: olivia.french@justice.gc.ca Email: andrea.gatt@justice.gc.ca
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Counsel for British Columbia Ferry Services Inc ("BC Ferries") **Michael A. Feder, Q.C., and Connor Bildfell**	McCarthy Tetrault LLP 2400-745 Thurlow Street Vancouver, BC V6E 0C5 Fac: 604-643-7900 Email: mfeder@mccarthy.ca Email: cbildfell@mccarthy.ca

No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

JOINT APPLICATION RECORD INDEX

TAB DOCUMENT

VOLUME 1

Pleadings

1. Notice of Civil Claim filed August 17, 2021

2. Response to Civil Claim of the Provincial Defendants filed January 12, 2022

3. Response to Civil Claim of the Health Authority Defendants filed October 14, 2021

Application to Strike – Provincial Defendants

4. Notice of Application of the Provincial Defendants filed January 12, 2022

5. Amended Application Response of the Plaintiffs filed May 18, 2022

6. Application Response of the Health Authority Defendants filed January 17, 2022

7. Application Response of BC Ferries filed January 19, 2022

8. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Canada

9. Notice of Application of Canada filed April 28, 2022

10. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

11. Application Response of the Health Authority Defendants filed May 18, 2022

12. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – Health Authority Defendants

13. Notice of Application of the Heath Authority Defendants filed January 17, 2022

14. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

15. Application Response of the TransLink Defendants filed April 14, 2022

Application to Strike – TransLink Defendants

16. Notice of Application of TransLink filed April 14, 2022

17. Amended Application Response of the Plaintiffs filed May 18, 2022 (see Tab 5)

18. Application Response of the Health Authority Defendants filed May 18, 2022

Affidavits

19. Affidavit #2 of Rebecca Hill filed May 24, 2022

VOLUME 2

Case Law of the Defendants (Applicants)

20. *Borsato v. Basra*, [2000] B.C.J. No. 2855

21. *Camp Development Corp v. Greater Vancouver Transportation Authority,* 2009 BCSC 819

22. *Dixon v. Stork Craft Manufacturing Inc.* 2013 BCSC 1117

23. *Fowler v. Canada (Attorney General),* 2012 BCSC 367

24. *Gill v. Canada,* 2013 BCSC 1703

25. *Grosz v. Royal Trust Corporation of Canada,* 2020 BCSC 128

26. *Homalco Indian Band v. British Columbia*, [1998] B.C.J. No. 2703 (S.C.)

27. *Khodeir v. Canada (Attorney General),* 2022 FC 44

28. *Kuhn v. American Credit Indemnity Co.,* [1992] B.C.J. No. 953 (S.C.)

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32. *Mousa v. The Institute of Electrical and Electronics Engineers, Incorporated,* 2014 BCCA 415

33. *Nevson Resources Ltd. v. Araya,* 2020 SCC 5

34. *R. v. Find,* 2001 SCC 32

35. *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42

36. *Sahyoun v. Ho,* 2013 BCSC 1143

37. *Simon v. Canada,* 2015 BCSC 924

38. *Strata Plan LMS3259 v. Sze Hang Holding Inc.,* 2009 BCSC 473

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VOLUME 3

55. *Fleming v. Reid,* (1991) 48 O.A.C. 46 (CA)

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73. *TD Bank v. Delloitte Hoskins & Sells,* (1991) 5 O.R. (3d) 417 (Gen. Div.)

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81. *Committee for Monetary and Economic Reform v. Canada,* 2015 FCA 20

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90. *Sivak v. Canada,* 2012 FC 272

91. *Wang v. Canada,* 2016 FC 1052

92. *Wang v. Canada,* 2018 FCA 46

93. *Wang v. Canada,* [2018] S.C.C.A. No. 368

Fleming v. Reid, [1991] O.J. No. 1083

Ontario Judgments

Court of Appeal for Ontario

Robins, Grange and Carthy JJ.A.

June 28, 1991

Action Nos. 357/90 and 356/90

[1991] O.J. No. 1083 | 4 O.R. (3d) 74 | 82 D.L.R. (4th) 298 | 48 O.A.C. 46 | 28 A.C.W.S. (3d) 238 | 1991 CanLII 2728

Fleming v. Reid by his litigation guardian, the Public Trustee; Fleming v. Gallagher (a.k.a. Gallacher) by his litigation guardian, the Public Trustee

Counsel

Carla McKague and Anne Molloy, for appellants.

Rosalyn Train, for respondent.

Elizabeth Goldberg, for Attorney General of Ontario, intervener.

The judgment of the court was delivered by

ROBINS J.A.

1 The central issue in these two appeals is whether the state may administer neuroleptic drugs in non- emergency situations to involuntary incompetent psychiatric patients who have, while mentally competent, expressed the wish not to be treated with such drugs.

I

2 The appellants George Reid and Kenneth Gallagher are involuntary patients at the Oak Ridge Division of the Penetanguishene Medical Health Centre under the authority of Lieutenant Governor's Warrants, having been found not guilty by reason of insanity of criminal offences. Each of the appellants has a long history of mental illness, dating, in the case of Mr. Reid, back to 1978 and, in the case of Mr. Gallagher, back to 1973. They have both been diagnosed as schizophrenic.

3 The issues raised by these appeals do not require a detailed review of the appellants' psychiatric histories or of the events which led to their committal to a psychiatric facility. Under s. 35c [en. 1987, c. 37, s. 12] of the Mental Health Act, R.S.O. 1980, c. 262, as amended (the Act), the appellants are persons detained in a psychiatric facility pursuant to the Criminal Code, R.S.C. 1985, c. C-46, and stand in the same position, and have the same rights, as other involuntary patients. Accordingly, the issues can be considered from the standpoint of involuntary patients generally.

4 The respondent, Dr. Russell Fleming, is the appellants' attending physician and, as such, is responsible for their observation, care and treatment. Dr. Fleming is a psychiatrist and the director of the Oak Ridge facility. In September 1987, he found the appellant Reid not competent to consent to psychiatric treatment which, in his view, would likely improve Mr. Reid's deteriorating mental condition. Dr. Fleming made a similar determination with regard to Mr. Gallagher in the spring of 1988. Dr. Fleming proposed to treat Messrs. Reid and Gallagher with neuroleptic drugs, a form of medication commonly used in the treatment of mental disorders such as schizophrenia. Both of the appellants have had previous experience with these drugs and believe them to be non-beneficial or harmful. While mentally competent, both have refused to take the drugs notwithstanding their doctor's opinion that it would be in their best interests to do so.

5 The appellants challenged Dr. Fleming's finding as to their competence, as they were entitled to do under a s. 35b [en. 1987, c. 37, s. 12] of the Mental Health Act. The matter accordingly came before the review board established by s. 30 [am. 1986, c. 64, s. 33(26)] of the Act. After a full hearing in each case, the board upheld Dr. Fleming's decision. The appellants' mental competence is no longer in issue and I shall proceed on the basis that they are incompetent within the meaning of ss. 1(g) and 35(1)(b) [s. 35 am. 1986, c. 64, s. 33; rep. & sub. 1987, c. 37, s. 11] of the Act -- that is, they lack the requisite ability to understand the nature of the illness for which the treatment was proposed and the treatment proposed, and are unable to appreciate the consequences of giving or withholding consent to the treatment. Equally, it is not disputed that the appellants were competent within the meaning of ss. 1(g) and 35(1)(b) on the occasions relied on by their substitute decision-maker, the Official Guardian, as expressions of their prior competent wishes when he refused to consent to their being treated with neuroleptic drugs.

6 Our concern in this appeal is with the constitutional validity of ss. 35(2)(b)(ii) and 35a of the Act. These sections, in essence, empower the review board to make an order, as it did here, authorizing the attending physician to administer neuroleptic drugs to an involuntary incompetent psychiatric patient notwithstanding the refusal of the patient's substitute decision-maker to consent to the proposed treatment on the basis that, while apparently competent, the patient had expressed a prior competent wish not to be treated with neuroleptics. The principal challenge raised on the appeal is that the statutory scheme created by the impugned provisions deprive the appellants, and persons in like circumstances, of their right to security of the person guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms.

7 An understanding of the statutory scheme pursuant to which the review board made the impugned orders is basic to an appreciation of the issues in this appeal. Accordingly, before turning to the merits, it is necessary to set out in some detail the relevant sections of the Act and the procedures designed to authorize this form of non-consensual medical treatment.

II

8 The Act is concerned essentially with two types of persons -- voluntary and involuntary patients. A voluntary patient admits and discharges himself or herself to a psychiatric facility upon his or her own volition; an involuntary patient has no such choice. The determination of a patient as voluntary or involuntary is independent of any assessment of a patient's mental competency. An involuntary patient is defined in s. 1(c) of the Act to be:

> ... a person who is detained in a psychiatric facility, under a certificate of involuntary admission or a certificate of renewal ...

"Mentally competent" is defined in s. 1(g) as:

> ... having the ability to understand the subject-matter in respect of which consent is requested and able to appreciate the consequences of giving or withholding consent ...

9 The latter definition of mental competency must be read in conjunction with s. 35(1)(b). That provision sets out the test for determining mental competency with respect to a patient's ability to consent to psychiatric treatment. Section 35(1)(b) reads:

> 35(1)(b) "having the ability to understand the subject matter in respect of which consent is requested" in the definition of "mentally competent" (i.e., s. 1(g)) means having the ability to understand the nature of the illness for which treatment is proposed and the treatment proposed ...

Section 35(2) of the Act provides that:

> 35(2) Psychiatric and other related medical treatment shall not be given to a patient,
>
> (a) where the patient is mentally competent, without the voluntary, informed consent of the patient;
>
> (b) where the patient is not mentally competent,
>
> (i) without the consent of a person authorized by section 1a to consent on behalf of the patient,
>
> (ii) unless the review board has made an order authorizing the giving of the specified psychiatric and other related medical treatment, or
>
> (iii) unless a physician certifies in writing that there is imminent and serious danger to the life, a limb or a vital organ of the patient requiring immediate treatment and the physician believes that delay in obtaining consent would endanger the life, limb or a vital organ of the patient.

10 It will be observed that psychiatric treatment may not be given to a mentally competent patient without the patient's voluntary informed consent; and, further, that, apart from the emergency circumstances contemplated in s. 35(2)(b)(iii), once a patient is found to be incompetent, psychiatric treatment may not be given without the consent of the patient's substitute decision-maker unless, as s. 35(2)(b)(ii) provides, the review board authorizes the giving of the treatment. I should add that none of the emergency circumstances contemplated in s. 35(2)(b) (iii), or elsewhere in the Act, are present in this case. There is no suggestion that either appellant represents a threat of bodily harm to himself or anyone else in the facility. The orders requiring them to take anti-psychotic drugs were made solely in their best interests and not on any other ground.

11 The persons who may act as substitute decision-makers are enumerated in s. 1a(1) of the Act [s. 1a en. 1987, c. 37, s. 2]:

> 1a.(1) A person may give or refuse consent on behalf of a patient who is not mentally competent if the person has attained the age of sixteen years, is apparently mentally competent, is available and willing to give or refuse consent and is described in one of the following paragraphs:
>
> 1. The committee of the person appointed for the patient under the Mental Incompetency Act.
> 2. The patient's representative appointed under section 1b or 1c.
> 3. The person to whom the patient is married or the person of the opposite sex with whom the patient is living outside marriage in a conjugal relationship or was living outside marriage in a conjugal relationship immediately before being admitted to the psychiatric facility, if in the case of unmarried persons they,
>
> i. have cohabited for at least one year,
>
> ii. are together the parents of a child, or
>
> iii. have together entered into a cohabitation agreement under section 53 of the Family Law Act, 1986.
>
> 4. A child of the patient.
> 5. A parent of the patient or a person who has lawful custody of the patient.
> 6. A brother or sister of the patient.
> 7. Any other next of kin of the patient.
> 8. The Official Guardian.

In this case, the Official Guardian was appointed pursuant to s. 1a(1) to consent to or refuse treatment on behalf of each of the appellants.

12 Section 1b [en. 1987, c. 37, s. 2] grants an apparently mentally competent person the right to personally appoint a representative to give or refuse consent for the purpose of para. 2 of s. 1a(1); s. 1c [en. 1987, c. 37, s. 2] similarly grants a patient who is not mentally competent the right to apply to the board for the appointment of a representative for this purpose. These sections contemplate that psychiatric patients may select representatives to determine the course of their treatment should they become mentally incompetent within the meaning of the Act. Where such an appointment is made by a competent patient, the patient is not precluded from directing the substitute decision-maker to grant or refuse consent to the administration of neuroleptic drugs to the patient. I shall reproduce s. 1b in part:

> 1b.(1) A person who has attained the age of sixteen years and is mentally competent to do so has the right to appoint a representative who has attained the age of sixteen years and is apparently mentally competent to give or refuse consent on behalf of the person for the purpose of paragraph 2 of subsection 1a(1).
>
> . . . . .
>
> (4) The attending physician shall inform the patient in writing of the patient's right under subsection (1) within forty-eight hours after the patient is admitted or registered to the psychiatric facility.
>
> (5) As soon as practicable, the officer in charge shall inform all persons who are patients of the facility at the time of the coming into force of this section in writing of their rights under subsection (1).

13 A substitute decision-maker is obliged to give or refuse consent in accordance with s. 1a(6) of the Act. This section, which is critical to this appeal, reads:

> 1a(6) A person authorized to give or refuse consent on behalf of a patient shall do so in accordance with the wishes of the patient if the person knows that the patient expressed any such wishes when apparently mentally competent and in accordance with the best interests of the patient if the person does not know of any such wishes.

14 The latter part of s. 1a(6) makes it clear that in some cases the substitute must determine whether to give or refuse consent on the basis of the patient's "best interests". The factors governing that determination are set out in paras. (a) through (d) of s. 35(5):

> 35(5) A person authorized to give or refuse consent on behalf of a patient shall consider the following factors to determine whether a specified psychiatric treatment and other related medical treatment are in the best interests of a patient,
>
> (a) whether the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;
>
> (b) whether the mental condition of the patient will improve or is likely to improve without the specified psychiatric treatment;
>
> (c) whether the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and
>
> (d) whether the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

15 However, where the patient, while apparently mentally competent, has expressed his or her wishes with respect to the proposed psychiatric treatment, the substitute is obliged by s. 1a(6) to give or refuse consent in accordance with those wishes. In short, the substitute must first determine the prior competent wishes of the patient and give or refuse consent accordingly. It is only when those wishes cannot be determined that the substitute may give or refuse consent on the basis of the patient's best interests.

16 Where a substitute refuses a consent to the proposed psychiatric treatment, the attending physician of an involuntary patient may apply under s. 35a(1) [s. 35a en. 1987, c. 37, s. 12] to the review board for an order authorizing the treatment. Under s. 35a(2), the application must be accompanied by statements of the attending physician and a psychiatrist who is not a member of the medical staff of the facility that they are of the opinion that proposed treatment is in the patient's best interests. In rendering that opinion, the physicians are similarly obliged to take into consideration the factors set out in s. 35(5). Section 35a(1) states:

> 35a.(1) The attending physician of an involuntary patient may apply to the review board for an order authorizing the giving of specified psychiatric and other related medical treatment to the patient where the patient is not mentally competent,

(a) if a person authorized under section 1a to consent to such treatment on the patient's behalf has refused to consent; or

(b) under the circumstances described in subsection 1a(4) (i.e., where there is a conflict as to whether consent should be given between persons claiming authority to act as substitutes).

17 It is significant that this review procedure is applicable only to decisions made by the substitutes of involuntary incompetent patients. The decisions of substitutes of voluntary incompetent patients are not subject to review and, it follows, those patients cannot be forced to take neuroleptic drugs contrary to their competently expressed wishes. As I have already noted, in the case of competent patients, whether voluntary or involuntary, no psychiatric treatment can be given to them without their voluntary informed consent.

18 In determining whether to grant an order authorizing the psychiatric treatment proposed by the attending physician on a s. 35a(1) application, the review board must be satisfied that the specified treatment is in accordance with the patient's best interests. Section 35a(4) sets out the criteria to be considered by the board in making this determination as follows:

> 35a(4) The review board by order may authorize the giving of the specified psychiatric and other related medical treatment if it is satisfied that,
>
> (a) the mental condition of the patient will be or is likely to be substantially improved by the specified psychiatric treatment;
>
> (b) the mental condition of the patient will not improve or is not likely to improve without the specified psychiatric treatment;
>
> (c) the anticipated benefit from the specified psychiatric treatment and other related medical treatment outweighs the risk of harm to the patient; and
>
> (d) the specified psychiatric treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).

19 These factors are identical to those governing a substitute decision-maker's determination under ss. 1a(6) and 35(5) when the prior competent wishes of a patient are unknown. Significantly, however, where the patient's prior competent wishes are known, they are not a matter which may be considered by the board on a s. 35a(1) application. Under the scheme established by this legislation, it is the patient's "best interests", and not his or her "prior competent wishes", that must govern the review board in making its determination as to whether to authorize the treatment proposed by the attending physician.

20 Finally, a decision of the review board may, under s. 33f [en. R.S.O. 1980, c. 262, s. 67; am. 1986, c. 64, s. 33(43); am. 1987, c. 37, s. 10] be appealed to the District Court. Pending such an appeal, no treatment may be administered to a patient unless otherwise ordered by a judge of the court in which the appeal is pending (s. 35a(11)).

21 In the present case, the Official Guardian found that both Mr. Reid and Mr. Gallagher had, when apparently mentally competent, expressed the wish that they not receive psychiatric treatment in the nature of neuroleptic medication. Accordingly, pursuant to s. 1a(6), he refused to consent to the respondent's proposed treatment of either patient. It is agreed, as I indicated earlier, that the appellants were mentally competent at the time the wishes upon which the Official Guardian acted were expressed.

22 In light of the substitute's refusal, Dr. Fleming applied under s. 35a(1) for an order authorizing the proposed psychiatric treatment in each case. The review board granted the orders on the basis that the treatment was in the appellants' "best interests". The appellants then appealed to the District Court where Tobias D.C.J., in carefully considered reasons now reported at (1990), 73 O.R. (2d) 169, found no violation of the appellants' Charter rights and upheld the orders of the review board. The appellants, by their litigation guardian, the Public Trustee, now appeal the matter to this court.

III

23 It may be helpful to refer briefly to the nature and effects of neuroleptics. These "anti-psychotic drugs", "psychotropic drugs" or "major tranquillizers", as they are sometimes called, are the most common form of treatment for schizophrenia and related mental illnesses. Their medical efficacy stems from their ability to minimize or control psychotic episodes or the symptoms associated with schizophrenia. Not all patients are responsive to the drugs and some improve without them. However, there is no way to predict a patient's reaction to any particular medication within this class of drugs.

24 In general, anti-psychotic drugs influence chemical transmissions to the brain, affecting both activatory and inhibitory functions. Because the therapeutic effect of the drugs is to reduce the level of psychotic thinking, it is virtually undisputed that they are "mind-altering". Although neuroleptics are the drug of choice for treatment of patients diagnosed as schizophrenic, they are not a cure for the disorder but are said to work so as to have a beneficial effect on thought processes and the brain's ability to sort out and integrate perceptions and memory.

25 The use of neuroleptics in the treatment of various psychoses is generally effective in improving the mental condition of the patient by alleviating the symptoms of mental disorder. It is clear, however, that they may not be helpful in every case. Moreover, the efficacy of the drugs is complicated by a number of serious side effects which are associated with their use. These include a number of muscular side effects known as extra- pyramidal reactions: dystonia (muscle spasms, particularly in the face and arms, irregular flexing, writhing or grimacing and protrusion of the tongue); akathesia (internal restlessness or agitation, an inability to sit still); akinesia (physical immobility and lack of spontaneity); and Parkinsonisms (mask- like facial expression, drooling, muscle stiffness, tremors, shuffling gait). The drugs can also cause a number of non- muscular side effects, such as blurred vision, dry mouth and throat, weight gain, dizziness, fainting, depression, low blood pressure and, less frequently, cardiovascular changes and, on occasion, sudden death.

26 The most potentially serious side effect of anti-psychotic drugs is a condition known as tardive dyskinesia. This is a generally irreversible neurological disorder characterized by involuntary, rhythmic and grotesque movement of the face, mouth, tongue, and jaw. The patient's extremities, neck, back and torso can also become involved. Tardive dyskinesia generally develops after prolonged use of the drugs, but it may appear after short term treatment and sometimes appears even after treatment has been discontinued.

27 In short, it appears that although these drugs apparently operate so as to benefit many patients by alleviating their psychotic symptoms, they also carry with them significant, and often unpredictable, short term and long term risks of harmful side effects. See, generally, Donland's Illustrated Medical Dictionary, 26th ed. (Toronto: W.B. Sanders Co., 1981), at p. 887; Breggin, "Brain Damage Dementia and Persistent Cognitive Dysfunction Associated with Neuroleptic Drugs: Evidence, Etiology, Implications" (1990), 11 Journal of Mind and Behaviour 425; Moonasar, "Neuroleptic Malignant Syndrome" (1986), 79 South Med. J. 331; Kemna, "Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs" (1985), 6 Journal of Legal Medicine 107; and Brooks, "The Right to Refuse Antipsychotic Medications: Law and Policy" (1987), 39 Rutgers Law Rev. 340. See also In the Matter of Guardianship of Richard Roe, 421 N.E.2d 40 (1981).

28 With these observations in mind, I turn to the issues raised in this appeal.

IV

29 The appellants' principal submission is that ss. 35(2)(b)(ii) and 35a of the Mental Health Act, which empower the review board to compel involuntary incompetent patients, like the appellants, to take anti-psychotic drugs contrary to their competent wishes as expressed by them through their substitute decision-maker, are inconsistent with and a denial of their constitutional right to security of the person as guaranteed by s. 7 of the Charter.

30 In considering this issue, it is important to recall briefly some of the common law principles applicable to doctor-patient relationships which this court recently had occasion to consider in Malette v. Shulman (1990), 72 O.R. (2d) 417, 67 D.L.R. (4th) 321.

31 The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. With very limited exceptions, every person's body is considered inviolate, and, accordingly, every competent adult has the right to be free from unwanted medical treatment. The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination. The doctrine of informed consent ensures the freedom of individuals to make choices about their medical care. It is the patient, not the doctor, who ultimately must decide if treatment -- any treatment -- is to be administered.

32 A patient, in anticipation of circumstances wherein he or she may be unconscious or otherwise incapacitated and thus unable to contemporaneously express his or her wishes about a particular form of medical treatment, may specify in advance his or her refusal to consent to the proposed treatment. A doctor is not free to disregard such advance instructions, even in an emergency. The patient's right to forgo treatment, in the absence of some overriding societal interest, is paramount to the doctor's obligation to provide medical care. This right must be honoured, even though the treatment may be beneficial or necessary to preserve the patient's life or health, and regardless of how ill-advised the patient's decision may appear to others.

33 These traditional common law principles extend to mentally competent patients in psychiatric facilities. They, like competent adults generally, are entitled to control the course of their medical treatment. Their right of self-determination is not forfeited when they enter a psychiatric facility. They may, if they wish, reject their doctor's psychiatric advice and refuse to take psychotropic drugs, just as patients suffering other forms of illness may reject their doctor's advice and refuse, for instance, to take insulin or undergo chemotherapy. The fact that these patients, whether voluntarily or involuntarily, are hospitalized in a mental institution in order to obtain care and treatment for a mental disorder does not necessarily render them incompetent to make psychiatric treatment decisions. They may be incapacitated for particular reasons but nonetheless be competent to decide upon their medical care. The Act presumes mental competency, and implicitly recognizes that a mentally ill person may retain the capacity to function competently in all or many areas of everyday life.

34 Before psychiatric treatment can be administered without the consent of the patient, the Act requires a finding of incompetency, which is made on the basis of the patient's ability to understand (1) the nature of the illness for which the psychiatric treatment is proposed; (2) the nature of the treatment proposed; and (3) the patient's ability to appreciate the consequences of giving or withholding consent. More particularly, involuntary patients, including those who, like the appellants, are being held pursuant to the Criminal Code, are taken to have the capacity to decide for themselves whether or not to receive anti-psychotic drugs. Until they are found incompetent, they hold the same rights as any other competent patient in the facility. Indeed, they hold the same rights as competent persons elsewhere in the province whose consent must be obtained before they can be the subject of medical treatment. Mentally ill persons are not to be stigmatized because of the nature of their illness or disability; nor should they be treated as persons of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments.

35 In this case, the court's concern is with the rights, in non- emergency situations, of involuntary patients whose mental incompetence has been established and who are, therefore, incapable of giving or refusing consent to the proposed use of psychotropic drugs. Their inability to make a decision concerning their psychiatric treatment does not, however, extinguish their right to be free from non-consensual invasions of their person. Nor does it mean that psychiatric treatment must automatically be withheld from them. There are obviously many cases in which such treatment may be highly beneficial and should not be withheld simply because a patient cannot competently consent to the proposed treatment. Our society recognizes that the state has an obligation in these circumstances to provide care for the mentally disabled and to act in its role as parens patriae for the protection and benefit of those who, through mental disability, are unable to take care of themselves.

36 The provisions of the Mental Health Act to which I have made reference are designed to provide a mechanism whereby psychiatric treatment may be administered to patients who may need such treatment but are not mentally competent to consent to it. At the same time, the Act recognizes the civil rights of mentally ill patients by permitting them, or their substitutes acting in accordance with the patients' competent wishes, to refuse psychiatric treatment in spite of the fact that the treatment may be viewed by the mental health community as beneficial or necessary. However, in the case of an involuntary incompetent patient, the Act empowers the review board to overrule the substitute consent-giver's decision and thus the patient's competent wishes if, in the board's opinion, the psychiatric treatment is in the patient's "best interests". It is the provisions allowing this result which are at the heart of the dispute in this appeal.

V

37 This brings me to the appellants' contention that ss. 35a and 35(2)(b)(ii) authorizing the review board to override an involuntary patient's competent refusal to take anti-psychotic drugs, as expressed by the patient through his or her substitute, violate the principles of fundamental justice and contravene s. 7 of the Charter.

38 Section 7 guarantees everyone the right to life, liberty and security of the person and the right not to be deprived of that right except in accordance with the principles of fundamental justice. In determining whether the legislation is in breach of this section of the Charter, I adopt the approach set out by the Supreme Court of Canada in R. v. Beare; R. v. Higgins, [1988] 2 S.C.R. 387, 45 C.C.C. (3d) 57, at p. 401 S.C.R., p. 69 C.C.C.:

> The analysis of s. 7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly, that that deprivation is contrary to the principles of fundamental justice.

39 On the first branch of the analysis, it is manifest that the impugned provisions of the Act operate so as to deprive the appellants of their right to "security of the person" as guaranteed by s. 7. The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7. Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.

40 Few medical procedures can be more intrusive than the forcible injection of powerful mind-altering drugs which are often accompanied by severe and sometimes irreversible adverse side effects. To deprive involuntary patients of any right to make competent decisions with respect to such treatment when they become incompetent, and force them to submit to such medication, against their competent wishes and without the consent of their legally appointed substitute decision-makers, clearly infringes their Charter right to security of the person. To that extent, I agree with Judge Tobias' conclusion at p. 189 O.R. of his judgment that "there can be no question that the security of (the appellants') person will be affected if an order is made under the provisions of s. 35a that (they) receive specified psychiatric treatment". Reference might also be made to R. v. Rogers (1990), 61 C.C.C. (3d) 481, 2 C.R. (4th) 192, at p. 488 C.C.C., p. 201 C.R., where the British Columbia Court of Appeal, in another context, held that "a probation order which compels an accused person to take psychiatric treatment or medication is an unreasonable restraint upon the liberty and security of the accused person".

41 The second issue which must be addressed is whether the scheme of the Mental Health Act which effectively deprives an involuntary patient of the right to security of the person is contrary to the principles of fundamental justice.

42 The appellants do not attack the substitute decision-making scheme established by the Act. To the contrary, in their submission the scheme is in full accord with the principles of fundamental justice in that it takes as its basis the wishes of the patient when competent and, through the mechanism of the substitute decision-maker, allows an incompetent patient to exercise the same rights as a competent patient. Their complaint is that, under this statute, the competent wishes of an involuntary patient who subsequently becomes incompetent are, in effect, rendered meaningless when the substitute's refusal to consent to specified treatment is challenged at the level of the review board. At that stage, to quote from the appellants' factum, "the primary criterion for the first-level decision-maker, namely, the patient's wishes expressed when competent, is no longer a criterion at all". In other words, when the attending physician makes an application under s. 35a, the only question for the board's determination is whether the proposed treatment is in accordance with the patient's best interests. In the appellants' submission, the legislative scheme vitiates the patient's right to security of the person in a manner which is inconsistent with the principles of fundamental justice insofar as it compels a patient to take neuroleptic drugs without any regard to his or her competent wishes, and also permits the patient's substitute decision-maker's refusal to consent to be overridden without regard to the patient's competent wishes.

43 Counsel for the intervener, the Attorney General, whose submissions were made also on behalf of Dr. Fleming, took the position that "the policy underlying the scheme of substituted consent and the authorization of treatment orders by the review board is not, in substance, inconsistent with the principles of fundamental justice". Counsel contended that the ultimate regard for the best interests of the patient reflected in the Act is consistent with the common law development of the parens patriae jurisdiction. In her submission, the issue is whether the prior competent wishes of the patient, as expressed through the substitute consent-giver, must govern or take precedence over the views of the attending physician and review board as to the patient's best interests. She argued that the selection of the "test" -- i.e., the "prior competent wishes" or "best interests" of the patient -- to be applied by either the substitute or the review board is a public policy matter for the legislature. The legislature made a choice between two standards, both of which have "desirable features", and either of which could have been applied in circumstances such as those presented in this case. In short, the Attorney General submitted that in selecting the "best interests" test over the "prior wishes" test, and in affording a "full array of procedural protections" to patients faced with an application for a treatment order, the legislature acted within its traditional parens patriae jurisdiction and not in violation of any of the basic tenets of our legal system.

44 In the court below, Judge Tobias accepted the position advanced by the intervener in this appeal. Although he found that the order of the review board deprives the appellants of the security of their person, he held that deprivation was not in violation of the principles of fundamental justice. The scheme of the Act permitting the review board to override prior competent wishes, the judge found, is in accord with the same common law principles that underlie the parens patriae jurisdiction of the courts. Although recognizing [p. 188 O.R.] that "the concept of individual self-determination is given priority in the Act", the judge went on to find it unreasonable to say that, because the Act does not treat consent as the "paramount issue" but chooses the alternative of considering the best interests of the patient, the impugned provisions therefore violate s. 7 of the Charter. On his view of the Act, the "paramount issue for the attending physician, for the official guardian as a substitute consent-giver, for the review board, and for this court ... is not whether ... (the patient) expressed a specific wish while he was apparently mentally competent but, rather, whether at this time ... that wish still accords with his best interests" [pp. 188-89 O.R.].

VI

45 The Mental Health Act is unquestionably consistent with the spirit underlying the state's role as parens patriae. It can readily be accepted that the scheme in issue was intended to provide beneficial care for mentally incompetent patients incapable of caring for themselves, and that ss. 35a and 35(2) (b)(ii) were enacted out of a concern for the well-being of involuntary incompetent patients. It can also be accepted, as the evidence in this appeal indicates, that the appellants are very troubled individuals and that providing care for them in the facility is a very difficult task. Nonetheless, I am compelled to the conclusion that, in authorizing the review board to override the competent wishes of such patients in the manner it does, the Act fails to meet the standards set by the Charter and violates the rights guaranteed to the appellants by s. 7.

46 In E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1 sub nom. Re Eve -- a case which involved the question of whether the court might invoke its parens patriae jurisdiction to authorize the non-therapeutic sterilization of a mentally disabled woman -- the Supreme Court of Canada had occasion to examine the history and content of the parens patriae jurisdiction of the courts. La Forest J., writing for the court, makes it clear that this is a very broad, if not unlimited, inherent jurisdiction under which the court has the right and duty to protect those who are unable to take care of themselves, and in doing so, the court has a wide discretion to do what it considers in their best interests. But he also makes it clear that the discretion to invoke this jurisdiction is not unlimited and is to be exercised only in accordance with its underlying principle -- that is, to do what is necessary for the protection of the persons for whose benefit the discretion is exercised. At p. 427 S.C.R., p. 29 D.L.R., La Forest J. states:

> Though the scope or sphere of operation of the parens patriae jurisdiction may be unlimited, it by no means follows that the discretion to exercise it is unlimited. It must be exercised in accordance with its underlying principle. Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised ...

And at p. 434 S.C.R., p. 34 D.L.R.:

> ... parens patriae jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.

47 I do not read the judgment in Re Eve, or in Beson v. Director of Child Welfare (Newfoundland), [1982] 2 S.C.R. 716, 142 D.L.R. (3d) 20, another decision of the Supreme Court of Canada upon which the respondent and intervener relied, as supporting the proposition that the parens patriae jurisdiction can be invoked to deprive competent mentally ill patients of rights expressly granted by statute or to abrogate their Charter rights. The parens patriae jurisdiction was intended to operate only where a person is unable to take care of himself or herself. It cannot be exercised by the state to overrule a treatment decision made by a competent patient, who, by definition, is able to direct the course of his or her medical care, regardless of the fact that the decision may be considered, by objective standards, medically unsound or contrary to the patient's best interests. Nor, in my opinion, for the reasons I gave in Malette v. Shulman, supra, may resort be had to the parens patriae jurisdiction to authorize the medical treatment of an incompetent person who, while competent, had given instructions refusing to consent to the proposed treatment.

48 This Act acknowledges the fundamental individual rights asserted by these appellants. The legislature did not, as the intervener suggests, simply choose the "best interests" test over the "prior competent wishes" test to govern consent decisions made on behalf of involuntary incompetent patients. The Act explicitly recognizes the right of mental patients, voluntary and involuntary, to control their psychiatric treatment and, accordingly, their right to security of the person. Psychiatric treatment of competent patients without their voluntary informed consent is prohibited (s. 35(2)(a)), and the substitute consent-givers of incompetent patients are required to give or refuse consent on the basis of the patient's prior competent wishes (s. 1a(6)). Under this legislative scheme, the competent wishes of mentally disabled patients must be honoured regardless of whether or not the patients are competent when the psychiatric treatment for which consent is required is proposed. A competent patient's right to be free from non-consensual invasions of his or her person is not diminished by subsequent incompetency or subordinated to his or her "best interests" where the prior competent wishes of the patient are known. The legislature has given paramountcy to the "prior wishes" test and, in keeping with the patient's common law and constitutional rights, the "best interests" test comes into play only if the patient has no known competent wishes as to his or her psychiatric treatment.

49 In the case of involuntary incompetent patients, however, and in their case alone, the Act permits their competent wishes to be overridden by the review board on the basis that the proposed treatment order would be in the patient's best interests. Where the attending physician applies to reverse the substitute consent-giver's refusal to consent to psychiatric treatment on the basis of the patient's prior competent wishes, the review board is obliged under s. 35a to decide whether to authorize the treatment on entirely different criteria than that employed by the substitute. Whereas the substitute must apply a subjective test -- the patient's "prior competent wishes", the review board is precluded from considering any subjective criteria and must apply an objective test -- the patient's "best interests". These are separate and distinct tests founded on different values or standards, and, as such, necessarily raise different concerns or issues. The learned judge appealed from, in my respectful view, erred in merging the tests and defining the issue before the review board, as I noted earlier, as being, in effect, whether the patient's prior competent wishes still accord with his best interests. The Act is not capable of that interpretation. It was indeed common ground in this appeal, as counsel for the intervener aptly put it, that the tests are "mutually exclusive", and must accordingly be treated as such.

50 As the legislation stands, therefore, once the matter reaches the review board, these patients may be compelled to take anti- psychotic drugs regardless of the cogency and competency of their prior wishes. The review board is in no sense engaged in a "review" of the substitute's decision; its focus is exclusively on the "best interests" criterion set out in s. 35a(4). With respect to the board's determination, the patient's competent wishes are immaterial -- indeed, the board would exceed its statutory jurisdiction in considering the prior competent wishes of the patient. When the matter reaches the board, the substitute consent-giver scheme, for all practical purposes, is rendered nugatory with respect to these patients. While they, like other psychiatric patients, are entitled to appoint and direct a substitute to give or refuse consent to their psychiatric treatment and are effectively told that their competent wishes will govern the decision of whoever may be their substitute, when such a decision is challenged by the attending physician it is of no consequence in the board's considerations. At this stage, the whole of the exercise preceding the board hearing is of no force or effect.

51 In sum, after creating a substitute system which purports to recognize the prior known competent wishes of incompetent patients and to ensure that those wishes are respected, the Act proceeds to render those competent wishes, and the substitute's decision based thereon, entirely meaningless when a treatment order is sought from the review board. The patient's wishes can be overridden without any consideration as to their currency, validity or reliability. As a result, the appellants, and patients in a like position, are denied any right to have the issue of whether they should be compelled to take neuroleptic drugs determined on the basis of their competently expressed wishes.

52 A legislative scheme that permits the competent wishes of a psychiatric patient to be overridden, and which allows a patient's right to personal autonomy and self-determination to be defeated, without affording a hearing as to why the substitute consent-giver's decision to refuse consent based on the patient's wishes should not be honoured, in my opinion, violates "the basic tenets of our legal system" and cannot be in accordance with the principles of fundamental justice: Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, at p. 503 S.C.R., p. 302 C.C.C.

53 It is no answer to say that the patient has been afforded a full array of procedural protections with respect to the board's hearing when that hearing is not directed to the substitute consent-giver's decision, and the patient's competent wishes as expressed through the substitute consent- giver are irrelevant to the board's determination. In my opinion, it is plainly contrary to the principles of fundamental justice to force a patient to take anti-psychotic drugs in his or her best interests without providing the patient, or the patient's substitute, any opportunity to argue that it is not the patient's best interests but rather his or her competent wishes which should govern the course of the patient's psychiatric treatment.

54 In this case, the appellants' wishes were stated at a time when they were admittedly competent. It would appear that each of them has had extensive experience with anti-psychotic drugs and has in the past rejected this form of medication. However, it is not for this court to assess the validity of their wishes or the applicability of those wishes to their present psychiatric circumstances. No emergency is claimed here, and it is not suggested that the appellants are a threat to themselves or anyone else. In the context of this legislative scheme, the question of whether the decision of their substitute should be set aside is a matter to be determined after a hearing in which the effect or scope of the appellants' wishes, and not merely their best interests, can be properly considered in the light of all the existing circumstances.

55 In my view, no objection can be taken to procedural requirements designed to determine more accurately the intended effect or scope of an incompetent patient's prior competent wishes or instructions. As the Act now stands, the substitute consent-giver's decision must be governed by wishes which may range from an isolated or casual statement of refusal to reliable and informed instructions based on the patient's knowledge of the effect of the drug on him or her. Furthermore, there may be questions as to the clarity or currency of the wishes, their applicability to the patient's present circumstances, and whether they have been revoked or revised by subsequent wishes or a subsequently accepted treatment program. The resolution of questions of this nature is patently a matter for legislative action. But, in my respectful view, it is incumbent on the legislature to bear in mind that, as a general proposition, psychiatric patients are entitled to make competent decisions and exercise their right to self-determination in accordance with their own standards and values and not necessarily in the manner others may believe to be in the patients' best interests.

56 In this case, as I have stated, there was no hearing before the review board, nor could there be, on the question of the effect or scope of the appellants' prior competent wishes, or their substitute consent-giver's decision based on those wishes. Accordingly, the treatment orders made by the board must be seen as arbitrary and unfair, and must be set aside. It is not for the court to rewrite the Act and vest a tribunal with jurisdiction not given it by the legislature. Nor is it for the court to determine the procedure or criteria to be followed in making treatment decisions for mentally disabled patients. These are issues which involve governmental policy. Here, the substitute consent-giver, in compliance with the Act, refused consent to the use of neuroleptics. Since, as the Act is presently framed, no provision is made for a proper review of that decision, the decision must stand.

57 In the light of this conclusion, I find it unnecessary to consider the appellants' alternative argument that the Act violates their equality rights as guaranteed by s. 15(1) of the Charter. Nor do I find it necessary to consider the appellants' further contention that the Act is also contrary to s. 7 in that it permits a review of a substitute's decision on the application of the attending physician when consent is refused, but allows no review at the behest of the patient when the substitute consents to a proposed course of psychiatric treatment. This argument has no factual foundation in this case, and I think it inappropriate to deal with the issue on a hypothetical basis.

VII

58 Having found that s. 35a and s. 35(2)(b)(ii) are inconsistent with s. 7 of the Charter to the extent that they empower the review board to authorize the psychiatric treatment of an involuntary incompetent patient contrary to the patient's competent refusal to accept such treatment as expressed through the patient's substitute consent-giver, the remaining question is whether the sections can be saved by s. 1 of the Charter. In my opinion, they cannot.

59 The impugned scheme under the Mental Health Act fails to meet the requirement of s. 7 that the principles of fundamental justice be observed with respect to involuntary incompetent patients. Those patients are arbitrarily deprived of their right to security of the person insofar as they are denied any hearing in which they may assert, through their substitute consent-givers, their competent wishes with respect to treatment and, thus, their right to be free of unwanted medical treatment. Such a violation of the principles of fundamental justice, in my opinion, can be neither "reasonable" nor "demonstrably justified in a free and democratic society".

60 The right to personal security is guaranteed as fundamental in our society. Manifestly, it should not be infringed any more than is clearly necessary. In my view, although the right to be free from non-consensual psychiatric treatment is not an absolute one, the state has not demonstrated any compelling reason for entirely eliminating this right, without any hearing or review, in order to further the best interests of involuntary incompetent patients in contravention of their competent wishes. To completely strip these patients of the freedom to determine for themselves what shall be done with their bodies cannot be considered a minimal impairment of their Charter right. Safeguards can obviously be formulated to balance their wishes against their needs and ensure that their security of the person will not be infringed any more than is necessary. Recognizing the important objective of state intervention for the benefit of mentally disabled patients, nonetheless, the overriding of a fundamental constitutional right by the means chosen in this Act to attain the objective cannot be justified under s. 1 of the Charter.

VIII

61 For these reasons, I would allow the appeal of each of the appellants and set aside the order of Tobias D.C.J. In place thereof, I would vacate the treatment orders of the review board in the case of each of the appellants. I would further declare ss. 35a and 35(2)(b)(ii) of the Mental Health Act inoperative insofar as these sections purport to empower the review board to authorize the psychiatric treatment of incompetent patients involuntarily confined in psychiatric facilities contrary to the refusal of the patient's substitute decision-maker to consent to such treatment on the basis of the patient's prior competent wishes.

62 The appellants are entitled to their costs in this court and in the court below.

Appeals allowed.

End of Document

Grant v. Cormier-Grant, [2001] O.J. No. 4428

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Morden, Austin and Borins JJ.A.

Heard: August 15, 2001.

Judgment: November 19, 2001.

Docket No. C35830

[2001] O.J. No. 4428 | 56 O.R. (3d) 225 | 2001 CanLII 27938

Between Scott Grant, (plaintiff/appellant), and Jenny Cormier-Grant and Patricia Cormier, (defendants/respondents)

(2 paras.)

Case Summary

On appeal from the judgment of Justice Wailan Low dated January 26, 2001.

Counsel

James C. Morton, for the appellant. Ingrid Van Weert, for the respondent.

The following judgment was delivered by

THE COURT (endorsement)

1 We have found it necessary to vary paragraph 31 of the Court's reasons for judgment released on October 3, 2001 on the basis of submissions made by counsel following the release of the reasons.

2 Accordingly, paragraph 31, as varied, is to be substituted for the former paragraph, and reads as follows:

> I would, therefore, allow the appeal, set aside the judgment dismissing the appellant's claim against Jenny Cormier-Grant and order that her motion for summary judgment be dismissed. The appeal with respect to the summary judgment in favour of Patricia Cormier was, in effect, abandoned and it is dismissed without costs. In addition, the appellant is granted leave to amend his statement of claim, if so advised. The appellant is entitled to his costs of the motion made on behalf of Jenny Cormier-Grant and the appeal from the judgment in her favour. The costs order of the motion judge in so far as it relates to Patricia Cormier shall stand.

MORDEN J.A.
AUSTIN J.A.
BORINS J.A.

End of Document

Hanson v. Bank of Nova Scotia, [1994] O.J. No. 1250

Ontario Judgments

Court of Appeal for Ontario,

Morden A.C.J.O., Finlayson and Abella JJ.A.

June 10, 1994

Action No. C 10299

[1994] O.J. No. 1250 | 19 O.R. (3d) 142 | 74 O.A.C. 145 | 48 A.C.W.S. (3d) 709

Hanson v. Bank of Nova Scotia et al.

Counsel

David Stockwood, Q.C., and Christopher H. Wirth, for appellant.

William E. Pepall, for respondent, Osler, Hoskin & Harcourt.

The judgment of the court was delivered by

1 FINLAYSON J.A.: — This is an appeal from an order striking out the statement of claim against the respondent Osler, Hoskin and Harcourt ("Osler") under rule 21.01(1)(b) on the ground that it disclosed no reasonable cause of action.

2 The facts as pleaded are that the plaintiff, in his capacity as a creditor of Telfer's Tower Club (Hotels) Limited ("Telfer's"), a bankrupt, sued the Bank of Nova Scotia and Osler for damages for breach of fiduciary duty, negligence, and negligent misrepresentation arising out of the circumstances leading to the bankruptcy of Telfer's. The claim for negligent misrepresentation has been abandoned as against Osler.

3 In 1989, Telfer's was indebted to the bank in an unstated but presumably substantial amount, for which the bank held security. Telfer's was in the process of putting together a private placement offering to raise money. The bank was aware of these efforts and professed to be supportive of this initiative along with a proposed joint venture with Thornbrook International Consultants Inc. ("Thornbrook"). The private placement was designed to raise 7.8 million dollars and Wood Gundy Inc. ("Wood Gundy") was retained by Telfer's to market the offering. By August 1989, Wood Gundy had prepared and issued an offering memorandum.

4 In the meantime, and without the knowledge of Telfer's, the bank had retained Laventhol and Horwath ("Laventhol") with a view to appointing it as receiver or as trustee in bankruptcy of Telfer's. Laventhol reported back to the bank on August 8, 1989 with an analysis and comments on a possible receivership. The bank had retained Osler as its solicitors to act for it in any matter relating to the receivership or bankruptcy. Also, during August, rumours circulated in the market that Telfer's was in serious financial difficulty and was likely to go into receivership or bankruptcy. These rumours seriously jeopardized the ongoing joint venture discussions between Telfer's and Thornwood. Telfer's contacted the bank and was told categorically and falsely that Laventhol had not been retained by the bank and was not involved with Telfer's in any way.

5 Michael Judge was a salesman at Wood Gundy and his father, a senior partner at Osler, was one of his customers. He solicited his father as a potential purchaser of the Telfer's issue and asked his permission to circulate the offering to other members of the Osler firm. A special presentation was arranged for Osler and another law firm for September 6, 1989. This date was cancelled because Judge Sr. advised his son that the Osler firm had been retained by the bank in the matter of Telfer's and that the bank would be acting on its security on September 15, 1989. Judge Sr. told his son that one of his partners had been a participant in meetings with the bank involving the retainer of Laventhol, and that he, Judge Sr., and his partners had been advised against making any investment in the Telfer's offering. This information was conveyed by Wood Gundy to Telfer's. When Telfer's contacted the bank for confirmation, the bank, once again and falsely, denied any involvement by Laventhol.

6 In overview, it is the position of the plaintiff that Osler became privy to confidential information about Telfer's financial circumstances through their retainer as solicitors for the bank, that they were aware of Telfer's vulnerability in the financial markets and that they disclosed this confidential information to the underwriters of Telfer's under circumstances in which it was foreseeable that Telfer's would suffer harm, thereby causing damage to Telfer's by undermining its efforts to raise public moneys.

7 The respondent Osler submits that the facts as pleaded do not create, as between Osler and Telfer's, a fiduciary relationship that is now known to the law and accordingly, Telfer's cannot assert a claim against Osler for breach of confidence. The respondent also submits that the facts as pleaded do not create a duty of care by Osler to Telfer's as would form the basis of an action in negligence. Further, with respect to both causes of action, it is submitted that there is no causal connection between the disclosure of the alleged confidential information and the ultimate failure of Telfer's.

8 In my opinion, none of the above conclusions should be made at this stage of the proceedings. The threshold for sustaining a pleading under rule 21.01(1)(b) is not a high one. Much of the argument before us was directed to the lack of a factual underpinning for the causes of action alleged, particularly as to the damages issue. This is a matter to be resolved on the evidence called at the trial: see Temilini v. Ontario Provincial Police (Commissioner) (1990), 73 O.R. (2d) 664, 38 O.A.C. 270 (C.A.). It is also accepted that the fact that a cause of action could be a novel one is not a bar to its proceeding to trial: see Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321. The categories of relationships giving rise to fiduciary duties are not closed nor are the categories of negligence in which a duty of care is owed: see Guerin v. R., [1984] 2 S.C.R. 335 at p. 383, 13 D.L.R. (4th) 321 at p. 341; International Corona Resources Ltd. v. LAC Minerals Ltd., [1989] 2 S.C.R. 574 at pp. 596-97, 61 D.L.R. (4th) 14 at p. 61, and 34 Halsbury's Laws of England, 4th ed. (1980), para. 5 at p. 8.

9 Accordingly, I would allow the appeal, set aside the order under appeal and dismiss the respondent's motion. The appellant is entitled to its costs here and below in any event of the cause.

Appeal allowed.

End of Document

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

1990: February 22 / 1990: October 4.

File Nos.: 21508, 21536.

[1990] 2 S.C.R. 959 | [1990] 2 R.C.S. 959 | [1990] S.C.J. No. 93 | [1990] A.C.S. no 93

Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd.; appellants; v. George Ernest Hunt, respondent, and T & N, P.L.C. and Flintkote Mines Limited; respondents. And between Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd., appellants; v. George Ernest Hunt, respondent, and T & N, P.L.C. and Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (57 paras.)

* Chief Justice at the time of judgment.

Case Summary

Practice — Motion to strike — Action brought by person suffering from disease allegedly caused by exposure to asbestos fibres — Allegation of conspiracy to withhold information of potential health risks — Allegations of other nominate torts — Circumstances in which a statement of claim (or portions of it) could be struck out — Whether allegations based on the tort of [page960] conspiracy should be struck out — Rules of Court [British Columbia], Rule 19(24).

Respondent Hunt, a retired electrician, brought an action alleging that he had contracted mesothelioma because of exposure to asbestos fibres over the course of his employment. The defendants had been involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. It was alleged that they knew from 1934 that asbestos fibres could cause disease in those exposed to the fibres. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N, P.L.C. were sued not only in negligence but also for their alleged conspiracy to withhold information about the dangers associated with asbestos which ultimately resulted in Mr. Hunt's contracting mesothelioma. Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal by order of the British Columbia Court of Appeal.

Carey Canada Inc. successfully applied to have the action against it struck for want of a reasonable claim. (The action had been based solely on allegations of conspiracy.) The Court of Appeal allowed an appeal from that decision. The issues here dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on the tort of conspiracy should be struck out.

Held: The appeals should be dismissed.

The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim of conspiracy. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. Whether or not there is good reason to extend the tort to the present context is for the trial judge to consider in light of the evidence.

[page961]

It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chances of success. It is enough that the plaintiff has some chance of success. Whether or not a predominant purpose had been established and whether or not Quebec's Business Concerns Records Act limited the range of information that the defendants could produce at trial was not relevant to whether the plaintiff's statement of claim disclosed a reasonable claim. Striking out cannot be justified because a pleading reveals "an arguable, difficult or important point of law". On the contrary, it may well be critical that the action be allowed to proceed.

Alleging the tort of conspiracy is not precluded by the allegation of another tort. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be determined when the question of whether it has established that the defendant did in fact commit the other alleged torts has been decided.

Cases Cited

Considered: Dyson v. Attorney-General, [1911] 1 K.B. 410; Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094; Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Lonrho Ltd. v. Shell Petroleum Co. (No. 2), [1982] A.C. 173; Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452; distinguished: Frame v. Smith, [1987] 2 S.C.R. 99; referred to: Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86; Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co., [1892] 3 Ch. 274; Evans v. Barclays Bank and Galloway, [1924] W.N. 97; Kemsley v. Foot, [1951] 1 T.L.R. 197; Nagle v. Feilden, [1966] 2 Q.B. 633; Rex ex rel. Tolfree v. Clark, [1943] O.R. 501; Gilbert Surgical Supply Co. v. F. W. Horner Ltd., [1960] O.W.N. 289; Minnes v. Minnes (1962), 39 W.W.R. 112; McNaughton and McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17; Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279; [page962] Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563; Mogul Steamship Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598.

Statutes and Regulations Cited

Business Concerns Records Act, R.S.Q. 1977, c. D-12. Rules of Civil Procedure, O. Reg. 560/84, Rule 21.01. Rules of Court [British Columbia], Rule 19(24). Rules of the Supreme Court [England], R.S.C. 1883, O. 25, r. 4 [rep. & sub. R.S.C. (Revision) 1962, O. 18, r. 19]. Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66.

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APPEALS from a judgment of the British Columbia Court of Appeal reversing the judgment of Hollinrake J. dismissing the action against Carey Canada Inc. on the basis that it disclosed no reasonable claim. Appeals dismissed.
Jack Giles, Q.C., and Robert McDonell, for Carey Canada Inc. D. M. M. Goldie, Q.C., for Lac d'amiante du Québec Ltée. Marvyn Koenigsberg, for National Gypsum Co. David Martin and Michael P. Maryn, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited. James A. Macaulay, c.r., and K. N. Affleck, for T & N, P.L.C.

Robert Ward and S. E. Fraser, for Flintkote Mines Limited. J. J. Camp, Q.C., and P. G. Foy, for George Ernest Hunt.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

WILSON J.

1 The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent [Hunt's] statement of claim in which he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of Rule 19(24)(a) of the British Columbia Rules of Court.

1. The Facts

2 The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcock & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulations Ltd., Johns-Manville Amiante Canada Inc., Lac d'amiante du Québec Ltée., National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N, P.L.C. ("the defendants").

3 Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

4 The relevant portions of Mr. Hunt's statement of claim read as follows:

> 16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.

17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.

18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plantiff [sic] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.

19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.

20. The defendants' acts in furtherance of the conspiracy referred to in paragraphs 18 and 19 include:

    (a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;

    (b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;

    (c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;

[page965]

    (d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and

    (e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

5 Carey Canada Inc. brought an application before the Supreme Court of British Columbia under Rule 19(24)(a) of the British Columbia Rules of Court seeking to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. Rule 19(24) provides:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be, or
>
> (b) it is unnecessary, scandalous, frivolous, or vexatious, or
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. The Courts Below

(a) Supreme Court of British Columbia

6 Hollinrake J. accepted Carey Canada's submission that the only damage that could be the subject of a conspiracy action was "direct damage". Although counsels' memorandum summarizing Hollinrake J.'s oral reasons for judgment does not explain precisely what he understood the term "direct damage" to mean, it would appear that he meant damage suffered by a plaintiff that flows directly from acts aimed specifically at that plaintiff. Hollinrake J. stated:

[page966]

> Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey, J. refers to the "predominant purpose" of the defendants' conduct [see: Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, at p. 471]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in Canada Cement LaFarge Ltd.

Hollinrake J. therefore allowed the motion and dismissed the action against Carey Canada as disclosing no reasonable claim.

(b) British Columbia Court of Appeal

7 By order of the British Columbia Court of Appeal (dated March 30, 1989), Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal.

8 Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

(1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to very different social considerations.

(2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law. (See Minnes v. Minnes (1962), 39 W.W.R. 112 at 122).

9 Esson J.A. (Anderson and MacFarlane JJ.A. agreeing) gave additional reasons stressing that the "language of predominant purpose and direct damage" in Canada Cement LaFarge Ltd. had arisen in cases that involved competition and pure economic loss. In Mr. Hunt's case, however, the context was very different. Mr. Hunt had suffered [page967] personal injury and claimed that by conspiring to suppress information the defendants had created a foreseeable risk of causing him the harm which he in fact suffered. It was not possible at this stage in the proceedings to determine that the damage was not sufficiently direct to be able to support an action rooted in the tort of conspiracy. Esson J.A. specifically declined to embark upon a detailed consideration of the law of conspiracy, noting:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render a such decisions [sic], as it were, in a vacuum. For those reasons, as well as the reasons given by Mr. Justice Anderson, I agree in allowing the appeal.

3. The Issues

10 The issues that arise in this appeal are:

1. In what circumstances may a statement of claim (or portions of it) be struck out?
2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. Analysis

(1) In What Circumstances May a Statement of Claim be Struck Out?

11 Carey Canada's motion to have the action dismissed was made pursuant to Rule 19(24)(a) of the British Columbia Rules of Court. This rule stipulates that a court may strike out any part of a statement of claim that "discloses no reasonable claim". The rules of practice with respect to striking out a statement of claim are similar in other provinces. In Ontario, for example, Rule 21.01 of the Rules of Civil Procedure, O. Reg. 560/84, states:

> 21.01 (1) A party may move before a judge,
>
> [page968]
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
>
> (a) under clause (1)(a), except with leave of a judge or on consent of the parties;
>
> (b) under clause (1)(b). [Emphasis added.]

12 Rule 19(24) of the British Columbia Rules of Court and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see McLachlin and Taylor, British Columbia Practice (2nd. ed. 1979), vol. 1, pp. 19-71. This process of codification first took place in England shortly after the Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66, was enacted. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

(a) England:

13 In Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the Supreme Court of Judicature Act, 1873, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even although there was no written rule stating that courts could do so. The Lord Chancellor noted, at p. 951, that "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure". That is, it was open to courts to ensure that their process was [page969] not used simply to harass parties through the initiation of actions that were obviously without merit.

14 Before the advent of the Supreme Court of Judicature Act, 1873 and the new Rules of the Supreme Court (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see Halsbury's Laws of England (4th ed. 1981), vol. 36, para. 2, n. 7 and para. 35, n. 5; Milsom, Historical Foundations of the Common Law (2nd ed. 1981), at p. 72; and Baker, An Introduction to English Legal History (2nd ed. 1979), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in Pooley, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4 of the 1883 Rules of the Supreme Court came into force:

> 4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Commenting on the relative merits of demurrers and the new rule, Chitty J. observed in Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489, at p. 496:

[page970]

> Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

15 One of the most important points advanced in the early decisions dealing with O. 25, r. 4 was the proposition that the rule was derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for "vexatious" actions without legal merit designed solely to harass another party. In Pooley, supra, at p. 954, Lord Blackburn asserted that the new rule "considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law." Nonetheless, as Chitty J. subsequently observed in Peruvian Guano Co., the rule was not intended to prevent a "substantial case" from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.

16 In one of the better-known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated:

> The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure there introduced is only intended to [page971] be had recourse to in plain and obvious cases. [Emphasis added.]

[See: Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86 (C.A), at p. 91.]

Lindley M.R.'s observations made clear that even if the rule expanded the court's power to stay actions, courts were to use the rule only in those exceptional instances where it was "plain and obvious" that, even if one accepted the version of the facts put forward in the statement of claim, the plaintiff's case did not disclose a reasonable cause of action. The question was not whether the plaintiff could succeed since this was a matter properly left for determination at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject matter of a trial.

17 The Master of the Rolls had made this very point some six years earlier:

> Then the Vice-Chancellor says: "The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way". It appears to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched -- cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether. [Emphasis added.]

[See: Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co., [1892] 3 Ch. 274 (C.A.), at pp. 276-77.]

[page972]

Thus, the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim. Complex matters that disclosed substantive questions of law were most appropriately addressed at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

18 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see Dyson v. Attorney-General, [1911] 1 K.B. 410 (C.A.); Evans v. Barclays Bank and Galloway, [1924] W.N. 97 (C.A.); Kemsley v. Foot, [1951] 1 T.L.R. 197 (C.A.); and Nagle v. Feilden, [1966] 2 Q.B. 633 (C.A.). Lord Justice Fletcher Moulton's observations in Dyson, supra, at pp. 418-19, are particularly instructive:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of [page973] such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad. [Emphasis added.]

19 A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094 (C.A.). I note that in Drummond-Jackson the Court of Appeal dealt with Rules of the Supreme Court, O. 18, r. 19 (the provision that replaced R.S.C. O. 25, r. 4 in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

> 19. -- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that --
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a).

20 Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some [page974] eighty years earlier in Attorney-General of the Duchy of Lancaster: length and complexity were not appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-02:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.
>
> ...
>
> In my opinion the traditional and hitherto accepted view -- that the power should only be used in plain and obvious cases -- is correct according to the evident intention of the rule for several reasons. First, there is in r 19 (1) (a) the expression 'reasonable cause of action' to which Sir Nathaniel Lindley MR called attention in Hubbuck & Sons Ltd v. Wilkinson, Heywood and Clark Ltd. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19 (2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v Feilden Danckwerts LJ said:
>
>> 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court'.
>
> Salmon LJ said:
>
>> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.
>
> Secondly, r 19 (1) (a) takes some colour from its context in r 19 (1) (b) -- 'scandalous, frivolous and vexatious' -- r 19 (1) (c) -- 'prejudice, embarrass or delay the fair trial of the action' -- and r. 19 (1) (d) -- otherwise an abuse of the process of the court'. The defect referred to in r 19 (1) (a) is a radical defect ranking with those referred to in the other paragraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not [page975] be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. [Emphasis added.]

Lord Pearson concluded at p. 1102:

> That is the basis of the rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences -- possibly some very strong ones -- which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to rely on at the trial. [Emphasis added.]

21 In England, then, the test that governs an application under R.S.C. O. 18, r. 19 has always been and remains a simple one: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

[page976]

(b) Canada

(c) Ontario and British Columbia Courts of Appeal

22 In Canada, provincial courts of appeal have long had to grapple with the very same issues concerning the rules with respect to statements of claim that courts in England have dealt with for over a century. As noted earlier, the rules of practice in this country are to a large extent modelled on England's rules of practice. It comes as no surprise, therefore, that the test Canadian courts of appeal have adopted is in essence the same one that the courts in England favour.

Ontario

23 In Ontario, for example, the Court of Appeal dealt with Rule 124 (the predecessor to Rule 21.01) in Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4 and read as follows:

> 124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

24 In Ross, Magee J.A. embraced the "plain and obvious" test developed in England, stating at p. 316:

> That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out if disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence. [Emphasis added.]

Magee J.A. went on to note at p. 317:

> To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be [page977] manifest that it is something worse, so that it will not be curable by amendment: Dadswell v. Jacobs (1887), 34 Ch. D. 278, 281; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: Boaler v. Holder (1886), 54 L.T.R. 298.

25 At an early date, then, the Ontario Court of Appeal had modelled its approach to Rule 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything other than the clearest of cases. As Laidlaw J.A. put it in Rex ex rel. Tolfree v. Clark, [1943] O.R. 501 (C.A.), at p. 515:

> The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: Evans v. Barclay's Bank et al., [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

26 More recently, in Gilbert Surgical Supply Co. v. F. W. Horner Ltd., [1960] O.W.N. 289 (C.A.), at pp. 289-90, Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

27 Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

[page978]

British Columbia

28 In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in Minnes v. Minnes (1962), 39 W.W.R. 112 (B.C.C.A.), Tysoe J.A. observed at p. 122:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied. [Emphasis added.]

For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):

> I might add that upon the motion, with respect, it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [Emphasis added.]

The law as stated in Minnes v. Minnes was recently reaffirmed in McNaughton and McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17 (C.A.), at p. 23, per McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on Minnes v. Minnes in this appeal.

29 Once again then the "plain and obvious" test has been firmly embraced. The British Columbia [page979] Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) Supreme Court of Canada

30 While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the Court in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, stated at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co.

31 I had occasion to affirm this proposition in Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441. At pages 486-87 I provided the following summary of the law in this area (with which the rest of the Court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of

> success" (Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that [page980] reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added.]

32 Most recently, in Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in Inuit Tapirisat was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

33 Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

34 The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

(2) Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck from his Statement of Claim?

35 In the last decade the tort of conspiracy has received a considerable amount of attention. In [page981] England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt:

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B. This proposition is established by five decisions at the highest level: Mogul Steamship Co. Ltd. v. McGregor, Gow & Co. [1892] A.C. 25; Quinn v. Leathem, [1901] A.C. 495; Sorrell v. Smith, [1925] A.C. 700; Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435 and Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2), [1982] A.C. 173. [See: Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563, at p. 593, per Slade L.J.] [Emphasis added.]

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

36 In Lonrho Ltd. v. Shell Petroleum Co. (No. 2), [1982] A.C. 173, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. [page982] In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

> My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to [page983] the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

37 Lord Diplock went on to observe that he was of the view that the rationale that had apparently fuelled the development of the tort in the late-nineteenth and early-twentieth centuries, namely that "a combination may make oppressive or dangerous that which if proceeded only from a single person would be otherwise" (see: Mogul Steamship Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598, at p. 616, per Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in Quinn v. Leathem, [1901] A.C. 495, and accepted as good law in the Crofter case [1942] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

38 Having set out this groundwork and having thereby confirmed that the tort of conspiracy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

> This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.
>
> My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

39 Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in Lonrho (see: Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., supra) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy". The Court of Appeal continued:

[page984]

> Where the predominant intention to injure is absent but the defendants pursuant to agreement commit torts against the plaintiff, the House held, we conclude, that common sense and the legal logic of the decided cases are satisfied if the plaintiff is denied a remedy in conspiracy and left to sue on the substantive torts.

Thus, regardless of whether the alleged conspirators used lawful or unlawful means, the law in England required the plaintiff to establish that the defendants entered into the agreement with the predominant purpose of injuring the plaintiff.

40 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in Lonrho. Indeed, this Court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in Lonrho in Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452. Justice Estey stated at p. 468:

> The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

41 This passage made clear that this Court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

42 But what of situations in which the plaintiff alleges that there was an agreement that involved the use of unlawful means and that resulted in the plaintiff's suffering damage? Must the plaintiff also establish that the predominant purpose of the [page985] agreement was to injure him or her? It is in answering this question that Estey J. chose to follow a somewhat different path from Lord Diplock. Estey J. was of the view that it was not appropriate to go as far as the House of Lords had gone in precluding the action. He said at pp. 471-72:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
>
> (2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.
>
> In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [Emphasis added.]

43 Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As Fridman has noted in The Law of Torts in Canada, vol. 2, at p. 265:

> The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.

Fridman goes on to observe at pp. 265-66

[page986]

> In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the Court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

44 I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in Canada Cement LaFarge Ltd. when he prepared paragraphs 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr. Hunt's statement of claim, it is certainly not that paragraphs 18 or 19 fail to follow the language of this Court's most [page987] recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

45 The defendants contend, however, that this Court's recent pronouncements, as well as those of courts in England, make clear that the tort of conspiracy cannot be invoked outside a commercial law context and that it certainly cannot be invoked in personal injury litigation. They point out that in Lonrho, supra, at p. 189, Lord Diplock was not prepared to extend the tort to cover the facts of the case before him. They emphasize that Estey J. displayed a measure of sympathy for Lord Diplock's reluctance to extend the scope of the tort when he stated at p. 473 of Canada Cement LaFarge Ltd.:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in Lonrho, supra, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law world. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

46 Finally, the defendants point to my observations in Frame v. Smith, [1987] 2 S.C.R. 99, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which [page988] a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the Court agreed with my observations about the tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion, at p. 124, that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context". I concluded that even although the tort could in theory be extended to the facts of Frame, it was not desirable to extend the tort to the custody and access context.

47 Not surprisingly, the defendants contend that it would be equally inappropriate to extend the tort of conspiracy to cover the facts of this case. The difficulty I have, however, is that in this appeal we are asked to consider whether the allegations of conspiracy should be struck from the plaintiff's statement of claim, not whether the plaintiff will be successful in convincing a court that the tort of conspiracy should extend to cover the facts of this case. In other words, the question before us is simply whether it is "plain and obvious" that the statement of claim contains a radical defect.

48 Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this Court has ever suggested that the tort could not have application in other contexts. While Estey J. expressed the view in Canada Cement LaFarge Ltd., supra, at p. 473, that the action had lost much of its usefulness, and while I noted in Frame v. Smith, supra, at pp. 124-25, that some have even suggested that consideration should be given to abolishing the tort entirely (see: Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C. L. Rev. 229, at p. 254), we both affirmed the ongoing existence of the tort at the date of these judgments. In my view, it would be highly inappropriate for this Court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity [page989] to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

49 I note that in Frame v. Smith, supra, at p. 125, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination". But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

50 The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence [page990] establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this Court's statements in Inuit Tapirisat of Canada and Operation Dismantle Inc., as well as decisions such as Dyson and Drummond-Jackson, make clear that none of these considerations may be taken into account on an application brought under Rule 19(24) of the British Columbia Rules of Court.

51 In my view, Anderson and Esson JJ.A. were entirely correct in suggesting that it should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It seems to me that they were also correct in suggesting that it should be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of this case. Similarly, it seems to me that the argument that some of the defendants advanced, to the effect that Quebec's Business Concerns Records Act, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial, is a matter that is not relevant to the question whether the plaintiff's statement of claim discloses a reasonable claim.

52 The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can [page991] we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

53 Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

54 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

55 This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a [page992] statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

56 In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which allege the tort of conspiracy fail to disclose a reasonable claim. They should not therefore be struck out under Rule 19(24)(a) of the British Columbia Rules of Court.

5. Disposition

57 The appeal should be dismissed with costs.

Solicitors for Carey Canada Inc.: Farris, Vaughan, Wills & Murphy, Vancouver. Solicitors for Lac d'amiante du Québec Ltée: Davis & Co., Vancouver. Solicitors for National Gypsum Co.: Koenigsberg & Russell, Vancouver. Solicitors for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited: Douglas, Symes & Brissenden, Vancouver.

[page993]

Solicitors for T & N, P.L.C.: Macaulay & Company, Vancouver. Solicitors for Flintkote Mines Limited: Edwards, Kenny & Bray, Vancouver. Solicitors for George Ernest Hunt: Ladner Downs, Vancouver.

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J.N. v. C.G., [2022] O.J. No. 793

Ontario Judgments

Ontario Superior Court of Justice

A. Pazaratz J.

Heard: February 18, 2022.

Judgment: February 22, 2022.

Court File No. 987/18

[2022] O.J. No. 793 | 2022 ONSC 1198

Between J.N., Applicant, and C.G., Respondent

(94 paras.)

Counsel

J.N.: Self-Represented.

Jesse Herman, Counsel, for the Respondent.

JUDGMENT

A. PAZARATZ J.

1 When did it become illegal to ask questions? *Especially in the courtroom?*

2 And when did it become unfashionable for judges to receive answers? *Especially when children's lives are at stake?*

3 How did we lower our guard and let the words "unacceptable beliefs" get paired together? *In a democracy? On the Scales of Justice?*

4 Should judges sit back as the concept of "Judicial Notice" gets hijacked from a *rule* of evidence to a *substitute* for evidence

5 And is "misinformation" even a real word? Or has it become a crass, self-serving tool to pre-empt scrutiny and discredit your opponent? To de-legitimize questions and strategically avoid giving answers. Blanket denials are almost never acceptable in our adversarial system. Each party always has the onus to prove their case and yet "misinformation" has crept into the court lexicon. A childish - but sinister - way of saying *"You're so wrong, I don't even have to explain why you're wrong."*

6 What does *any* of this have to do with family court? Sadly, these days it has *everything* to do with family court.

7 Because when society demonizes and punishes anyone who disagrees - or even dares to ask really important questions - the resulting polarization, disrespect, and simmering anger can have devastating consequences for the mothers, fathers and children I deal with on a daily basis.

8 It's becoming harder for family court judges to turn enemies into friends -- when governments are so recklessly turning friends into enemies.

9 The motion before me is a typical - and frightening - example of how far we are drifting from cherished values.

10 The father wants two children ages 12 and 10 to receive COVID vaccinations. The mother is opposed.

11 Now, answer honestly. Did the previous paragraph give you enough information to form an opinion about how this case should turn out?

12 We're all weary. We all wish COVID would just go away. But pandemic fatigue is no excuse for short-cuts and lowering our standards. We all have to guard against the unconscious bias of thinking *"Why won't these people just do what the government tells them to do?"*

13 We have to decide on the basis of the best interests of each particular child in each particular fact situation.

14 We have to rely on - and insist upon - evidence.

15 In this case the evidence provided more questions than answers.

a. The father filed two affidavits.

b. The mother filed one.

c. They both relied extensively on unsworn "exhibits", which were basically internet downloads.

d. In addition, the father relied on numerous downloads from the mother's social media accounts.

e. They both consented to my receiving these materials, to demonstrate the sources of information which each of them is relying on in formulating their respective parenting position.

16 The basic facts are not disputed:

a. The mother is 34 years old. The father is 35.

b. They were married on November 24, 2007 and separated on June 1, 2014.

c. They have three children, a 14 year old son C.B.G.; a 12 year old daughter L.E.G.; and a ten year old son M.D.G..

d. C.B.G. resides primarily with the father. L.E.G. and M.D.G. reside primarily with the mother.

e. Pursuant to final order based on minutes of settlement signed October 5, 2021, the father has sole decision-making authority with respect to the oldest child. The mother has sole decision-making authority with respect to the two children who are the subject of this motion. The order requires the parties to consult with each other prior to making major decisions for the children.

f. When the parties signed the minutes of settlement, they already knew that they disagreed about the issue of vaccinations. The minutes of settlement specified: *"The issue of the children L.E.G. and M.D.G. receiving a COVID-19 vaccine shall remain a live issue and shall be determined at a later date. The child C.B.G. can determine whether or not he wants to be vaccinated now."*

g. In fact, earlier in the pandemic the father went to court complaining the mother was being *too protective* of the children when it came to COVID. In August 2020 the father brought a motion trying to compel the children to attend school in person for the 2020-2021 school year. The mother argued that the risk of COVID exposure was too high; she was particularly concerned about the oldest child's medical vulnerability as a result of his history of asthma; and she proposed remote learning for the children until the pandemic risk subsided. On September 23, 2020 Justice Bale issued a lengthy endorsement dismissing the father's motion, and confirming that the mother's position was appropriate and in the best interests of the children.

h. In 2020 the father alleged the mother was being *too* protective about COVID. Now he's saying she's not protective enough. He brought a motion dated January 25, 2022 requesting that L.E.G. and M.D.G. receive the COVID vaccine and all recommended booster vaccines. He also asks that he be permitted to arrange the vaccinations and attend with the children, because he doesn't trust that the mother will comply even if she is ordered to do so.

i. Meanwhile, soon after the parties signed Minutes in October 2021 the older child C.B.G. elected to be vaccinated. Both parents supported his decision. He's had two shots, and the parents agree he has exhibited no adverse effects.

j. The mother insists the father is misrepresenting her position. She is not opposed to vaccines. She is offended by the pejorative term "anti-vaxxer". She has always ensured that the three children received all of their regular immunizations. She says she's open minded to vaccinating both younger children if safety concerns can be better addressed. But she says her extensive research has left her with well-founded concerns that the potential benefit of the current COVID vaccines for L.E.G. and M.D.G. is outweighed by the serious potential risks. She says there are too many unknowns, and she worries that "once children are vaxed, they can't be unvaxed."

k. The mother notes that both children have already had COVID - with minimal symptoms - and they have recovered completely. She refers to medical research which says that since they have already recovered from COVID, the children now have greater protection from future infection.

l. Both parents agree L.E.G. and M.D.G. are in excellent health, with no special medical needs or vulnerabilities.

m. Neither parent provided any evidence from a medical professional about any potential positive or negative considerations with respect to *these* children receiving COVID vaccines.

17 The mother's evidence focused entirely on the medical and scientific issues.

18 In contrast, the father focussed extensively on labelling and discrediting the mother as a person, in a dismissive attempt to argue that her views aren't worthy of consideration.

a. This odious trend is rapidly corrupting modern social discourse: Ridicule and stigmatize your opponent as a person, rather than dealing with the ideas they want to talk about.

b. It seems to be working for politicians.

c. But is this really something we want to tolerate in a court system where parental conduct and beliefs are irrelevant except as they impact on a parent's ability to meet the needs of a child?

19 For example, the father's affidavits included the following:

a. "I am aware that the Applicant has political affiliations with the People's Party of Canada. The Applicant is entitled to her personal beliefs and ideologies, but I am very fearful that it is having a direct, negative impact on the children, especially when it comes to this vaccine issue."

b. "I searched the Applicant's recent Facebook postings and was alarmed to see just how involved the Applicant is at perpetuating COVID-related conspiracy theories and vaccine hesitancy."

c. He attached "a collection of some of the Applicant's Facebook postings ..... which I believe are indicative of her personal views."

d. "The Applicant is a self-proclaimed 'PPC founding member'. In my opinion, she is openly promoting very dangerous beliefs. Surely, these thoughts and feelings are also being promoted in her household, which is where L.E.G. and M.D.G. primarily reside."

e. "I looked up what the PPC stance is on the COVID-19 vaccine and was not surprised to read under its website's "FACTS" section that "lockdowns, mask mandates, school closures and other authoritarian sanitary measures have not had any noticeable effect on the course of the pandemic." Unfortunately, no facts are actually provided."

f. He attaches a copy of the PPC's COVID Policy taken from its website.

g. "I am alarmed that the children are being exposed to the Applicant's unsupported views on the issue of the pandemic, and in particular the efficacy of the available and Government-recommended vaccines."

h. "The Applicant's anti-vaccination stance is much more severe than that of a regular concerned parent, who is unsure whether or not she wants the children to receive a relatively new vaccine. Rather, the Applicant is leading the charge, attending anti-vaccine rallies and refusing to follow COVID protocols."

i. He attaches a Facebook posting of the mother not wearing a mask "in a crowd of 10,000 people at a rally."

j. He makes other references to the mother's Facebook account, and attaches numerous pictures of her social media pages.

k. He attaches photographs of PPC leader Maxime Bernier addressing an audience.

20 Where to begin.

a. How is any of this relevant?

b. Have we reached the stage where parental rights are going to be decided based on what political party you belong to?

c. Is being seen with Maxime Bernier - or anyone, for that matter - the kiss of death, as far as your court case is concerned?

d. Can you simply utter the words "conspiracy theorist" and do a mic drop?

e. If you allege that someone is "openly promoting very dangerous beliefs", shouldn't you provide a few details. A bit of proof, maybe?

f. And if you presume that a parent believes things they shouldn't believe - can you go one step further and also presume that the parent must be poisoning their children's minds with these horrible unspecified ideas? ("*Surely, these thoughts and feelings are also being promoted in her household...")*

g. The father criticizes the mother for something she didn't say. He presumes she doubts the effectiveness of school closures, and then criticizes her for providing no evidence. But on this motion she didn't raise the issue. And back in 2020 *she* was the one who wanted to keep the children out of school, and *he* fought (unsuccessfully) for them to attend. As with other allegations, the father provides no evidence of his own, and fails to address the fact that vigorous community debate led to school closures being abandoned.

h. How far are we willing to take "guilt by association"? If you visit a website, read a book, or attend a meeting -- are you permanently tarnished by something someone else wrote or said? At what point do the "thought police" move in?

i. And really, how fine is the line between "vaccine hesitancy" and "not taking any chances with your kid"? All of the caselaw says judges have to act with the utmost caution and consider all

> relevant evidence in determining the best interests of the child. How can we then impose a lesser standard on a demonstrably excellent parent?

21 It is of little consequence that an individual litigant chooses to advance such dubious and offensive arguments. Even though the father may not admit it, this is still a free country and people can say what they want. *Including him.*

22 But there's a bigger problem here. An uglier problem.

23 We're seeing more and more of this type of intolerance, vilification and dismissive character assassination in family court. Presumably we're seeing it inside the courtroom because it's rampant outside the courtroom. It now appears to be socially acceptable to denounce, punish and banish anyone who doesn't agree with you.

24 A chilling example: I recently had a case where a mother tried to cut off an equal-time father's contact with his children, primarily because he was "promoting anti-government beliefs." And in Communist China, that request would likely have been granted.

25 But this is Canada and our judicial system has an obligation to keep it Canada.

26 I won't belabor the point, because I still have to get to my real job: determining what's in the best interests of these two children. But the word needs to get out that while the court system won't *punish* intolerance, it certainly won't reward it either.

27 All parenting issues - including health issues - must be determined based upon the best interests of the child. Last year's amendments to the *Divorce Act* (applicable in this case) and the *Children's Law Reform Act* make it mandatory for the court to include consideration of a child's views and preferences to the extent that those views can be ascertained.

28 As Justice Mandhane stated in *E.M.B. v. M.F.B*. 2021 ONSC 4264 (SCJ):

> 60. The requirement in s. 16(3)(e) to consider the "child's views and preferences" is new and is consistent with Article 12 of the *Child Rights Convention*. In the Legislative Background to the *Divorce Act* amendments, the Department of Justice explains that:
>
> Under Article 12 of the United Nations *Convention on the Rights of the Child,* children who are capable of forming their own views have the right to participate in a meaningful way in decisions that affect their lives, and parenting decisions made by judges and parents affect child directly. The weight to be given to children's views will generally increase with their age and maturity. However, in some cases, it may not be appropriate to involve the children, for example if they are too young to meaningfully participate.
>
> See also: *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 326 (26 September 2018) at p. 21866 (Hon. Jody Wilson-Raybould).
>
> 61. A human rights-based approach fundamentally recognizes children as subjects of law rather than objects of their parents. Making children more visible in legal proceedings that affect their rights is fundamentally important in Canada because children are not guaranteed legal representation in family law proceedings. Therefore, in my view, even where there is no direct evidence about the child's views and preferences, s. 16(3)(e) still requires the court should make a reasonable effort to glean and articulate the child's views and preferences wherever possible, considering the child's age and maturity and all the other evidence before it.

29 In this case, the children's views have been *independently* ascertained -- *they both don't want to receive the COVID vaccines* - but the father is asking me to ignore how they feel and force them to be vaccinated against their will. The background:

a. In 2021, in an effort to resolve parenting issues, the parties enlisted a well-respected local social worker, Michelle Hayes, to prepare a "Voice of the Child Report". The father filed Hayes' comprehensive seven-page report dated June 22, 2021.

b. For purposes of that report the children were each interviewed twice - once in the care of each parent.

c. During the interview period the mother and father had clearly identified their respective positions on vaccination. The report specifically addressed each child's views on the topic.

d. L.E.G. advised that she had discussed vaccinations with each parent privately. She knew her father favoured getting the shot and her mother didn't. L.E.G. specifically explained to Hayes the reasons why she didn't want to receive the COVID vaccines. She explained herself in some detail.

e. Similarly, M.D.G. had discussed vaccinations with each parent privately. He also knew his father promoted vaccination and his mother didn't. M.D.G. not only told Hayes he didn't want to be vaccinated, but he said he was "fearful that his father would make him." Indeed, M.D.G. told Hayes that "he wanted the judge to know his thoughts about his parenting schedule as well as the vaccine."

f. The mother says her children are mature and intelligent, and that they have come to their own conclusions without being pressured by either parent. She feels it is important to respect their clear wishes, comfort level and anxieties. She says she adopted the same position for her older son C.B.G., and when he decided he wanted to be vaccinated she was fully supportive.

g. The father says at ages 12 and 10 the children are too young to make an informed decision about this. He admits both children have expressed fear of the COVID vaccine. He suggests the younger child's views are wavering. But he's opposed to either child being interviewed again. No matter what the children say, he doesn't think the court should listen, because he feels the mother has planted these ideas in their minds. But he offered no proof of any coaching, manipulation or inappropriate statement by the mother.

h. Hayes' June 22, 2021 report was actually a follow-up to an earlier report she prepared on March 3, 2020. She has worked with the family for a long time and got to know the children quite well. The social worker expressed no concerns or suspicions about either child being manipulated or pressured by either parent. In her summary she stated: *"As in the original report, each of the children presented confidently and thoughtfully for both interviews. As they reviewed their thoughts, they each showed consistency in their views and preferences in each interview."*

30 While I agree with the father that these two children are not old enough to decide this complicated issue for themselves, I disagree with his suggestion that we should completely ignore how they feel about what they experience and what their bodies are subjected to. Rather than simplistically accept or reject what children say they want, the court must engage in a complex and sensitive analysis of the weight to be attributed to each child's stated views.

31 In *Decaen v. Decaen*, 2013 ONCA 218 the Court of Appeal set out the factors to consider when assessing a child's wishes:

a. Whether both parents are able to provide adequate care;

b. How clear and unambivalent the wishes are;

c. How informed the expression is;

d. The age of the child;

e. The maturity level;

f. The strength of the wish;

g. The length of time the preference has been expressed;

h. Practicalities;

i. The influence of the parent(s) on the expressed wish or preference;

j. The overall context; and

k. The circumstances of the preferences from the child's point of view.

32 With respect to L.E.G. and M.D.G.:

a. They have received all their regular immunizations. At ages 12 and 10 they understand the experience of getting needles. And they understand the purpose of vaccinations is to create a long-term medical consequence in their body.

b. They understand the magnitude of the COVID pandemic, and the personal and community health issues involved.

c. They understand the extended and ongoing discussion about the COVID vaccine.

d. They have both clearly and consistently stated their objection to receiving the COVID vaccine.

e. They have both outlined very specific reasons for their decision. Those reasons do not appear to be frivolous, superficial or poorly thought out.

f. Both children have sufficient age, intelligence, maturity and independence of thought to understand the issue and formulate their own views, feelings, comfort level, questions, *and fears* about what should or should not happen to their bodies.

g. They hold these views very strongly.

h. They have maintained these views for an extended period of time.

i. Despite the father's speculation, there is no evidence that the mother has inappropriately drawn the children into any sort of personal or political agenda. *Both* parents have equally engaged in appropriate and necessary discussions with the children about the many aspects of the pandemic - including vaccinations. Both parents have answered the children's questions, provided information, and stated their own beliefs. The social worker's report gives no suggestion that either parent has pressured, manipulated, or unduly influenced either child. Nor did Hayes express any concern about internal inconsistencies or ambiguities with respect to either child's strongly stated views.

33 For the past two years *all* children have been bombarded with all sorts of information about the pandemic. It has become an inescapable, oppressive part of their daily lives. Mental health experts regularly warn us that we need to be mindful of the emotional impact of this scary new world on the young mind.

34 In this case, the father doesn't like what the children are saying, so he submits their views aren't worthy of consideration - just as he submits the mother's views aren't worthy of consideration. *There's a bit of a pattern here.*

35 But when a ten-year-old child says he's afraid he'll be forced to take the vaccine - *and he specifically wants the judge to know it* - I don't think that's something the court can or should ignore.

36 Children may not have wisdom. But they have Charter rights and undeniable emotions.

37 Any best interests analysis must take into account all relevant factors, including the impact on a child's mental health if their legitimate and powerful feelings and anxieties are ignored; and if they perceive they are being violated.

38 A number of recent court decisions have grappled with this new "COVID vaccine" issue, and in particular with the issue of the weight to be given to children's views on the subject. In most of those cases the children were younger than L.E.G. and M.D.G., so "views and preferences" were either unascertainable or less relevant because of the child's lack of maturity.

39 In *McDonald v. Oates* 2022 ONSC 394 (SCJ) the court disregarded a ten-year-old's views, concluding that the child was unable to make an informed choice due to the contradictory information the child was receiving from his parents.

a. But unlike the situation with 10-year-old M.D.G., in *McDonald* there was no independent information as to the nature or strength of the child's views, and the court declined to order a Voice of the Child Report, to avoid delay.

b. Here I had the benefit of a thorough and highly informative Voice of the Child Report.

c. And unlike *McDonald*, as discussed below, I find that the objecting parent's concerns cannot be dismissed as frivolous or uninformed.

d. More to the point I find that there is no evidence that either M.D.G. or L.E.G. have been unduly influenced by either their pro-vaccine or anti-vaccine parent. I am satisfied that they came to their own conclusions, for understandable reasons.

40 In *Saint-Phard v. Saint-Phard* 2021 ONSC 6910 (SCJ) the court overruled a 13-year-old's opposition to vaccinations, as conveyed through the child's lawyer.

a. Again, the child's situation was quite different from L.E.G. and M.D.G..

b. In *Saint-Phard* the child had made inconsistent and ambiguous statements; he had been misinformed by a physician; and the court concluded he was incapable of making an informed decision.

41 In *Rouse v. Howard* 2022 ONCJ 23 (OCJ) Justice Hilliard provided a thoughtful analysis of facts more similar to the case at bar - even though the child in question was only nine.

> 17 Although Fiona is only 9, there is evidence before me that she is, at present, opposed to receiving the COVID-19 vaccine. In A.C. v. L.L., [2021] O.J. No. 4992, Justice Charney considered section 4 of the Health Care Consent Act, 1996, S.O. 1996, c. 2 (HCCA), in his analysis as to whether the mother's consent was even required for the children to be vaccinated. Justice Charney noted that the HCCA does not provide any minimum age for capacity to make medical treatment decisions. That finding accords with the Supreme Court of Canada's decision in A.C. v Manitoba (Director of Child and Family Services), 2009 SCC 30, wherein Justice Abella explained the common law "mature minor" doctrine at paragraph 47:
>
> The doctrine addresses the concern that young people should not automatically be deprived of the right to make decisions affecting their medical treatment. It provides instead that the right to make those decisions varies in accordance with the young person's level of maturity, with the degree to which maturity is scrutinized intensifying in accordance with the severity of the potential consequences of the treatment or of its refusal.
>
> 18 Unlike in A.C. **,** where the children wanted to be vaccinated, and Saint-Phard where the child only expressed opposition to being vaccinated after the influence of the mother and her doctor, Fiona's views about vaccination appear to be long-standing and in accordance with her mother's beliefs about vaccines in general. An order granting Mr. Rouse decision-making authority would result in Mr. Rouse having the ability to override Fiona's right to withhold her consent to vaccination which may have negative emotional and/or psychological consequences.

42 The determination of any child's best interests is a fact-specific exercise, based on the evidence presented -

and tested - in each case. As stated, an important - but not determinative - part of the analysis consideration of each child's views and preferences.

a. In each of the recent cases where a child's stated opposition to being vaccinated was overridden, the court made unfavourable findings with respect to the objecting parent's rationale and their inappropriate influence over the child.

b. The court concluded that the pro-vaccine parent had presented more reasonable information to the child, and more compelling arguments to the court in relation to the science.

c. In each case the court was left with more confidence in the pro-vaccine parent's parental judgment and insight on the issue of vaccinations.

43 But that's not at all what I'm dealing with in this case.

a. Despite the father's relentless campaign to dismiss the mother as some sort of lunatic, the reality is that the mother presented all her evidence and made all her oral submissions in a calm, mature, articulate, analytical, extensively researched, and entirely child-focussed manner. She is to be commended for her skillful and professional presentation as a self-represented party.

b. In contrast, the father came across as somewhat dogmatic, intolerant and paternalistic. He focussed more on discrediting the mother's ideas rather than explaining his own. And his shameless efforts to vilify the mother by ridiculing her personal beliefs bordered on hysterical.

c. I mention this to further explain why I have confidence that the mother has not inappropriately influenced the children to adopt their current views.

d. If the mother explained herself to the children the way she explained herself to me...and if the father explained himself to the children the way he explained himself to me...then I have absolutely no doubt about which of the parents communicated with the children in a more responsible manner.

44 Finally, we have the other "evidence" filed by the parents. And here we have to think carefully about what constitutes proper or sufficient evidence - and how we should apply it.

45 As with all the other recent COVID vaccine cases, the mother and the father attached dozens of pages of internet downloads to their affidavits. The fact that they both consented to my receiving all this unsworn material doesn't make it properly admissible. But at the very least, it informs me as to the type and quality of research each parent conducted in formulating their respective positions.

46 Included among the father's downloads from the internet:

a. A November 23, 2021 seven page "Position Statement" from the Canadian Paediatric Society.

b. A January 2022 five page "Caring for Kids" information sheet from the Canadian Paediatric Society.

c. A December 17, 2021 nine-page "Vaccines for Children: COVID 19" information sheet from the Government of Canada.

d. A September 24, 2021 five-page "Post COVID-19 Condition" information sheet from the Government of Canada.

e. A May 18, 2021 seven-page "Vaccines for children: Deciding to Vaccinate" information sheet from the Government of Canada.

f. A May 6, 2021 three-page "The Facts About COVID-19 Vaccines" information sheet from the Government of Canada.

g. A January 20, 2022 four-page article entitled "Vaccinated kids half as likely to get Omicron but protection fades fast" from The Times of Israel.

h. A January 14, 2022 five page article entitled "COVID-19 Cases and Hospitalizations Surge Among Children" from the Canada Communicable Disease Report.

47 Included among the mother's downloads from the internet:

a. A June 25, 2021 eight-page "Fact Sheet" issued by Pfizer, the manufacturer of one of the vaccines being proposed by the father.

b. An August 26, 2021 three-page article from the journal "Science" entitled "Having SARRS-CoV-2 once confers much greater immunity than a vaccine - but vaccination remains vital."

c. A January 31, 2012 13-page PLOS One peer-reviewed article entitled "Immunization with SARS Coronavirus Vaccines Leads to Pulmonary Immunopathology on Challenge with the SARS virus."

d. A July 10, 2021 five-page article in the medical journal "Total Health" entitled "Are people getting full facts on COVID vaccine risks?"

e. A September 26, 2018 15 page article in the medical journal "Contagion Live" entitled "High Rates of Adverse Events Linked with 2009 H1N1 Pandemic vaccine".

f. A May 28, 2021 two-page article from the Centers for Disease Control and Prevention (CDC) entitled "Clinical Considerations: Myocarditis and Pericarditis after Receipt of mRNA COVID-19 Vaccines Among Adolescents and Young Adults."

g. An August 1, 2020 29 page research paper published by eClinicalMedicine entitled "A country level analysis measuring the impact of government actions, country preparedness and socioeconomic factors on COVID -19 mortality and related health outcomes."

h. A June 9, 2021 10 page open letter from The Evidence-Based Medicine Consultancy Ltd. research organization entitled "Urgent Preliminary report of Yellow Card data up to May 26, 2021".

i. A June 22, 2021 14 page article from the World Health Organization entitled "COVID-19 advise for the public: Get vaccinated".

48 Information obtained from the internet can be admissible if it is accompanied by indicia of reliability, including, but not limited to:

a. Whether the information comes from an official website from a well-known organization;

b. Whether the information is capable of being verified;

c. Whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.

ITV Technologies Inc. v. WIC Television Ltd. 2003 FC 1056; *Sutton v. Ramos* 2017 ONSC 3181 (SCJ)

49 Where the threshold of "admissibility" is met, it is still up to the trier of fact to weigh and assess the information to determine the relevance, if any, with respect to the issues to be decided.

50 And since this is a motion proceeding by affidavit, we have the further limitation that even to the extent that the internet downloads are admissible, there is no opportunity for cross-examination or testing.

51 To simplify matters, the mother does not deny the authenticity or integrity of the website information submitted by the father.

a. It's mostly statements by the Government of Canada and the Canadian Pediatric Society recommending that children should receive COVID vaccinations.

b. These are the same types of downloads which courts have considered in other recent COVID vaccine cases.

c. The mother doesn't deny that these are reputable organizations. Nor does she deny that the statements and information have been prepared by qualified persons in a responsible, professional manner.

d. She doesn't deny that the father has accurately presented *one side of the story*.

e. All she asks is that the court equally consider the other side of the story. That the court allow both sides of the story to be equally presented, tested and considered. Before making an irreversible decision for her children.

52 *Evidence* and *both sides of the story*. We're in deep trouble if those become antiquated concepts.

53 In almost all cases where COVID vaccinations have been ordered the court has made a finding that, on the face of it, the internet materials presented by the objecting parent have been grossly deficient, unreliable and - at times - dubious. This lack of an equally credible counter-point to government recommendations may well have been determinative in those earlier cases.

54 But what if the objecting parent presents evidence which potentially raises some serious questions or doubts about the necessity, benefits or potential harm of COVID vaccines for children?

a. Clearly we shouldn't be too quick to embrace the naysayers.

b. But should we banish them? Without hearing from them?

c. Should we stifle and forbid a reasonable opportunity to present and test evidence, and make submissions?

d. There are obvious public policy reasons to avoid recklessly undermining confidence in public health measures.

e. But that has to be weighed against our unbridled obligation to leave no stone unturned, when it comes to protecting children.

55 For example, the mother presented a detailed fact sheet from Pfizer. This isn't one of the fringe websites dismissed in the other cases. *It's Pfizer!* The people who make the vaccine.

56 Under the heading "What Are The Risks of the Pfizer-BioNTech COVID-19 Vaccine", the company says:

> There is a remote chance that the Pfizer-BioNTech COVID-19 Vaccine could cause a severe allergic reaction. A severe allergic reaction would usually occur within a few minutes to one hour after getting a dose of the Pfizer-BioNTech COVID-19 Vaccine. For this reason, your vaccination provider may ask you to stay at the place where you received your vaccine for monitoring after vaccination. Signs of a severe allergic reaction can include:

* Difficulty breathing

* Swelling of your face and throat

* A fast heartbeat

* A bad rash all over your body

* Dizziness and weakness

> Myocarditis (inflammation of the heart muscle) and pericarditis (inflammation of the lining outside the heart) have occurred in some people who have received the Pfizer-BioNTech COVID-19 Vaccine. In most of these people, symptoms began within a few days following receipt of the second dose of the Pfizer-BioNTech COVID-19 Vaccine. The chance of having this occur is very low. You should seek medical attention right away if you have any of the following symptoms after receiving the Pfizer-BioNTech COVID-19 Vaccine:

* Chest pain

* Shortness of breath

> * Feelings of having a fast-beating, fluttering, or pounding heart.

Side effects that have been reported with the Pfizer-BioNTech COVID-19 Vaccine include:

* severe allergic reactions

> * non-severe allergic reactions such as rash, itching, hives, or swelling of the face

* myocarditis (inflammation of the heart muscle)

> * pericarditis (inflammation of the lining outside the heart)

* injection site pain

* tiredness

* headache

* muscle pain

* chills

* joint pain

* fever

* injection site swelling

* injection site redness

* nausea

* feeling unwell

* swollen lymph nodes (lymphadenopathy)

* diarrhea

* vomiting

* arm pain

> These may not be all the possible side effects of the Pfizer-BioNTech COVID-19 Vaccine. Serious and unexpected side effects may occur. Pfizer-BioNTech COVID-19 Vaccine is still being studied in clinical trials.

57 It's very hard to fault a parent for being worried about such an ominous list of potentially very serious side effects.

58 Several of the earlier decisions requiring children to be vaccinated have noted that the evidence presented by the objecting parent was not reliable because the authors' credentials were either not-established or non-existent.

59 But in this case, none of the materials presented by the mother are from fringe organizations or dubious authors. To the contrary, the mother quotes extensively from leaders in the medical and scientific community.

60 For example, the article submitted by the mother "Are People Getting Full Facts on COVID Vaccine Risks?" quotes Dr. Robert W. Malone, the inventor of the mRNA vaccine. Whether he is right or wrong about the current use of COVID vaccines is a matter for discussion and determination. But with his credentials, he can hardly be dismissed as a crackpot or fringe author. The mother referred to the following excerpt from the article:

> The original inventor of the mRNA vaccine (and DNA vaccine) core platform technology currently used to create the vaccines is Dr Robert W Malone. Dr Malone has been expressing serious concerns about how therapeutic approaches that are still in the research phase are being imposed on an ill-informed public. He says that public health leadership has, "stepped over the line and is now violating the bedrock principles which form the foundation upon which the ethics of clinical research are built".
>
> Dr Malone asks why health leaders seem to be so afraid of sharing the adverse event data. He says, "Why is it necessary to suppress discussion and full disclosure of information concerning mRNA reactogenicity and safety risks?"
>
> He goes onto say that we should be analysing the safety data and risks vigorously. Again he asks, "Is there information or patterns that can be found, such as the recent finding of the cardiomyopathy signals, or the latent virus reactivation signals? We should be enlisting the best biostatistics and machine learning experts to examine these data, and the results should -- no must -- be made available to the public promptly".
>
> For any drug it has always been important to have systems in place for monitoring adverse events. However, for an experimental, genetic modifying approach that has not been fully tested, and where the public are effectively the guinea pigs, this information should be immediately and readily available. As previously reported...the fact that it is so difficult to access and make sense of ...reporting systems - along with low reporting simply raises further concern about what is actually happening.

... .

> Dr Malone says, " .. what is being done by suppressing open disclosure and debate concerning the profile of adverse events associated with these vaccines violates fundamental bioethical principles for clinical research".
>
> With regard to the use and abuse of misinformation, the inventor of these vaccines says that the public have to be given accurate information to allow informed consent. He says, "The suppression of information, discussion, and outright censorship concerning these current COVID vaccines which are based on gene therapy technologies cast a bad light on the entire vaccine enterprise. It is my opinion that the adult public can handle information and open discussion. Furthermore, we must fully disclose any and all risks associated with these experimental research products".
>
> In short, it is simply not possible to arrive at a position of informed consent unless you have access to the full facts around your options and the associated risks and benefits.

61 The same article outlines other serious concerns about COVID vaccines expressed by Dr. Bret Weinstein, Dr. Peter McCullough, Dr. Tess Lawrie, Professor Stanley S. Levinson (medicine, endocrinology, diabetes and metabolism) and Professor Sucharit Bhakdi (awarded the Order of Merit for medical microbiology). These are well-known leaders in their fields.

62 Several other articles presented by the mother outline similar expressions of concern about the COVID vaccines from equally qualified and reputable sources worldwide.

63 For clarity:

a. I am not for one moment suggesting that we should presume the mother's experts are *right*.

b. But once we determine they're not crackpots and charlatans, how can we presume that they are *wrong*? Or that they couldn't possibly be right about any of their warnings?

c. When children's lives are at stake, how can we ignore credible warnings?

64 The following paragraphs from *Saint-Phard v. Saint-Phard* 2021 ONSC 6910 (SCJ) illustrate the approach which has been taken in a number of cases in which COVID vaccinations were approved by the court.

> 4 The decision to be made is governed by the best interests of the child: A.C. v. L.L, 2021 ONSC 6530. It is required to be based on findings of fact made from admissible evidence before the court: O.M.S. v. E.J.S, 2021 CarswellSask 547 (Q.B.); B.C.J.B. v. E.-R.R.R., 2021 CarswellOnt 13242 (S.C.J.).
>
> Judicial notice may be taken
>
> 5 Facts may be found by taking judicial notice: B.C.J.B. v. E.-R.R.R., A.P. v. L.K, 2021 ONSC 150, and A.C. v. L.L Each of these cases include findings related to the safety and efficacy of publicly funded vaccines on the basis of judicial notice. For example, in A.C. v. L.L at paragraphs 21, 23 and 25 the court made the following findings by taking judicial notice under the public documents' exception to the hearsay rule:
>
> * The COVID-19 vaccination has been approved for children aged 12-17.
>
> * All levels of government have been actively promoting vaccination against COVID-19 and expending significant resources to make it available to the public.
>
> * The safety and efficacy of the COVID-19 vaccine has been endorsed by governments and public health agencies.
>
> * The Ontario Ministry of Health website states that Pfizer-BioNTech vaccine is now licensed by Health Canada for adolescents aged 12 years and older, has been proven to be safe in clinical trials and provided excellent efficacy in adolescents, and that NACI continues to strongly recommend a complete series with an MNRA vaccine for all eligible individuals in Canada, including those 12 years of age and older, as the known and potential benefits outweigh the known and potential risks.
>
> 6 Elyon's father relied on statements made by Dr. Tam, Chief Officer of Health for Canada on the Canadian Government website recommending COVID-19 vaccinations for those between the ages of 12 and 17, stating that thorough testing has determined the vaccines to be safe and effective at preventing severe illness, hospitalization, and death from COVID-19. Dr. Kieran Moore is the Chief Medical Officer for Ontario. The father tendered his recommendation to vaccinate all youth ages 12 to 17 against COVID-19 as set out in a publication by the Ontario COVID-19 Science Advisory Table. Elyon's school is administered under the Ottawa Catholic School Board. That Board

> released a notice advising that all students over age 12 are eligible to be vaccinated for COVID-19 and stating that the vaccine is key in protecting schools from the virus.
>
> 7 Relying on these public documents and the authority of the court in A.C. v. L.L, I find that the applicable government authorities have concluded that the COVID-19 vaccination is safe and effective for children ages 12-17 to prevent severe illness from COVID-19 and have encouraged eligible children to be vaccinated.

65 And that's really what many of these cases come down to: After considering all the evidence - or often, the lack of evidence - can the court just fill in the blanks and take judicial notice of the fact that all children should get vaccinated?

a. Because if the answer is "yes", then we're wasting a lot of time and judicial resources.

b. If judges just "know" that all children should be vaccinated, then we should clearly say that that's what we're doing.

c. But equally, if that's *not* what we're supposed to be doing....then we shouldn't do it.

66 In *R.S.P. v. H.L.C.* 2021 ONSC 8362 (SCJ) Justice Breithaupt Smith recently set out a timely warning about the danger of applying judicial notice to cases where expert opinion is unclear or in dispute. It's a warning I whole heartedly adopt:

> 56 Unfortunately, the recent case of Saint-Phard v. Saint-Phard[14] does not assist in navigating medical treatment for minors because of its fatal flaw regarding judicial notice. In that case, the Court wrote: "Facts may be found by taking judicial notice. [citations omitted] Each of these cases include findings related to the safety and efficacy of publicly funded vaccines on the basis of judicial notice." This shows a misunderstanding of the purpose of taking judicial notice, which, according to the Supreme Court's definitive decision in R. v. Find 2001 SCC 32 (CanLII) (at paragraph 48) is intended to avoid unnecessary litigation over facts that are:
>
> ...clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.
>
> 57 Judicial notice of the facts contained in government publications are "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy." Such facts could include, for example, that there are two time zones in the Province of Ontario or that there were two deaths and 39 Intensive Care Unit admissions among Ontario children from January 15, 2020 to June 30, 2021 connected with SARS-CoV-2.
>
> 58 Judicial notice cannot be taken of expert opinion evidence. Chief Justice McLachlin for the unanimous Court in R. v. Find underscored that: "Expert evidence is by definition neither notorious nor capable of immediate and accurate demonstration. This is why it must be proved through an expert whose qualifications are accepted by the court and who is available for cross-examination" (at paragraph 49).
>
> 59 The acceptance of government-issued statements as evidence renders the facts published by the government agency (presumed to be a source of indisputable accuracy) admissible. Public Health Ontario's statement that two children died of SARS-CoV-2 between January 15, 2020 and June 30, 2021 is therefore admissible as fact. Public Health Ontario's publicly accessible document is admissible as proof of the truth of its contents. In contrast, a statement concerning the safety and efficacy of any medication in the prevention or treatment of any condition is, in and of itself, an opinion. Judicial notice cannot be taken of the opinion of any expert or government official that a medical treatment is "safe and effective." As judicial notice cannot be taken of expert opinion

evidence, it is illogical to reason, as was done at paragraph 12 of Saint-Phard , that an expert's "objections raised against the vaccine were directly countered by the judicial notice taken that the vaccine is safe and effective and provides beneficial protection against the virus to those in this age group." To compound the problem, this statement draws a conclusion that is overbroad (i.e. that the vaccine provides beneficial protection to all children and ought therefore to be received by the child in question) without having considered the comparative analysis of the factors in A.C. v. Manitoba 2009 SCC 30 (CanLII). As a result, reliance upon this reasoning would be misguided.

60 In submissions, I was also referred to the case of A.C. v. L.L. 2021 ONSC 6530 (SCJ) in which both parents agreed that each of their three teenage children would be permitted to make his or her own decision with respect to the COVID-19 vaccination. Two of the three children chose to have it administered and one did not. While the Court made many very concerning and overly broad comments, all are obiter dicta. None were relevant to the result ultimately reached, namely that both parents acknowledged each child's maturity in choosing whether or not to participate in the medical procedure and agreed to allow each child to make his or her own choice. With the parents having agreed upon that point, the Court was no longer obligated to make any finding as to whether receipt of the COVID-19 vaccine was in the best interests of any of the children. As the parents had agreed to respect the decisions made by their children, one of whom declined the COVID-19 vaccine, is that child now in breach of the Court's determination, at paragraph 32, that vaccination is in that child's best interests? Of what utility is the declaration in the Order portion of the decision that "[all three] children ... shall be entitled to receive the COVID-19 vaccine"? In family litigation, unsolicited judicial opinions on parenting questions already solved by the parents serve no one. I am reminded of Justice Abella's warning that: "[the analysis of a child's maturity in making medical decisions] does not mean ... that the standard is a license for the indiscriminate application of judicial discretion" A.C. v. Manitoba (paragraphs 90-91). Thus, while I commend the parents in A.C. v. L.L. for resolving the issue of each child's ability to make his or her own decision, the case itself does not assist this Court.

67 Why should we be so reluctant to take judicial notice that the government is always right?

a. Did the Motherisk inquiry teach us nothing about blind deference to "experts"? Thousands of child protection cases were tainted - and lives potentially ruined - because year after year courts routinely accepted and acted upon substance abuse testing which turned out to be incompetent.

b. What about the Residential School system? For decades the government assured us that taking Indigenous children away - and being wilfully blind to their abuse - was the right thing to do. We're still finding children's bodies.

c. How about sterilizing Eskimo women? The same thing. The government knew best.

d. Japanese and Chinese internment camps during World War Two? The government told us it was an emergency and had to be done. Emergencies can be used by governments to justify a lot of things that later turn out to be wrong.

e. Few people remember Thalidomide. It was an experimental drug approved by Canada and countries throughout the world in the late 1950's. It was supposed to treat cancer and some skin conditions. Instead it caused thousands of birth defects and dead babies before it was withdrawn from the market. But for a period of time government experts said it was perfectly safe.

f. On social issues the government has fared no better. For more than a century, courts took judicial notice of the fact that it was ridiculous to think two people of the same sex could get married. At any given moment, how many active complaints are before the courts across the Country, alleging government breaches of Charter Rights? These are vitally important debates which need to be fully canvassed.

- g. The list of grievous government mistakes and miscalculations is both endless and notorious. Catching and correcting those mistakes is one of the most important functions of an independent judiciary.
- h. And throughout history, the people who held government to account have always been regarded as heroes - not subversives.
- i. When our government serially pays out billions of dollars to apologize for unthinkable historic violations of human rights and security - how can we possibly presume that today's government "experts" are infallible?

j. Nobody is infallible.

- k. And nobody who controls other people's lives - *children's lives* - should be beyond scrutiny, or impervious to review.

68 As well, how can you take judicial notice of a moving target?

- a. During the past two years of the pandemic, governments around the world - and within Canada - have constantly changed their health directives about what we should or shouldn't be doing. What works and what doesn't.
- b. And the changes and uncertainty are accelerating with each passing newscast. Not a day goes by that we don't hear about COVID policies changing and restrictions being lifted.
- c. Government experts sound so sure of themselves in recommending the current vaccines.
- d. But they were equally sure when they told us to line up for AstraZeneca. Now they don't even mention that word.
- e. Even Pfizer has changed its mind. It recently approved vaccines for kids under five. Then more recently the company changed its mind.
- f. None of this is meant a criticism. Everyone is doing their best with a new and constantly evolving health crisis.
- g. But how can judges take judicial notice of "facts" where there's no consensus or consistency?

69 And then we have the issue of delegation.

- a. As with almost all these vaccine motions, the father asks for an order that his children receive the current COVID vaccine *"and all recommended booster vaccines."*

b. Which recommended booster vaccines?

c. When?

d. How many?

e. What will they contain?

f. Who will decide?

- g. Will there be any opportunity for future judicial oversight, or will this simply be a forever commitment controlled by the government.
- h. What are the health implications if children receive the current vaccine, but skip some or all of the boosters?
- i. What future COVID variant will the boosters guard against? We already seem to be using the Delta vaccine to fight the Omicron variant. Will future boosters continue our pattern of using old medicine to fight new viruses?
- j. These are all valid questions, requiring answers which are currently unavailable.

k. It is improper for the court to pre-determine future medical treatments at unknown times, in unknown circumstances, with decision making authority delegated to unknown persons.

l. If you can't take judicial notice of the *present,* you can't take judicial notice of the *future*.

70 As well, there is a systemic issue common to most of these COVID vaccine cases.

a. The father presented his expert evidence.

b. The mother then presented her expert evidence.

c. The father responded that the mother's theories have already been "debunked" - so we shouldn't waste time talking about them.

d. Alleging that your opponent's position has already been debunked is a common tactic these days.

e. And quite effective.

f. Because unlike *stare decisis* - the doctrine of precedent which requires judges to follow specifically cited earlier court decisions - there is no such formality to the concept of debunking.

g. All you have to do is make the blanket assertion that an opposing view has already been debunked - without providing any details - and hope that nobody asks for proof.

h. In this case, I reject the father's claim that all of the mother's concerns about COVID vaccines have already been properly considered and disproven, in a process adhering to natural justice, conducted by an appropriate judicial body.

i. Quite to the contrary, I have not been able to find any indication - in the father's evidence or in the body of COVID vaccine case law - that allegedly debunked theories have ever been properly considered or tested. In any court. Anywhere.

71 In a complex, important, and emotional case like this, it is important to remember the court's mandate:

a. I am not being asked to make a scientific determination. I am being asked to make a parenting determination.

b. I am not being asked to decide whether vaccines are good or bad.

c. I am not being asked to decide if either *parent* is good or bad.

d. My task is to determine which parent is to have decision-making authority over L.E.G. and M.D.G. with respect to the very specific and narrow issue of COVID vaccinations. Each parent has clearly identified how they would exercise such decision-making authority.

72 Pursuant to the recent, final, consent order, the two children reside primarily with the mother.

a. She has sole decision-making authority on all issues - with the exception that the parties deferred the issue of decision-making in relation to COVID vaccinations.

b. The father suggests there should be an inference that the mother was deliberately deprived of authority over this particular issue, because she could not be trusted to make the right decision.

c. I am not prepared to make any such an inference.

d. Both parents showed commendable maturity and insight in negotiating comprehensive minutes of settlement on all but one of the issues.

e. I interpret the minutes of settlement as leaving it open for the court to consider vaccinations as a stand-alone issue, to be determined solely based on the best interests of the children, and without either parent having any presumptive advantage or disadvantage in the determination.

73 With respect to the mother and father:

a. I find that they are both excellent parents.

b. The father has shown excellent parenting skills and familiarity with respect to the oldest child C.B.G. who is doing well in his care.

c. The mother has shown excellent parenting skills and familiarity with respect to L.E.G. and M.D.G. who are doing well in her care.

74 With respect to the children L.E.G. and M.D.G.:

a. I find that they are both intelligent, mature, articulate and insightful with respect to their place both within the family and within the community.

b. Both children are healthy. Their medical needs have always been properly addressed.

c. I received no professional or other evidence to suggest that there are any specific medical condition or issue which either favours or disfavours vaccination.

d. I find that both children have very specific, strongly held and independently formulated views about COVID vaccinations. Those views have been verified independently by an experienced social worker who would be alive to the possibility of parental influence or interference.

e. While the mother has strongly held views on the subject, the father has equally strongly held views. It is both understandable and appropriate that each parent has discussed the issue with each child. I find that while each parent has expressed their preference and view on the topic, neither parent has pressured or manipulated the children.

f. I am confident that each child's view has been clear, consistent, thoughtful, and entirely understandable in all the circumstances.

75 Section16(1) of the *Divorce Act* provides that the court shall take into consideration only the best interests of a child when making a parenting order or a contact order.

76 Section 16(2) says when considering best interest factors, primary consideration is to be given to the child's physical, emotional and psychological safety, security and well-being. *Pierre v. Pierre*, 2021 ONSC 5650 (SCJ).

77 Section 16(3) sets out a list of factors for the court to consider in considering the circumstances of a child and determining best interests:

> 16(3) Factors to be considered
>
> In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including
>
> (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
>
> (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
>
> (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
>
> (d) the history of care of the child;
>
> (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
>
> (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
>
> (g) any plans for the child's care;
>
> (h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
>
> (i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
>
> (j) any family violence and its impact on, among other things,
>
> (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
>
> (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
>
> (k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

78 I find that the combination of sections 16(2) ("the child's physical, emotional and psychological safety, security and well-being") and 16(3)(e) ("the child's views and preferences...") require that significant weight should be given to each child's stated views and requests. I would be very concerned that any attempt to ignore either child's views on such a deeply personal and invasive issue would risk causing serious emotional harm and upset.

79 With respect to the positions advanced by each parent.

a. I respect the father's decision to be guided by government and health protocols.

b. I think the father did himself a disservice by focussing so much of his case on dismissive personal attacks on the mother. Those attacks are not only misguided and mean-spirited. They raise doubts about his insight with respect to the vaccine issue - and they also raise doubts about his appreciation of the nature and quality of the important relationship between the mother (as primary resident parent) and the children.

c. I equally respect the mother's decision to make exhaustive efforts to inform herself about the vaccination issue.

d. I find that the mother took a reasonable approach in acknowledging the strengths of the pro-vaccine materials, while at the same time attempting to reconcile them with contrary viewpoints and warnings issued by equally competent and credible medical professionals.

e. I find that the mother's position is more reasonable and helpful in that she invites discussion and exploration of both sides of the story, while the father seeks to suppress it.

f. I find that the father has inaccurately and somewhat unfairly characterized both the mother's position and her evidence.

g. The father has attempted to dismiss the mother as some sort of crazy anti-vaxxer. Nothing could be further from the truth. The mother's materials and submissions actually addressed the important and complex issues in more detail and with more comprehension than conveyed by the father. She has made it very clear that she has not completely rejected COVID vaccinations for L.E.G. and M.D.G.. She is simply concerned that in her view there is overwhelming evidence of unresolved safety concerns with respect to the current vaccines being administered. She has come to the conclusion that at this time the risks associated with the vaccines outweigh the benefits.

h. As well, the mother's statement that she believes "in personal choice, knowledge, understanding and informed consent" is to be viewed in a reassuring context. She has gone to extraordinary lengths to inform herself, to maintain an open mind, and to discuss the issue with her children in a balanced, enlightened, and dispassionate manner.

i. The father has attempted to dismiss the mother's supporting materials as unreliable and less persuasive than his own materials. Once again, I find his attack to be misguided and inaccurate.

j. Pro-vaccine parents have consistently (and effectively) attempted to frame the issue as a contest between reputable government experts versus a lunatic fringe consisting of conspiracy theorists, and socially reprehensible extremists. This was absolutely the wrong case to attempt that strategy. The professional materials filed by the mother were actually more informative and more thought-provoking than the somewhat repetitive and narrow government materials filed by the father.

80 This is not the kind of case where the court can say that either side is necessarily correct. Nor that the same determinations should apply for every child, no matter the circumstances.

81 With the mother's materials satisfying me that a legitimate and highly complex debate exists on the efficacy and utilization of COVID vaccines, I am not prepared to apply judicial notice as a method of resolving the issue. Anyone reading even some of the articles presented by the mother would likely conclude that these are complicated and evolving issues, and there can be no simplistic presumption that one side is right and that the other side is comprised of a bunch of crackpots. That's why the court should require evidence rather than conclusory statements.

82 The father insists the mother's views have been debunked, but he provides no example of any such determination actually having been made. It would be helpful if, once and for all, the competing positions and science could be properly explored and tested in a public trial.

83 On balance, I am satisfied that that mother's request for a cautious approach is compelling, and reinforced by the children's views and preferences which are legitimate and must be respected. The mother has consistently made excellent decisions throughout the children's lives. Her current concerns about the vaccines are entirely understandable, given the credible warnings and commentary provided by reputable sources who are specifically acquainted with this issue.

84 The mother has consistently made excellent, informed, and child-focussed decisions. In every respect she is an exemplary parent, fully attuned to her children's physical and emotional needs. She has demonstrated a clear understanding of the science. She has raised legitimate questions and concerns. I have confidence that she will continue to seek out answers to safeguard the physical and emotional health of her children.

85 She is not a bad parent - *and no one is a bad citizen* - simply by virtue of asking questions of the government.

86 At a certain point, where you have absolute confidence in a parent's insight and decision-making, you have to step back and acknowledge that they love their child; they have always done the right thing for their child...*and they will continue to do the right thing for their child*.

87 The father's motion is dismissed.

88 The mother shall have sole decision-making authority with respect to the issue of administering COVID vaccines for the children L.E.G. and M.D.G.

89 If any issues other than costs need to be addressed, counsel should arrange with the Trial Co-ordinator a time for this matter to be spoken to. This should be arranged within 10 days.

90 If only costs need to be determined, the parties should serve and file written submissions on the following timelines:

- a. Mother's materials (not to exceed three pages of narrative, and not to be more than 12 pages in total including offers, with cases to be hyperlinked) by March 18, 2022.
- b. Father's materials (not to exceed three pages of narrative, and not to be more than 12 pages in total including offers, with cases to be hyperlinked) by April 1, 2022.
- c. Any reply by mother (not to exceed two pages) by April 11, 2022.

POSTSCRIPT:

91 It's irrelevant to my decision and it's none of anyone's business.

92 But I am fully vaccinated. My choice.

93 I mention this because I am acutely aware of how polarized the world has become.

94 We should all return to discussing *the issues* rather than making presumptions about one another.

A. PAZARATZ J.

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Supreme Court of India
Jacob Puliyel vs Union Of India on 2 May, 2022
Author: L. Nageswara Rao
Bench: L. Nageswara Rao, B.R. Gavai

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
Writ Petition (Civil) No. 607 of 2021

JACOB PULIYEL ..PETITIONER

Versus

UNION OF INDIA & ORS. ..RESPONDENTS

JUDGMENT

L. NAGESWARA RAO, J.

1. The Petitioner was a member of the National Technical Advisory Group on Immunization (NTAGI) and was advising the Government of India on vaccines. He has filed this Writ Petition in public interest seeking the following reliefs:

> (a) Direct the respondents to release the entire segregated trial data for each of the phases of trials that have been undertaken with respect to the vaccines being administered in India; and
>
> (b) Direct the respondent No 2 to disclose the detailed minutes of the meetings of the Subject Expert Committee and the NTGAI with regard to the vaccines as directed by the 59th Parliamentary Standing Committee Report and the members who constituted 1 | Page the committee for the purpose of each approval meeting; and
>
> (c) Direct the respondent No.2 to disclose the reasoned decision of the DCGI granting approval or rejecting an application for emergency use authorization of vaccines and the documents and reports submitted to the DCGI in support of such application; and
>
> (d) Direct the respondents to disclose the post vaccination data regarding adverse events, vaccinees who got infected with Covid, those who needed hospitalization and those who died after such infection post vaccination and direct the respondents to widely publicize the data collection of such adverse event through the advertisement of toll free telephone numbers where such complaints can be registered; and

(e) Declare that vaccine mandates, in any manner whatsoever, even by way of making it a precondition for accessing any benefits or services, is a violation of rights of citizens and unconstitutional; and

(f) Pass any other orders as this Hon'ble Court deems fit.

2. In the Writ Petition, the Petitioner highlighted the adverse consequences of emergency approval of vaccines in India, the need for transparency in publishing segregated clinical trial data of vaccines, the need for disclosure of clinical data, lack of transparency in regulatory approvals, minutes and constitution of the expert bodies, imperfect evaluation of Adverse Events Following Immunisation (AEFIs) 2 | Page and vaccine mandates in the absence of informed consent being unconstitutional. The Petitioner further stated in the Writ Petition that coercive vaccination would result in interfering with the principle of informed self-determination of individuals, protected by Article 21 of the Constitution of India.

3. Notice was issued in the Writ Petition on 09.08.2021. An additional affidavit was filed by the Petitioner on 03.09.2021 raising additional grounds. It was averred in the additional affidavit that natural immunity is long-lasting and robust in comparison to vaccine immunity and that vaccines do not prevent infection or transmission of COVID-19. The Petitioner further stated that vaccines are not effective in preventing against infection from new variants of COVID-19. The Petitioner relied on news articles on the fourth nationwide serological survey conducted by Indian Council of Medical Research (ICMR) in June and July, 2021, according to which up to two-thirds of the Indian population above the age of 6 years had already been infected with COVID-19 and had antibodies specific to the SARS-CoV-2 virus. The Petitioner relied upon other news articles and research studies conducted to state that there had been breakthrough infections even amongst vaccinated people. Urging that 3 | Page research has shown that vaccinated people also transmit the virus, the Petitioner contended that vaccine mandates are meaningless.

4. The Petitioner filed an Interlocutory Application seeking a direction to restrain all authorities and institutions, public and private, from mandating the vaccine in any manner whatsoever, on a precondition of accessing any service or on pain of any penalty. The Petitioner has drawn the attention of this Court to various restrictions that were placed by State Governments, other employers and educational institutions on unvaccinated individuals. The Petitioner contended that mandating vaccination for access to resources, public places and means of earning livelihood would be in violation of their fundamental rights, especially so, when scientific studies have shown that unvaccinated persons do not pose more danger of transmission of the virus when compared to vaccinated persons.

5. Respondent No. 1, the Union of India, has raised a preliminary objection regarding the maintainability of the Writ Petition. The Union of India has further contended that the serious threat posed by the unprecedented pandemic which had devastating effects on the entire world called for emergency measures. It is accepted world over that 4 | Page vaccination for COVID-19 is necessary to avoid infection. India was one of the few countries in the world which succeeded in manufacturing vaccines for protection from COVID-19, one of which was COVAXIN, Indias

indigenous vaccine and the other being COVISHIELD, which was manufactured by Serum Institute of India with technology transfer from AstraZeneca / Oxford University. The country started one of the largest inoculation programmes in the world in larger public interest, while tackling challenges of vaccine hesitancy, effect of the second wave of the pandemic and other such adverse circumstances. The Union of India expressed serious doubts about the intention of the Petitioner in filing this Writ Petition. As we have not seen the end of the pandemic caused due to the COVID-19 virus, any interference with the steps taken by the Union on the basis of the advice given by the NTAGI and other expert bodies would provide impetus to the already prevailing vaccine hesitancy in certain sections of the society. In their counter-affidavit, the Union of India reminded us that decisions of domain experts should not normally be interfered with in judicial review and that this Court should not sit in appeal over a scientific process undertaken by domain experts on a subject which is not the expertise of any judicial forum. The long-

5 | Page drawn procedure for making applications for issuance of licenses for manufacturing vaccines and the statutory regime governing the same have been referred to in the counter- affidavit to emphasize that the Union of India has not been remiss in grant of emergency licences. There is a detailed procedure for approval with checks at every stage which has been followed for grant of emergency approval. In so far as disclosure of clinical trial data is concerned, the Union of India referred to the National Ethical Guidelines for Biomedical and Health Research involving Human Participants published by the ICMR, which require privacy and confidentiality of human participants to be maintained. Accordingly, the Union of India contended that such details pertaining to identity and records of the participants in the clinical trial data cannot be disclosed to the public as per the prevailing statutory regime. It was asserted by the Union of India that the remaining data has already been made available in the public domain.

6. On the subject of monitoring of AEFIs, the Union of India brought to our attention established procedures and protocols in place for surveillance of AEFIs established under the National Adverse Event Following Immunisation Surveillance Guideline. Further, the multi-tier structure 6 | Page comprising AEFI Committees at the state and national levels, providing guidance, carrying out investigation and causality assessment was elaborated upon. Details of the procedures followed in accordance with globally accepted practices were highlighted in the counter-affidavit. According to the Union of India, all cases of serious and severe AEFI, including reported deaths, are subjected to scientific and technical review process with causality assessments done at the state and national levels by trained experts to ascertain whether a particular AEFI can be attributed to the vaccine. In the counter-affidavit, it was also made clear that COVID-19 vaccination is voluntary and that the Government of India encourages all individuals to take vaccination in the interest of public health, as the individuals ill health has a direct effect on the society. It was also made clear that COVID-19 vaccination is not linked to any benefits or services.

7. Counter-affidavits have been filed by other Respondents as well. The vaccine manufacturers, i.e., Respondents Nos. 4 and 5, have brought to the notice of this Court that approval to their vaccines was granted after strict compliance of the procedure prescribed. The States of Tamil Nadu, Maharashtra, Delhi and Madhya Pradesh have also filed counter-affidavits, justifying the restrictions that were 7 | Page placed on unvaccinated persons in public interest. The details of the

restrictions have been discussed later.

8. We have heard Mr. Prashant Bhushan, learned counsel for the Petitioner, Mr. Tushar Mehta, learned Solicitor General of the Union of India, Mr. S. Guru Krishnakumar, learned Senior Counsel for Respondent No. 4, Mr. Amit Anand Tiwari, learned Additional Advocate General for the State of Tamil Nadu, Mr. Rahul Chitnis, learned counsel for the State of Maharashtra, Ms. Mrinal Gopal Elker, learned counsel for the State of Madhya Pradesh and Ms. Shyel Trehan, learned counsel for Respondent No. 5.

Preliminary Issues I. Maintainability

9. The learned Solicitor General raised a preliminary objection as to the maintainability of the Writ Petition which is filed in public interest. He stated that this Writ Petition, if entertained, would harm public interest, as any observation made by this Court against vaccination would result in potential threat of vaccine hesitancy.

10. The Petitioner is a paediatrician, who was a member of the NTAGI earlier. It has been stated in the Writ Petition that he has a number of publications in internationally peer- reviewed medical journals to his credit. The Petitioner 8 | Page strongly believes that there cannot be coercive vaccination, especially of inadequately tested vaccines, which amounts to an intrusion into the individuals personal autonomy. He is also of the firm opinion that an individual is deprived of the opportunity to give informed consent in the absence of availability of segregated data of clinical trials of the vaccines. He has also aired further grievances pertaining to poor evaluation and reporting of AEFIs.

11. This Court is entitled to entertain a public interest litigation moved by a person having knowledge in the subject-matter of the lis and, thus, having an interest therein, as contradistinguished from a busybody, in the welfare of people[1]. The Union of India has objected to the maintainability of the Writ Petition on the ground that the questions raised by the Petitioner may result in raising doubts in the minds of the citizenry about the vaccination, adding to the already existing vaccine hesitancy in the country. The consequence would be a debilitating effect on public health and therefore, the petition cannot be said to be in public interest. In other words, the maintainability of the Writ Petition is raised on the ground that the sensitive issue of vaccination should not be dealt with by this Court, as it 1 Indian Banks Association, Bombay v. Devkala Consultancy Service (2004) 11 SCC 1 9 | Page has the propensity of fuelling doubts about the efficacy of the vaccines.

12. From the rejoinder affidavit submitted by the Petitioner, we note that a petition had been filed by the Petitioner earlier, during his tenure as a member of the NTAGI, with respect to the Rotavac vaccine claiming that adequate data from the clinical trials had not been provided to the NTAGI. The rejoinder affidavit further states that the petition was dismissed by this Court, on the ground that the Petitioner could not have filed the said petition while being a member of the NTAGI. The enthusiasm of the Petitioner in approaching this Court has not gone unobserved. However, as the issues raised by the Petitioner have a bearing on public health and pertain to the fundamental rights

of the countrys populace, we are of the opinion that they warrant due consideration by this Court. Therefore, we are not inclined to entertain the challenge mounted by the Union of India to the maintainability of the Writ Petition. II. Judicial review of executive decisions based on expert opinion

13. Yet another ground taken by the Union of India is that this Court has to yield to executive decision and action in the matter of administration of drugs / vaccines. The existence 10 | P a g e of any other possible view cannot enable this Court to interfere in matters relating to opinion of domain experts by sitting in appeal over such decisions, while adjudicating a writ petition filed under Article 32 of the Constitution. The learned Solicitor General supported the stand of the Union of India with reference to the law laid down by this Court in Academy of Nutrition Improvement v. Union of India 2, G. Sundarrajan v. Union of India 3 and Shri Sitaram Sugar Company Ltd. v. Union of India 4. Further, the learned Solicitor General relied upon the judgments of the Supreme Court of the United States (hereinafter, the US Supreme Court) in Henning Jacobson v.

Commonwealth of Massachusetts5, Zucht v. King6 and in Docket No. 21A240 titled Joseph R. Biden v. Missouri dated 13.01.2022 and the judgment of the Supreme Court of New South Wales (hereinafter, the NSW Supreme Court) in Kassam v. Hazzard; Henry v. Hazzard 7 to bolster his submissions that courts should not lightly interfere with matters of policy concerning the safety and health of the people and it is not the courts function to determine the 2 (2011) 8 SCC 274 3 (2013) 6 SCC 620 4 (1990) 3 SCC 223 5 197 US 11 (1905) 6 260 US 174 (1922) 7 [2021] NSWSC 1320 11 | P a g e merits of the exercise of power by the executive. The learned Solicitor General was joined by Mr. Amit Anand Tiwari, learned Additional Advocate General for the State of Tamil Nadu, in emphasising the limited scope of judicial review in matters of policy framed on the basis of expert opinion.

14. In opposition, the Petitioner argued that matters of public importance involving invasion of fundamental rights of individuals cannot be brushed aside by this Court on the ground that they are beyond the jurisdiction of this Court. This Court has a duty to safeguard the fundamental rights of individuals and issues raised herein are of seminal importance which ought to be decided after assessing the relevant material placed before this Court by both sides. Mr. Bhushan referred to the judgement of the High Court of New Zealand in Ryan Yardley v. Minister for Workplace Relations and Safety8 in support of his submission that the scientific data and evidence that was produced before the High Court of New Zealand was assessed to adjudge the efficacy of vaccines in preventing transmission of the COVID- 19 virus.

8 [2022] NZHC 291 12 | P a g e

15. It was further argued by Mr. Bhushan that the judgments relied upon by the Union of India are not applicable to the facts of this case. He relied upon the judgments of this Court in Delhi Development Authority v. Joint Action Committee, Allottee of SFS Flats 9, Directorate of Film Festivals v. Gaurav Ashwin Jain 10 and an order of this Court in Distribution of Essential Supplies and Services During Pandemic, In re 11 and submitted that policy decisions taken by the executive are not beyond the scope of judicial review, if they are manifestly arbitrary or unreasonable.

16. Before examining the parameters of judicial review in this case, it is profitable to refer to judgments from beyond our borders which have dealt with the scope of judicial review in matters relating to public health and vaccinations, in particular. Compulsory vaccination against small pox was the subject-matter of Jacobson (supra) decided in 1905. The US Supreme Court was of the opinion that the mandate of the local government for compulsory vaccination was binding on every individual. The safety and health of the people has to be protected by the government and the judiciary is not 9 (2008) 2 SCC 672 10 (2007) 4 SCC 737 11 (2021) 7 SCC 772 13 | P a g e competent to interfere with decisions taken in the interest of public health. The Court can interfere by way of judicial review of legislative action in matters of public health only when there is no real or substantial relation to the object of the legislation or when there is plain, palpable invasion of rights secured by fundamental law and thereby, give effect to the Constitution.

17. In the wake of the COVID-19 pandemic, restrictions on attendance at religious services in areas classified as red or orange zones were imposed by an executive order issued by the Governor of New York. The said restrictions were challenged on the ground that they violate the free exercise clause of the First Amendment of the Constitution of the United States. By a majority of 6:3, the US Supreme Court in Roman Catholic Diocese v. Cuomo12 granted injunctive relief on being satisfied that the executive order struck at the very heart of the First Amendments guarantee of religious liberty. While doing so, the US Supreme Court observed that the members of the Court are not public health experts and they should respect the judgment of those with special expertise and responsibility in this area. However, the Constitution cannot be put away and forgotten even in a 12 141 S. Ct. 63 (2020) 14 | P a g e pandemic. Gorsuch, J., who wrote a concurring opinion, observed that Jacobson (supra) hardly supports cutting the Constitution loose during a pandemic. Jacobson (supra) was distinguished by Gorsuch, J., who held that the Court did not interfere with the challenged law in Jacobson (supra) only because it did not contravene the Constitution of the United States or infringe any right granted or secured by it. A word of caution sounded by Gorsuch, J. is to the effect that the Court cannot stay out of the way in times of crisis, when the Constitution is under attack. In his dissent, Roberts, C.J. held that the injunction sought would not be in public interest, especially when it concerns public health and safety needs which calls for swift government action in everchanging circumstances. He relied upon the earlier order passed by the US Supreme Court in South Bay United Pentecostal Church v. Newsom 13 wherein it was recognised that courts must grant elected representatives broad discretion when they undertake to act in areas fraught with medical and scientific uncertainties.

18. Biden v. Missouri (supra) related to vaccine mandates for healthcare providers. The Secretary of Health and Human Services issued a rule on being convinced that vaccination of 13 140 S. Ct. 1613 (2020) 15 | P a g e healthcare workers in facilities in the Medicare and Medicaid Programs against COVID19 was necessary for the health and safety of individuals to whom care and services are furnished. The said rule was challenged and the US District Courts for the Western District of Louisiana and the Eastern District of Missouri each entered preliminary injunctions against its enforcement. The appeals filed against the said injunction were rejected by the Fifth Circuit in Louisiana and the Eighth Circuit in Missouri. Aggrieved thereby, the Government moved the US Supreme Court seeking for a stay on the preliminary injunctions passed by the US District Courts. While granting stay of the preliminary injunctions, by its plural opinion the US Supreme Court held

that the role of courts in reviewing decisions taken by the executive should be to ensure that the executive has acted within a zone of reasonableness.

19. Having been aggrieved by certain orders of the Minister for Health and Medical Research that required people working in the construction, aged care and education sectors to be compulsorily vaccinated, Al-Munir Kassam and three others, along with Natasha Henry and five others, approached the NSW Supreme Court challenging the 16 | P a g e constitutional validity of the decision. While considering the grounds of challenge, the NSW Supreme Court in Kassam v. Hazzard (supra) was of the view that it is not the Courts function to determine the merits of the exercise of the power by the Minister to make the impugned orders, much less for the court to choose between plausible responses to the risks to the public health posed by the Delta variant . The NSW Supreme Court further observed that it is not the courts function to conclusively determine the effectiveness of some of the alleged treatments for those infected or the effectiveness of COVID-19 vaccines, especially their capacity to inhibit the spread of the disease, which are all matters of merits, policy and fact for the decision maker and not the court. The NSW Supreme Court emphasised that its only function is to determine the legal validity of the impugned orders. The said view of the NSW Supreme Court was approved by the New South Wales Court of Appeal in Kassam v. Hazzard; Henry v. Hazzard14.

20. The Minister for Workplace Relations and Safety passed COVID-19 Public Health Response (Specified Work Vaccinations) Order 2021, by which it was determined that work carried out by certain police and defence force 14 [2021] NSWCA 299 17 | P a g e personnel could only be undertaken by workers who have been vaccinated. Three police and defence force workers who did not wish to be vaccinated sought judicial review of the said order before the High Court of New Zealand (hereinafter, the NZ High Court). While adjudicating the dispute, the NZ High Court in Ryan Yardley (supra) expressed its opinion that the choices made by governments on their response to COVID-19 involve wide policy questions, including decisions on the use of border closures, lockdowns, isolation requirements, vaccine mandates and many other measures, which are decisions for the elected representatives to make. The NZ High Court made it clear that the Court addresses narrower legal questions and the Courts function is not to address the wider policy questions. While referring to the evidence of experts, the NZ High Court stressed on the institutional limitations on the Courts ability to reach definitive conclusions but clarified that the Court must exercise its constitutional responsibility to ensure that decisions are made lawfully. While relying upon a judgment of the Court of Appeal of New Zealand in Ministry of Health v. Atkinson15, the NZ High Court held that the Crown has the burden to demonstrate that a limitation of a fundamental 15 [2012] NZCA 184 18 | P a g e right is demonstrably justified. We have come to know that in the time since the judgment in this matter was reserved, the decision of the NZ High Court in Ryan Yardley (supra) has been appealed by the Government of New Zealand before the New Zealand Court of Appeal.

21. We shall now proceed to analyse the precedents of this Court on the ambit of judicial review of public policies relating to health. It is well settled that the Courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed,

arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional16. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical17. Courts do not and cannot act as 16 Ugar Sugar Works Ltd. v. Delhi Administration (2001) 3 SCC 635 17 Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561 19 | P a g e appellate authorities examining the correctness, suitability and appropriateness of a policy, nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate. The scope of judicial review when examining a policy of the Government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or manifestly arbitrary 18.

22. This Court in a series of decisions has reiterated that courts should not rush in where even scientists and medical experts are careful to tread. The rule of prudence is that courts will be reluctant to interfere with policy decisions taken by the Government, in matters of public health, after collecting and analysing inputs from surveys and research. Nor will courts attempt to substitute their own views as to what is wise, safe, prudent or proper, in relation to technical issues relating to public health in preference to those formulated by persons said to possess technical expertise and rich experience19. Where expertise of a complex nature is expected of the State in framing rules, the exercise of that power not demonstrated as arbitrary must be presumed to 18 Directorate of Film Festivals v. Gaurav Ashwin Jain (2007) 4 SCC 737 19 Academy of Nutrition Improvement v. Union of India (2011) 8 SCC 274 20 | P a g e be valid as a reasonable restriction on the fundamental right of the citizen and judicial review must halt at the frontiers. The Court cannot re-weigh and substitute its notion of expedient solution. Within the wide judge-proof areas of policy and judgment open to the government, if they make mistakes, correction is not in court but elsewhere. That is the comity of constitutional jurisdictions in our jurisprudence. We cannot evolve a judicial policy on medical issues. All judicial thought, Indian and Anglo-American, on the judicial review power where rules under challenge relate to a specialised field and involve sensitive facets of public welfare, has warned courts of easy assumption of unreasonableness of subordinate legislation on the strength of half-baked studies of judicial generalists aided by the ad- hoc learning of counsel. However, the Court certainly is the constitutional invigilator and must act to defend the citizen in the assertion of his fundamental rights against executive tyranny draped in disciplinary power.20

23. There is no doubt that this Court has held in more than one judgment that where the decision of the authority is in regard to a policy matter, this Court will not ordinarily interfere since decisions on policy matters are taken based 20 Pyarali K. Tejani v. Mahadeo Ramchandra Dange (1974) 1 SCC 167 21 | P a g e on expert knowledge of the persons concerned and courts are normally not equipped to question the correctness of a policy decision. However, this does not mean that courts have to abdicate their right to scrutinise whether the policy in question is formulated keeping in mind all the relevant facts and the said policy can be held to be beyond the pale of discrimination or unreasonableness, bearing in mind the material on record.21 In Delhi Development Authority (supra), this Court held that an executive order termed as a policy decision is not beyond the pale of judicial review. Whereas the superior courts may not interfere with the nitty- gritty of the policy, or

substitute one by the other but it will not be correct to contend that the court shall lay its judicial hands off, when a plea is raised that the impugned decision is a policy decision. Interference therewith on the part of the superior court would not be without jurisdiction as it is subject to judicial review. It was further held therein that the policy decision is subject to judicial review on the following grounds:

a) if it is unconstitutional;

b) if it is dehors the provisions of the Act and the regulations;

21 Union of India v. Dinesh Engineering Corporation (2001) 8 SCC 491 22 | P a g e

c) if the delegatee has acted beyond its power of delegation;

d) if the executive policy is contrary to the statutory or a larger policy.

24. During the second wave of COVID-19 pandemic, this Court in Distribution of Essential Supplies & Services during Pandemic (supra), to which one of us was a party (L Nageswara Rao, J.), dealt with issues of vaccination policy, pricing and other connected issues. While doing so, this Court held that policy-making continues to be the sole domain of the executive and the judiciary does not possess the authority or competence to assume the role of the executive. It was made clear that the Court cannot second guess the wisdom of the executive when it chooses between two competing and efficacious policy measures. However, it continues to exercise jurisdiction to determine if the chosen policy measure conforms to the standards of reasonableness, militates against manifest arbitrariness and protects the right to life of all persons.

25. There can be no ambiguity in the principles of law relating to judicial review laid down by this Court. A perusal of the judgments referred to above would clearly show that this Court would be slow in interfering with matters of policy, 23 | P a g e especially those connected to public health. There is also no doubt that wide latitude is given to executive opinion which is based on expert advice. However, it does not mean that this Court will not look into cases where violation of fundamental rights is involved and the decision of the executive is manifestly arbitrary or unreasonable. It is true that this Court lacks the expertise to arrive at conclusions from divergent opinions of scientific issues but that does not prevent this Court from examining the issues raised in this Writ Petition, especially those that concern violation of Article 21 of the Constitution of India.

26. Identifying the issues in the present matter, they can be divided as follows:

I. Vaccine mandates being violative of Article 21 of the Constitution of India.

II. Non-disclosure of segregated clinical trial data in public domain.

III. Improper collection and reporting of AEFIs.

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IV.    Vaccination of children.
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I. Vaccine Mandates

A. Submissions

27. Mr. Bhushan submitted that there is nothing wrong in the Government encouraging the people to get vaccinated. However, coercive vaccination from the pain of denial of essential services is plainly unconstitutional, being violative 24 | P a g e of the principle of bodily autonomy and the right to access ones means of livelihood. Though the Union of India has made a categorical submission that vaccines are voluntary, the State Governments have been placing restrictions on unvaccinated people by denying them access to public places and services. He referred to: (i) an order passed by the Government of NCT of Delhi on 08.10.2021 by which government employees, including frontline workers and healthcare workers, as well as teachers and staff working in schools and colleges were not to be allowed to attend their respective offices and institutions without the first dose of vaccination with effect from 16.10.2021; (ii) a directive issued by the Government of Madhya Pradesh on 08.11.2021 stating that it was mandatory to be vaccinated with two doses of the vaccine to get food grains at fair price shops;

(iii) an order passed by the Government of Maharashtra dated 27.11.2021 requiring persons to be fully vaccinated if they are connected with any program, event, shop, establishment, mall and for utilising public transport; (iv) an order issued by the Government of Tamil Nadu dated 18.11.2021 permitting only vaccinated people into open, public places, schools, colleges, hostels, boarding houses, factories and shops; and other instances where students in 25 | P a g e the age group of 15 to 18 years were not permitted to appear for their examinations without being vaccinated.

28. Mr. Bhushan contended that there is need to balance individuals rights with public interest concerning health. According to him, vaccine mandates can be on the basis of efficacy and safety of vaccination and prevention of transmission. He submitted that there is sufficient evidence to the effect that natural immunity acquired from a COVID-19 infection is long-lasting and robust in comparison to vaccine immunity. Studies also indicate that vaccines do not prevent infection from the virus or transmission amongst people. Vaccines are also ineffective in preventing infection from new variants. According to serological studies, 75 per cent of the Indian population has already been infected and is seropositive and, therefore, they have better immunity to infection than what is provided by the vaccines. The vaccines which are being administered in this country are only authorised for emergency use and the procedure for clinical trials of such vaccines has not been fully complied with. In view of the lack of transparency in disclosure of trial data resulting in absence of informed consent, any vaccine mandate would be unconstitutional. Mr. Bhushan contended that every individual has personal autonomy and cannot be 26 | P a g e forced to be vaccinated against his will. For the said proposition, he relied on the judgments of Common Cause (A Registered Society) v. Union of India 22, Aruna Ramachandra Shanbaug v. Union of India 23 and K. S. Puttaswamy v. Union of India24. Imposing restrictions on the rights of persons who are unvaccinated is totally unwarranted as there is no basis for discriminating against unvaccinated persons. He relied upon scientific studies, opinions of experts and news articles to contend that vaccinated people are also prone to infection and there is no difference between a vaccinated individual and an unvaccinated person with respect to transmission of the virus. As there is no

serious threat of spread of the virus by an unvaccinated person in comparison to a vaccinated person, placing restrictions on unvaccinated persons is meaningless.

29. Per contra, the learned Solicitor General of India contended that more than 180 crore doses had been administered, resulting in a substantial number of individuals in the country being vaccinated. He submitted that the vaccines have proved to be effective and safe and any indulgence by this Court would result in vaccine hesitancy. 22 (2018) 5 SCC 1 23 (2011) 4 SCC 454 24 (2017) 10 SCC 1 27 | P a g e The Government had taken extra care to appoint various committees to examine the efficacy, safety, immunogenicity, pharmacodynamics of the vaccines before granting approvals. Some of the material placed before this Court to bolster the Union of Indias submissions have been listed below:

(a) Science Brief: SARS-CoV-2 Infection-induced and Vaccine-induced immunity of the United States Centers for Disease Control and Prevention (CDC) updated as on 29.10.2021, which in its conclusion states that: Numerous immunologic studies and a growing number of epidemiologic studies have shown that vaccinating previously infected individuals significantly enhances their immune response and effectively reduces the risk of subsequent infection, including in the setting of increased circulation of more infectious variants. Although the Delta variant and some other variants have shown increased resistance to neutralization by both post-infection and post-vaccination sera in laboratory studies, observed reduction in effectiveness has been modest, with continued strong protection against hospitalization, severe disease and death. 28 | P a g e

(b) A study conducted by researchers of Christian Medical College, Vellore25, wherein it has been concluded as follows: Among symptomatic COVID-19 patients, prior vaccination with either Covishield or Covaxin® impacted the severity of illness and reduced mortality when compared with unvaccinated patients. Full vaccination conferred a substantially higher protective effect over partial vaccination. The results of the study also indicate that compared with unvaccinated patients, partially vaccinated patients had milder disease, reduced requirement of oxygen, hospital admission, ICU admission and mortality. Again, when fully vaccinated patients were compared with unvaccinated individuals, full vaccination was associated with significantly less disease severity, requirement of respiratory supports, hospital admission, ICU admission and mortality. The study further showed that majority of the patients screened who required hospitalisation were unvaccinated.

25 Abhilash, Kundavaram Paul Prabhakar et al. Impact of prior vaccination with CovishieldTM and Covaxin® on mortality among symptomatic COVID-19 patients during the second wave of the pandemic in South India during April and May 2021: a cohort study. Vaccine vol. 40,13 (2022): 2107-2113 29 | P a g e

(c) A study conducted by researchers of All India Institute of Medical Sciences (AIIMS), New Delhi26, which states that: We evaluated the association between COVID-19 vaccination status (the number of vaccine shots received and time interval since the last dose) and the vaccines clinical efficacy in India in preventing the disease and its severity. This study has several noteworthy findings. Firstly, both the Indian vaccines provided a significant protective role in preventing the disease among people who had a clinical suspicion of COVID-19. Secondly, These vaccines protected from progression to a severe form of the disease among the patients who turned RT- PCR positive despite getting vaccinated. The probability of hospitalisation was about eight times less, and ICU admission/death was about fourteen times lesser among fully vaccinated patients in comparison to unvaccinated RT-PCR positive patients. Thirdly, the protective efficacy of the vaccines had a dose-dependent effect. The effectiveness is maximum among individuals who 26 Aakashneel Bhattacharya, Piyush Ranjan, Tamoghna Ghosh, Harsh Agarwal, Sukriti Seth, Ganesh Tarachand Maher, Ashish Datt Upadhyay, Arvind Kumar, Upendra Baitha, Gaurav Gupta, Bindu Prakash, Sada Nand Dwivedi, Naveet Wig Evaluation of the dose- effect association between the number of doses and duration since the last dose of COVID-19 vaccine, and its efficacy in preventing the disease and reducing disease severity: A single centre, cross-sectional analytical study from India Diabetes & Metabolic Syndrome: Clinical Research & Reviews Volume 15, Issue 5 (2021), 102238 30 | P a g e received both doses of vaccination at least two weeks before the onset of their symptoms.

(d) A study conducted by researchers of AIIMS, Patna 27, which concludes as follows: COVID-19 vaccination was found to be effective in infection prevention. One out of two and four out of five individuals were found to be protected against SARS-CoV-2 infection following partial and full vaccination, respectively. The vaccinated individuals had lesser LOS compared to unvaccinated ones. Additionally, the fully vaccinated individuals were less likely to develop severe disease. LOS herein refers to the length of hospital stays.

30. On behalf of the State of Tamil Nadu, Mr. Amit Anand Tiwari, learned Additional Advocate General, submitted that the restrictions placed by way of the circular dated 18.11.2021 are within the competence of the State in exercise of its powers under the Disaster Management Act, 2005 (hereinafter, the DM Act) and the Tamil Nadu Public Health Act, 1939. Section 76(2)(b) thereof empowers the State Government to make vaccinations compulsory, in the event of a declaration by the Government of an outbreak of a 27 Singh C, Naik BN, Pandey S, et al. Effectiveness of COVID-19 vaccine in preventing infection and disease severity: a case-control study from an Eastern State of India. Epidemiology and Infection. 2021;149:e224 31 | P a g e notified disease. He submitted that the restrictions placed by the circular dated 18.11.2021 are in larger public interest and cannot be said to be unreasonable restrictions, as these were an essential facet of the precautionary approach adopted by the State of Tamil Nadu in dealing with the unprecedented pandemic. According to Mr. Tiwari, these restrictions were in furtherance of the State realising the importance of curtailing the spread of COVID-19. The unchecked spread of the virus could lead to further dangerous mutations. While referring to opinions of experts in the field of health, including that of the World Health Organization (WHO), the United Nations International Childrens Emergency Fund (UNICEF) and the Oxford Vaccine group, as well as scientific studies published in the New England Journal of Medicine, the Lancet and the International Journal of Scientific Studies, it was submitted on behalf of the State of Tamil Nadu that vaccination prevents severe disease and significantly reduces hospitalisation and mortality and that vaccines continued to be highly effective in preventing severe disease and death. The measures were justified on the ground that they were not only aimed for the safety of a particular individual but also served a greater purpose of ensuring safety of the community at large.

32 | P a g e

31. Mr. Rahul Chitnis, learned counsel appearing for the State of Maharashtra, referred to the information provided by the WHO to contend that vaccines save infected individuals from life threatening complications, and consequential untimely death and therefore, vaccine mandate issued by the State of Maharashtra is in the interest of general public. The restrictions that are imposed are reasonable and cannot be said to manifestly arbitrary as they are issued only for a temporary period with exclusions and are reviewed periodically by the State to assess if relaxations can be granted. He submitted that there is no compulsion to get vaccinated, however, in view of the serious threat that not being vaccinated poses to the right of life and personal liberty of the larger population, certain unavoidable restrictions have been imposed, especially given that strict adherence to social distancing and masking is significantly compromised in bigger cities.

32. The complaint of the Petitioner in relation to prevention of access to essential resources in the State of Madhya Pradesh pertains to ration not being provided to unvaccinated persons through the public distribution system. We were informed by the learned counsel for the State of 33 | P a g e Madhya Pradesh that the order dated 08.11.2021, by which vaccination was made mandatory for receiving ration from fair price shops, was not implemented and was eventually withdrawn on 07.01.2022.

33. In the counter-affidavit filed on behalf of the Government of NCT of Delhi, it was submitted that the order dated 08.10.2021 was issued by the Delhi Disaster Management Authority after due application of mind, to control the spread of COVID-19 and mitigate its effects. Under Section 6(2)(i) of the DM Act, the National Disaster Management Authority has been issuing orders from time to time directing State Governments and Union Territories, amongst other authorities, to take effective measures to prevent the spread of COVID-19, and in furtherance of this, also permitted States to impose further local restrictions. The Delhi Disaster Management Authority, in a meeting held on 29.09.2021, decided to ensure 100 per cent vaccination of all Government employees, frontline workers, healthcare workers as well as teachers and staff working in schools and colleges, on the advice of medical and other experts. It was considered necessary as these individuals have frequent interaction with the general public and vulnerable sections of the society and therefore, pose greater risk of spreading the 34 | P a g e virus. While an individual may have a right to decide against getting vaccinated, the State, however, has a statutory duty to regulate the interaction of unvaccinated persons within the society in the interest of public health.

34. In his rejoinder, Mr. Bhushan, while reiterating his submissions, took exception to the contradictory stand taken by the Union of India on COVID-19 vaccination being voluntary and not mandatory. On one hand, the Union of India made it clear in the counter-affidavit that vaccination is voluntary and on the other, a series of advisories and material had been filed by the Union of India, supporting the claim of vaccination being mandatory. Mr. Bhushan submitted that the Union of India has not provided any material to the Court contrary to what has been supplied by the Petitioner furthering his scientific and legal contention that unvaccinated people pose no greater danger than vaccinated individuals in the matter of transmission of the COVID-19 virus, and therefore, there is no public health rationale in vaccine mandates. In addition to the various points raised in his submissions, the learned counsel for the Petitioner relied upon the opinion of Dr. Aditi Bhargava, who is a professor at University of California, San Francisco and a molecular biologist

with 33 years of research experience, 35 | P a g e from her presentation made before the US Senate on 02.11.2021. Her opinion is to the effect that vaccines do not prevent infection and transmission. She is of the further belief that natural immunity is the gold standard. According to Dr. Bhargava, there has been no documented case of a naturally immune person getting reinfected with severe disease or hospitalised, despite the first case reported nearly two years ago, whereas, there have been thousands of cases of severe infection, hospitalisation, and deaths in fully vaccinated people. Mr. Bhushan concluded by submitting that any restrictions placed on personal autonomy of individuals would be violative of Article 21, unless the criteria laid down in K. S. Puttaswamy (supra) is met. B. Evolution of COVID-19 and vaccines

35. COVID-19 emerged in late 2019. The WHO officially declared the novel coronavirus outbreak as a pandemic on 11.03.2020. The virus was detected in the country in the last week of January, 2020 and spread rapidly. As the threat of infections from the virus loomed large, an unprecedented national lockdown was announced on 24.03.2020, which extended for a few months, with restrictions being removed thereafter in a phased manner. India was not alone in this;

36 | P a g e several countries imposed lockdowns to arrest the spread of the deadly disease, which has led to a drastic loss of human life worldwide and presented a threat of extraordinary proportions to public health, food systems, economic and social conditions. Scientific studies and research for manufacture of vaccines to prevent severe infections were undertaken on an emergency basis. Towards the end of 2020, emergency vaccines came to be administered in the western part of the world. However, by then, the spread of COVID-19 around the globe was considerable. Around the same period, a variant called B.1.1.7 was found in the United Kingdom. The said variant was renamed as Alpha, as per the naming scheme recommended by the expert group convened by the WHO, which also includes scientists from the WHOs Technical Advisory Group on Virus Evolution (TAG- VE). Another variant, called B.1.351 and later renamed as Beta, was found to be linked to a second wave of infections in South Africa. Both these variants were identified as Variants of Concern (VOC) by the WHO on 18.12.2020, meaning that they were variants with genetic changes that would affect virus characteristics such as transmissibility, disease severity or immune escape and through a comparative assessment, are found to be associated with an 37 | P a g e increase of transmission or increase in virulence or decrease in effectiveness of public health measures such as vaccines, therapeutics etc. Soon thereafter, the highly transmissible variant called Gamma was found in Brazil and was identified as a VOC by the WHO on 11.01.2021.28

36. In the first half of 2021, the Delta variant was identified as the predominant variant in India and was believed to be 60 per cent more transmissible than the Alpha variant. Thereafter, Delta rapidly spread beyond the borders to other countries. Another variant, Omicron, surfaced in November, 2021, whose spread was much more accelerated than earlier variants, including that of Delta. On the basis of the evidence available as on 21.01.2022, the WHO was of the opinion that the Omicron has a significant growth advantage over Delta, leading to rapid spread in the community with higher levels of incidence than previously seen in the pandemic. It was further observed that despite a lower risk of severe disease and death following infection, the very high levels of transmission nevertheless have resulted in significant increases in hospitalisation and continue to pose overwhelming demands on health care systems in most 28 Tracking SARS-CoV-2 variants, World

Health Organization, available at https://www.who.int/en/activities/tracking-SARS-CoV-2-variants/ (last accessed on 01.05.2022) 38 | P a g e countries. It was found that because of the 26-32 mutations that it has in the spike protein, Omicron has infected even those who have been previously infected or vaccinated. 29 Though the infections and transmission from Omicron at present within the country are not as serious as they were in the first two months of 2022, expert opinion is to the effect that Omicron might not be the last of the variants, as we have since witnessed.

37. The WHO established the Technical Advisory Group on COVID-19 Vaccine Composition (TAG-CO-VAC) in September, 2021. According to the statement made by the said group on 11.01.2022 in the context of circulation of the Omicron variant, the group reviews and assesses the public health implications of emerging VOCs on the performance of COVID- 19 vaccines and provides recommendations on COVID-19 vaccine composition. The said group is developing a framework to analyse the evidence on emerging VOCs in the context of criteria that would trigger a recommendation to change COVID-19 vaccine strain composition and will advise the WHO on updated vaccine compositions, as required. The group has spelt out in their statement that at present, with 29 Statement by Dr Hans Henri P. Kluge, WHO Regional Director for Europe, 11.01.2011, available at https://www.euro.who.int/en/media-centre/sections/statements/2022/statement-update-on-covid-19-omicron-wave-threatening-to-overcome-health-workforce (last accessed on 01.05.2022) 39 | P a g e the available COVID-19 vaccines, the focus is on reducing severe disease and death, as well as protecting health systems. According to the TAG-CO-VAC, vaccines, which have received WHO Emergency Use Listing across several vaccine platforms, provide a high level of protection against severe disease and death caused by VOCs. The group takes note of data which indicates that vaccine effectiveness will be reduced against symptomatic disease caused by the Omicron variant but at the same time, it was of the opinion that protection against severe disease is more likely to be preserved. Along with the Strategic Advisory Group of Experts on Immunization (SAGE) and its Working Group on COVID-19 vaccines, TAG-CO-VAC has recommended COVID- 19 vaccines for priority populations worldwide to provide protection against severe disease and death globally and, in the longer term, to mitigate the emergence and impact of new VOCs by reducing the burden of infection.30

38. With the outbreak of the devastating pandemic, as many as 5,23,843 lives have been lost in this country, as per the latest data available on the website of the Ministry of 30 Interim Statement on COVID-19 vaccines in the context of the circulation of the Omicron SARS-CoV-2 Variant from the WHO Technical Advisory Group on COVID-19 Vaccine Composition (TAG-CO-VAC), 11.01.2022, available at https://www.who.int/news/item/11-01-2022-interim-statement-on-covid-19-vaccines-in-the-context-of-the-circulation-of-the-omicron-sars-cov-2-variant-from-the-who-technical-advisory-group-on-covid-19-vaccine-composition (last accessed on 01.05.2022) 40 | P a g e Health and Family Welfare (MoHFW). Initially, efforts made by the Government of India were to protect people by arresting serious infection. With treatment protocol and clinical management protocol for COVID-19 being revised periodically as more and more data and research on the virus came to be known, persons affected by the virus were treated with the information that was available at the point. Using whatever little was known about the virus in the initial stages, dedicated

efforts have been made to save countless lives in this country. With the approval of vaccines on an emergency basis in January, 2021, there was some hope about preventing infections from the virus. Inoculation, which commenced slowly in view of the non-availability of sufficient doses of vaccines, gained pace with the increase in manufacture by Respondent Nos. 4 and 5. With the Government embarking upon extensive awareness drives encouraging vaccination, more than 189 crore doses of vaccine have been administered within the country till date, as per the data available on the website of the MoHFW.

39. With the introduction of vaccines, it was understood that vaccines would aid in preventing infections. To protect their populace from infection, countries worldwide promoted 41 | P a g e vaccination as, needless to say, an uninfected person will not transmit the disease. Thereafter, with the mutation of the virus eventually resulting in multiple VOCs, breakthrough infections were noticed. Vaccinated people were found to be infected with the virus and could also act as carriers, transmitting the virus to others. Even in such a situation, there is no question of whether vaccination for COVID-19 should be continued. The recommendations of the WHOs TAG-CO-VAC and SAGE make it amply clear that vaccines, which have received emergency use approvals, provide strong protection against serious illness, hospitalisation and death and getting vaccinated is one of the most crucial steps towards protecting oneself from COVID-19, stopping new variants from emerging and helping end the pandemic. It should be noted that the advice of the WHO with respect to COVID-19 has been consistent since the time vaccines became available, even after recognising that it was still possible to get infected and spread the infection to others despite being vaccinated, as is evident from the latest version of the WHOs COVID-19 advice for the public: Getting vaccinated as of 13.04.2022 31. The Union of India has placed considerable material on record in terms of 31 Available at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/covid-19-vaccines/advice (last accessed on 01.05.2022) 42 | P a g e scientific briefs and published studies which stand testimony to the significance of vaccination as a crucial public health intervention in this pandemic and its continued benefits to individual health as well as public health infrastructure. Vaccination of a majority of the population of this country has undoubtedly been instrumental in preventing severe disease, hospitalisation and deaths, and benefited the community at large, especially those members with co-morbidities, the elderly and sick persons. Even the Petitioner is not opposed to the vaccination programme and does not challenge the vaccination drive of the Government of India, as has been reiterated by him during the course of his arguments. Exception to the vaccination programme taken by the Petitioner is only to coercive vaccination through vaccine mandates, which place unjustifiable restrictions on those who wish to not be vaccinated.

40. In light of the virulent mutations of the COVID-19 virus and advice of experts from the WHO as well as common findings of several studies on this subject, the vaccination drive that is being undertaken by the Government of India in the interest of public health cannot be faulted with. C. Personal autonomy and public health 43 | P a g e

41. Before dealing with the issue of coercive vaccination, it is necessary to consider whether the right of privacy of individuals can override public health, more so, when the submission on behalf of the Respondents is that steps taken to restrict the rights of individuals are in the larger interest of public

health. It is true that to be vaccinated or not is entirely the choice of the individual. Nobody can be forcefully vaccinated as it would result in bodily intrusion and violation of the individuals right to privacy, protected under Article 21 of the Constitution of India. Personal autonomy was read into Article 21 by this Court in Common Cause (supra), by placing reliance on National Legal Services Authority v. Union of India 32, and Aruna Ramachandra Shanbaug (supra). This Court, in Common Cause (supra), emphasized the right of an individual to choose how he should live his own life, without any control or interference by others. It recognised the right of an individual to refuse unwanted medical treatment and to not be forced to take any medical treatment that is not desired. In view of the categoric statement of the Union of India that vaccination of COVID-19 is voluntary, the question of any intrusion into bodily integrity does not arise for consideration in this case. 32 (2014) 5 SCC 438 44 | P a g e However, the Petitioner has asserted that limitations placed on access to public places and public resources for unvaccinated persons result in coercive vaccination, and therefore, limit the right of unvaccinated persons to refuse medical treatment.

42. Disclosure of data of a patient suffering from AIDS was the subject matter of a decision of this Court in X v. Hospital Z33. Placing reliance on Kharak Singh v State of U.P.34, Gobind v. State of M.P.35 and a judgment of the US Supreme Court in Jane Roe v. Henry Wade36, this Court held that though non-disclosure of medical information of an individual can be traced to the right to privacy protected under Article 21, it is not absolute and is subject to action lawfully taken for protection of health or morals or protection of rights and freedoms of others.

43. In Association of Medical Super Speciality Aspirants and Residents v. Union of India 37, to which one of us was a party (L Nageswara Rao, J.), this Court, while considering validity of service bonds to be executed at the time of admission to postgraduate and superspeciality courses in medical science, held as follows: 33 (1998) 8 SCC 296 34 (1964) 1 SCR 332 35 (1975) 2 SCC 148 36 410 US 113 (1973) 37 (2019) 8 SCC 607 45 | P a g e 33. The above discussion leads us to the conclusion that right to life guaranteed by Article 21 means right to life with human dignity. Communitarian dignity has been recognised by this Court. While balancing communitarian dignity vis-à-vis the dignity of private individuals, the scales must tilt in favour of communitarian dignity. The laudable objective with which the State Governments have introduced compulsory service bonds is to protect the fundamental right of the deprived sections of the society guaranteed to them under Article 21 of the Constitution of India. The contention of the appellants that their rights guaranteed under Article 21 of the Constitution of India have been violated is rejected.

44. Strong reliance was placed by the Petitioner on the judgment of the High Court of New Zealand in Ryan Yardley (supra). The principal contention of the applicants therein was that the impugned order, requiring police and defence force personnel to be vaccinated, placed unjustified limitation on the rights protected by the New Zealand Bill of Rights Act 1990 (hereinafter, the NZ Bill of Rights), particularly the right to refuse to undergo medical treatment, the right to manifest religion, the right to be free from discrimination and other rights under Section 28 of the said Act (including the right to work, and of minority groups to enjoy their culture and practice their religion). The purpose of 46 | P a g e the order, as clarified by the Minister by way of an amendment order in February, 2022 is as below:

(a) avoid, mitigate, or remedy the actual or potential adverse effects of the COVID-19 outbreak (whether direct or indirect); and

(b) ensure continuity of services that are essential for public safety, national defence, or crisis response; and

(c) maintain trust in public services.

45. Considering the submissions of the applicants therein that the order placed unjustified limitations on fundamental rights protected by the NZ Bill of Rights, the NZ High Court held that the impugned order limits the right of affected workers to refuse to undergo a medical treatment as well as the right (or significant interest) to retain employment. While examining the question of whether the limitation of the said rights was justified, the NZ High Court noted that the order mandating vaccinations for the police and defence personnel was imposed to ensure the continuity of services that are essential for public safety, national defence, or crisis response, and to promote public confidence in those services, rather than to stop the spread of COVID-19. The NZ High Court further took note of the fact that by October, 2021, 83.1 per cent of police personnel had received at least one or more doses of the vaccination, and 70.1 per cent had received both doses. By the time the order took effect on 47 | P a g e 17.01.2022, there were only 164 unvaccinated staff members in an overall workforce of 15,682 staff. It was found that the position within the New Zealand Defence Forces (NZDF) was similar. From a total of 15,480 NZDF personnel, 3,048 are civil staff. As on 01.02.2022, 99.2 per cent of the regular forces were fully vaccinated, leaving aside 75 members and 98.7 per cent of the civil staff were fully vaccinated, leaving 40 who were not. The NZ High Court was of the view that the relatively low number of unvaccinated police and NZDF personnel impacted by the order may not, by itself, mean that the order was not a reasonable limit on rights that can be demonstrably justified, if there was evidence to establish that the presence of unvaccinated personnel, even in small numbers, created a materially higher risk to the remaining workforce. While observing that the evidence on this issue is sparse, the NZ High Court referred to the evidence of Dr. Petrovsky, who deposed that vaccination has potential benefit in reducing the severity of disease, even with the Omicron variant. However, in his view, mandatory vaccination did not assist in preventing workers in affected roles from contracting COVID- 19, or transmitting it to others. The NZ High Court further considered the evidence of Dr. Town, the Ministrys Chief 48 | P a g e Science Adviser, who, according to the NZ High Court, did not directly respond to Dr. Petrovskys analysis of the effectiveness of the vaccine to inhibit the spread of COVID-19 in a workforce, but instead provided his more generalised opinions. In his evidence, Dr. Town stated that vaccines show reduced effectiveness compared with Delta in terms of becoming infected with and transmitting Omicron.

46. After weighing the evidence, the NZ High Court was of the view that vaccination may still be effective in limiting infection and transmission, but at a significantly lower level than was the case with the earlier variants. It was further concluded that vaccination does not prevent persons contracting and spreading COVID-19, particularly with the Omicron variant. The NZ High Court referred to an earlier judgment in Four Aviation Security Service Employees v. Minister of COVID-19 Response 38, where the precautionary principle had been applied, to make the point that

even a modest vaccination protection on a modest number of personnel needs to be considered in the context of potential effects of a pandemic. The NZ High Court referred to a judgment of the Federal Court of Ontario in 38 [2021] NZHC 3012 49 | P a g e Spencer v. Attorney General of Canada 39 to elaborate on the precautionary principle, as a foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health of the citizens. In Four Aviation Security Service Employees (supra), which dealt with restrictions placed on aviation security workers, the NZ High Court held that even though the applicants therein were not being forcibly treated, they were required to be vaccinated as a condition of their employment, refusal of which led to termination. Observing that a right does not need to be taken away in its entirety before it is regarded as having been limited, the NZ High Court opined that the level of pressure in that case was significant and amounted to coercion, and therefore, the applicants right to refuse to undergo medical treatment was limited. However, the said limitation was held to be justified. From the evidence adduced before the NZ High Court, it concluded that the vaccine was effective at reducing the transmission of the earlier variants of the virus and that it was also effective at reducing symptomatic infection and detrimental effects of the Delta variant. As the applicants were border workers 39 [2021] FC 361 50 | P a g e interacting with international travellers who may be carrying the virus and given the likelihood of vaccines contributing to preventing the risk of transmission, the NZ High Court held that a precautionary approach, in doing everything that can be reasonably done to minimise risk of the outbreak or spread in strong public interest, is justified. Further, the curtailment of the right to refuse to undergo medical treatment was found to be proportionate to the objective, as the applicants, who worked as aviation workers, were situated in a key location where COVID-19 might enter New Zealand.

47. In Ryan Yardley (supra), the NZ High Court held that the principle in Four Aviation Security Service Employees (supra) is not directly applicable as the order was not promulgated to contain the spread of the virus but for the purpose of ensuring continuity of, and confidence in, essential services. Additionally, there was no evidence of a threat to the continuity of the police and NZDF services, which would enable the NZ High Court to give the benefit of the doubt to the New Zealand Crown in imposing measures to address that risk. Placing reliance on the evidence adduced as well as the public health advice which was to the 51 | P a g e effect that vaccine mandates were not considered necessary for addressing the risk of the outbreak or spread of COVID- 19, the High Court made it clear that while vaccination significantly improved the prospects of avoiding illness and death even with the Omicron variant, given the variants propensity to break through vaccination barriers, it concluded that there was no real threat to the continuity of these essential services that the impugned order sought to address. Further, finding that suspension of the unvaccinated would address any potential problems, the terminations arising from the order in light of the temporary, albeit significant, period of peak impact of the infection, were found to be disproportionate and unjustified. While the Petitioner has sought support from this judgment to demonstrate how courts in other jurisdictions have struck down vaccine mandates taking into account Omicrons impact on the effectiveness of vaccines in addressing spread, we believe that this judgment may not be of much assistance to us for determining the issue at hand for two reasons. First, the judgment expressly recognised that the impugned vaccine mandate was not brought about to suppress the spread of the virus but to ensure continuity of, and confidence in, essential services, such as the police and the 52

| P a g e defence personnel, which we are not concerned with in the present case. Second, while the NZ High Court looked into depositions of expert witnesses to come to its own conclusion on efficacy of vaccines vis-à-vis the Omicron variant, the scope of our review does not entail assessment of competing scientific opinions, as the judiciary is not equipped to decide issues of medical expertise and epidemiology.

48. The crucial point that requires to be considered by us is whether limitations placed by the Government on personal autonomy of an individual can be justified in the interest of public health in the wake of the devastating COVID-19 pandemic. As stated, personal autonomy has been recognized as a critical facet of the right to life and right to self-determination under Article 21 of the Constitution, by this Court in Common Cause (supra). In K.S. Puttaswamy (supra), this Court laid down three requirements to be fulfilled by the State while placing restraints on the right to privacy to protect legitimate State interests. It was held:

> 310. The first requirement that there must be a law in existence to justify an encroachment on privacy is an express requirement of Article 21. For, no person can be deprived of his life or personal liberty except in accordance with the procedure established by law. The 53 | P a g e existence of law is an essential requirement. Second, the requirement of a need, in terms of a legitimate State aim, ensures that the nature and content of the law which imposes the restriction falls within the zone of reasonableness mandated by Article 14, which is a guarantee against arbitrary State action. The pursuit of a legitimate State aim ensures that the law does not suffer from manifest arbitrariness. Legitimacy, as a postulate, involves a value judgment. Judicial review does not reappreciate or second guess the value judgment of the legislature but is for deciding whether the aim which is sought to be pursued suffers from palpable or manifest arbitrariness. The third requirement ensures that the means which are adopted by the legislature are proportional to the object and needs sought to be fulfilled by the law. Proportionality is an essential facet of the guarantee against arbitrary State action because it ensures that the nature and quality of the encroachment on the right is not disproportionate to the purpose of the law. Hence, the threefold requirement for a valid law arises out of the mutual interdependence between the fundamental guarantees against arbitrariness on the one hand and the protection of life and personal liberty, on the other. The right to privacy, which is an intrinsic part of the right to life and liberty, and the freedoms embodied in Part III is subject to the same restraints which apply to those freedoms. While the judgment is in context of the right to privacy, the analysis with respect to the threefold requirement for curtailment of such right is on the anvil of the protection guaranteed to fundamental freedoms under Article 21, and 54 | P a g e therefore, would also be the litmus test for invasion of an individuals bodily autonomy under Article 21.

49. The upshot of the above discussion leads to the following conclusions:

> a) Bodily integrity is protected under Article 21 of the Constitution of India and no individual can be forced to be vaccinated.

b) Personal autonomy of an individual involves the right of an individual to determine how they should live their own life, which consequently encompasses the right to refuse to undergo any medical treatment in the sphere of individual health.

c) Persons who are keen to not be vaccinated on account of personal beliefs or preferences, can avoid vaccination, without anyone physically compelling them to be vaccinated. However, if there is a likelihood of such individuals spreading the infection to other people or contributing to mutation of the virus or burdening of the public health infrastructure, thereby affecting communitarian health at large, protection of which is undoubtedly a legitimate State aim of paramount significance in this collective battle against the pandemic, the Government can regulate such public 55 | P a g e health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object sought to be fulfilled.

50. The submission made on behalf of the Petitioner is that the Delta and Omicron variants have shown breakthrough infections and it is clear from the scientific data that, an unvaccinated person does not pose a greater risk than a vaccinated person in terms of transmission of the infection. While this submission has been dealt with subsequently, we believe that as long as there is a risk of spreading the disease, there can be restrictions placed on individuals rights in larger public interest. Further, extensive material from experts has been placed before this Court, which extol the benefits of vaccination in tackling the severe and life- threatening impact of the infection, specifically in terms of reduction in oxygen requirement, hospitalisation, ICU admissions and mortality, thereby easing the disproportionate burden from the upsurge of severe cases on the health infrastructure, which has already been witnessed by the country during the second wave of the pandemic where resources were woefully inadequate to stem the impact of the Delta variant on a then scarcely vaccinated population. We hasten to add that restrictions that are 56 | P a g e placed by the Government should not be unreasonable and are open to scrutiny by constitutional courts. It is difficult for us to envisage the myriad situations in dealing with the evolving pandemic that may call for restraint on individual rights in larger public interest and therefore, as and when such limitations are challenged, they can be assessed by constitutional courts to see whether they meet the threefold requirement laid down in K.S. Puttaswamy (supra). D. Assessment of the vaccine mandates imposed by State Governments

51. The grievance of the Petitioner pertains to the vaccine mandates imposed by various State Governments and private organisations, resulting in restrictions on fundamental freedoms of persons who have chosen not to be vaccinated. The Petitioner has alleged duality in the stand of the Respondents, as on one hand, the Union of India has categorically stated that vaccines are voluntary and on the other, the State Governments have imposed and defended restrictions on access to public places and resources for persons who are unvaccinated. The Petitioner contested the vaccine mandates on the following grounds:

57 | P a g e

(a) Natural immunity acquired from COVID-19 infection is more long-lasting and robust as compared to vaccine immunity.

(b) Serological studies show that more than 75 per cent of the Indian population has already been infected and is seropositive and therefore, has better immunity to the infection than that which can be provided by the vaccine.

(c) Vaccines do not prevent infection from or transmission of COVID-19 and are especially ineffective in preventing against infection from new variants.

52. In support of the above grounds, other than on the aspect of transmission of the virus, the Petitioner has relied on individual opinions of doctors and other advisors, news articles and findings from research studies, some of which are preprints meaning they have not been peer-reviewed and report new medical research which has yet to be evaluated and therefore, should not be used to guide clinical practice, as explained by medRxiv, a platform where several preprint articles in the field of health sciences are published. Some of the material relied on by the Petitioner has been listed below:

58 | P a g e

(a) An article in the scientific journal Nature40, which states that studies have shown that memory plasma cells secreted antibody specific for the spike protein encoded in SARS-CoV-2 even 11 months after the infection and further that, immune memory to many viruses is stable over decades, if not for a lifetime.

(b) A study published in the European Journal of Epidemiology41, which has analysed data from 68 countries available as of 03.09.2021 and has found that at the country level, there appears to be no discernible relationship between percentage of population fully vaccinated and new COVID-19 cases. It is further stated therein that in fact higher percentage of population fully vaccinated have higher COVID-19 per 1 million people.

(c) The United Kingdoms COVID-19 vaccine surveillance report, Week 40, which appears to indicate negative efficacy against infection amongst all ages above 30 years, on the basis of data between week 36 and week 39 in 2021.

40 Andreas Radbruch and Hyun-Dong Chang, A long-term perspective on immunity to Covid Nature 595, 359-360 (2021) 41 Subramanian, S.V., Kumar, A. Increases in COVID-19 are unrelated to levels of vaccination across 68 countries and 2947 counties in the United States Eur J Epidemiol 36, 12371240 (2021) 59 | P a g e

53. While we are aware that courts cannot decide whether natural immunity is more resilient as compared to vaccine- acquired immunity and we do not seek to substitute our own views in matters of differences in scientific opinion, we cannot help but notice that in the first article referred to above, published in Nature, it has been noted that immunity in convalescent individuals (i.e., those who have recovered from COVID-19) can be boosted further by vaccinating them after a year. According to the said article, this results in the generation of more plasma cells, together with an increase in the level of SARS-CoV-2 antibodies that was up to 50 times greater than before

vaccination. In the second article referred to above, published in the European Journal of Epidemiology, it has been mentioned therein that the interpretation of the findings should be as follows: The sole reliance on vaccination as a primary strategy to mitigate COVID-19 and its adverse consequences needs to be re- examined, especially considering the Delta (B.1.617.2) variant and the likelihood of future variants. Other pharmacological and non-pharmacological interventions may need to be put in place alongside increasing vaccination rates. We do not see how these conclusions and interpretations are in favour of an argument that natural 60 | P a g e immunity has proven to be better in protection against COVID-19 infection, as compared to vaccine-acquired immunity.

54. In any event, what we have to assess, in accordance with the law laid down by this Court, is whether the Union of India has taken note of scientific and medical inputs and research findings in putting together its policy advocating vaccination for the entire eligible population. Article 47 of the Constitution of India imposes an obligation on the Union of India to improve public health. It is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health. From the several obligations of the State enshrined in Part IV of the Constitution, maintenance and improvement of public health rank high as these are indispensable to the very physical existence of the community.42

55. It should be noted that the submission made on behalf of the Petitioner championing natural immunity is from the perspective of a healthy person. Even the Petitioner does not dispute the fact that the same standard is not applicable to persons with co-morbidities, the sick and elderly people. A cursory glance at the data recorded in the India Fact Sheet 42 Vincent Panikurlangara v. Union of India (1987) 2 SCC 165 61 | P a g e on the basis of the National Family Health Survey 5 (2019-

21) shows that (i) in the age group of 15-49 years, 57 per cent of women and 25 per cent of men are anaemic, (ii) amongst individuals aged above 15 years, 13.5 per cent of women and 15.6 per cent of men have high or very high blood sugar level or take medicines to control blood sugar level, (iii) amongst individuals aged above 15 years, 21.3 per cent of women and 24 per cent of men have hypertension or elevated blood pressure or take medicines to control blood pressure. Further, as per the 75 th Round National Sample Survey (NSS), conducted from July 2017 to June 2018, the average age of the elderly population in India was 67.5 years, with 67.1 per cent of Indias elderly living in rural areas. A study was conducted 43 on the basis of the data from the NSS, aiming to highlight the vulnerability of the aged amidst the COVID-19 pandemic. According to the study, out of every 100 elderly, 27.7 persons reported ailments during the previous 15 days, with cardiovascular conditions including hypertension (32.0%), endocrine conditions including diabetes (22.5%), musculoskeletal conditions (13.9%), infectious diseases (10.0%), and 43 Ranjan, A., Muraleedharan, V.R. Equity and elderly health in India: reflections from 75th round National Sample Survey, 201718, amidst the COVID-19 pandemic Global Health 16, 93 (2020) 62 | P a g e respiratory ailments (7.3%) being the top five conditions for seeking outpatient care among the elderly in the preceding 15 days. The Constitution, through Article 41, mandates the State to make available to the elderly the right to live with dignity and to provide the elderly, ill and disabled with assistance, medical facilities and geriatric care 44.

56. Surely, the Union of India is justified in centering its vaccination policy around the health of the population at large, with emphasis on insulating the weaker and more vulnerable sections from the risk of severe infection and its consequences, as opposed to basing its decision keeping in mind the interests of a healthy few. Given the considerable material filed before this Court reflecting the near-unanimous views of experts on the benefits of vaccination in dealing with severe disease, reduction in oxygen requirement, hospital and ICU admissions and mortality and stopping new variants from emerging, this Court is satisfied that the current vaccination policy of the Union of India, formulated in the interest of public health, is informed by relevant considerations and cannot be said to be unreasonable. Whether there is contrasting scientific opinion supporting the argument of natural immunity offering better protection 44 Ashwani Kumar v. Union of India (2019) 2 SCC 636 63 | Page against infection from COVID-19 and whether these scientific opinions can be substantiated are not pertinent for determination of the issue before this Court.

57. We now come to the crux of the challenge against coercive vaccine mandates, with respect to which the Petitioner has argued that they amount to restrictions on the fundamental rights of unvaccinated individuals and cannot be said to be proportionate, as according to the Petitioner, with the prevalence of the Omicron variant, unvaccinated people pose no greater danger to the transmission of the virus in comparison to vaccinated persons. It was claimed by the Petitioner that even if the vaccines reduced the severity of the disease, it was up to the individual to decide whether they wanted to be the beneficiary of vaccines. The States lookout was the protection of larger public health and with both the vaccinated and unvaccinated posing nearly equal risks in transmission of the infection to others around them, the State cannot impose restrictions targeting only the unvaccinated and impeding their right to access public resources. The Petitioner has thus, alleged discrimination against the unvaccinated, who in the present situation, are placed more or less on the same footing as vaccinated individuals with respect to the transmission of the virus. In 64 | Page support of his submissions, the Petitioner has relied on scientific studies and reports, some of which are listed below:

(a) A letter published in the Lancet, Regional Health45, which states: In the UK it was described that secondary attack rates among household contacts exposed to fully vaccinated index cases was similar to household contacts exposed to unvaccinated index cases (25% for vaccinated vs 23% for unvaccinated). 12 of 31 infections in fully vaccinated household contacts (39%) arose from fully vaccinated epidemiologically linked index cases. Peak viral load did not differ by vaccination status or variant type.The US Centres for Disease Control and Prevention (CDC) identifies four of the top five counties with the highest percentage of fully vaccinated population (99.984.3%) as high transmission counties. Many decisionmakers assume that the vaccinated can be excluded as a source of transmission. It appears to be grossly negligent to ignore the vaccinated population as a possible and relevant source of transmission when deciding about public health control measures. 45 Gunter Kampf, Letter titled The Epidemiological relevance of the COVID-19 vaccinated population is increasing Lancet Regional Health Vol. 11, 100272, December 01, 2021 65 | Page

(b) A study conducted on breakthrough infection in Massachusetts in July, 2021 and reported in the Morbidity and Mortality Weekly Report46, which investigated 469 COVID-19 cases that had been identified among the Massachusetts residents who had travelled to a town where multiple large public events had been held and 346 cases, i.e., 74 per cent of the infections occurred in fully vaccinated individuals. Findings from the investigation suggest that even jurisdictions without substantial or high COVID-19 transmission might consider expanding prevention strategies, including masking in indoor public settings regardless of vaccination status, given the potential risk of infection during attendance at large public gatherings that include travelers from many areas with differing levels of transmission.

The Petitioner has also cited various news articles reporting instances of breakthrough infections in fully vaccinated people, carrying as much virus as those who were unvaccinated, abroad as well as within India. 46 Brown CM, Vostok J, Johnson H, et al. Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings Barnstable County, Massachusetts, July 2021. MMWR Morb Mortal Wkly Rep 2021;70:1059-1062 66 | Page

58. We have already referred to the material placed by the Union of India and the States appearing before this Court. While there is abundant data to show that getting vaccinated continues to be the dominant expert advice even in the face of new variants, no submission nor any data has been put forth to justify restrictions only on unvaccinated individuals when emerging scientific evidence appears to indicate that the risk of transmission of the virus from unvaccinated individuals is almost on par with that from vaccinated persons. To put it differently, neither the Union of India nor the State Governments have produced any material before this Court to justify the discriminatory treatment of unvaccinated individuals in public places by imposition of vaccine mandates. No doubt that when COVID-19 vaccines came into the picture, they were expected to address, and were indeed found to be successful in dealing with, the risk of infection from the variants in circulation at the time. However, with the virus mutating, we have seen more potent variants surface which have broken through the vaccination barrier to some extent. While vaccination mandates in the era of prevalence of the variants prior to the Delta variant may have withstood constitutional scrutiny, in light of the data presented by the Petitioner, which has not been 67 | Page controverted by the Union of India as well as the State Governments, we are of the opinion that the restrictions on unvaccinated individuals imposed through vaccine mandates cannot be considered to be proportionate, especially since both vaccinated and unvaccinated individuals presently appear to be susceptible to transmission of the virus at similar levels.

59. Details of the vaccine mandates passed by the States of Maharashtra, Tamil Nadu, Madhya Pradesh and Delhi have been discussed earlier. It has come to our knowledge that since the judgment in this matter was reserved, the National Disaster Management Authority took a decision that there may not be any further need to invoke provisions of the DM Act for COVID-19 containment measures, taking into consideration the overall improvement in the situation. Further, the States of Maharashtra and Tamil Nadu, taking into account the present situation in which near-normalcy has been restored, have rolled back the restrictions placed on unvaccinated persons. The State of Madhya Pradesh had withdrawn the restrictions imposed on unvaccinated individuals in terms of withholding distribution of food grains from fair price shops and had notified this Court of the same during the hearing. Till the infection rate and spread 68 | Page remains low, as it is currently, and any new development or research finding comes to light which provides the

Government due justification to impose reasonable and proportionate restrictions on the rights of unvaccinated individuals in furtherance of the continuing efforts to combat this pandemic, we suggest that all authorities in this country, including private organisations and educational institutions, review the relevant orders and instructions imposing restrictions on unvaccinated individuals in terms of access to public places, services and resources.

60. While we appreciate that it is the domain of the executive to determine how best to encourage vaccination without unduly encroaching into the fundamental rights of unvaccinated individuals, we wish to highlight the mechanism of the health pass employed in France, as an apt example of a proportionate measure intended to cope with the perils of the spread of the virus. We understand that a health pass may take the form of either the results of a viral screening test not concluding that a person has been infected with COVID-19, or proof of vaccination status, or a certificate of recovery following an infection. In a referral by the Prime Minister to review the law on managing the public health state of emergency, the Constitutional 69 | Page Council in France, in Decision no. 2021-824 DC dated 05.08.2021, determined that the health pass did not infringe the right to personal privacy guaranteed by Article 2 of the Declaration of Human and Civic Rights of 1789 as the requirement did not introduce an obligation to vaccinate.

61. Having expressed our opinion on the vaccine mandates in the prevailing context, we reiterate that vaccines effectively address severe disease arising from COVID-19 infections, are instrumental in reducing oxygen requirement, hospital and ICU admissions and mortality and continue to be the solution to stopping new variants from emerging, as per the advice of the WHO. Since the time arguments were heard in the matter, we have come to know of more variants that have now come into circulation. Given the rapidly- changing nature of the virus and the clear purpose served by the approved vaccines in terms of restoration and protection of public health, our suggestions with respect to review of vaccine mandates are limited to the present situation alone. This judgment is not to be construed as impeding, in any manner, the lawful exercise of power by the executive to take suitable measures for prevention of infection and transmission of the virus in public interest, which may also take the form of restrictions on unvaccinated people in the 70 | Page future, if the situation so warrants. Such restrictions will be subject to constitutional scrutiny to examine if they meet the threefold requirement for intrusion into rights of individuals, as discussed earlier.

II. Non-disclosure of segregated clinical trial data in public domain

62. It is the complaint of the Petitioner that the COVID-19 vaccines, manufactured by Respondent Nos. 4 and 5, have been given restricted emergency approval by the Drugs Controller General of India (DCGI) in a hurried and opaque manner. Mr. Bhushan argued that clinical trials in respect of the vaccines had not been completed and at present, the vaccines are only authorised for emergency use. According to the Petitioner, while clinical trials are scheduled to be completed in the year 2023, even the full dataset from the interim analysis conducted has not been made public. The disclosure of segregated data of clinical trials is essential to determine the adverse effects, if any, across various age groups and diverse populations and accordingly, enable individuals to make more informed decisions on whether to be vaccinated. Reliance was placed on an order of this Court in Aruna Rodrigues (4) v. Union of India 47 and a 47 (2011) 12 SCC 481 71 | Page judgment of the Delhi

High Court dated 15.01.2019 in W.P. (C) No. 343 of 2019 titled Master Hridaan Kumar (minor) v. Union of India with respect to the importance of disclosure of relevant technical data and informed consent. Additionally, the last amended version of the Declaration of Helsinki Ethical principles from medical research involving human subjects (hereinafter, the Declaration of Helsinki) and a statement by the WHO dated 09.04.2015 on public disclosure of clinical trial results (hereinafter, the WHO Statement on Clinical Trials) were pressed into service to establish the significance of disclosure of data of clinical trials, so as to enable the data to be assessed independently, and not only by the vaccine manufacturer who has a commercial interest in production of the vaccines. Mr. Bhushan submitted that there would be no invasion of privacy of individuals, if personal identification data and past medical history of the trial participants was redacted and the raw data pertaining to clinical trials is made public. The further grievance of the Petitioner pertained to lack of transparency in regulatory approvals, minutes of meetings and constitution of expert bodies. The Petitioner has sought for clear detailing of the information furnished before, and evidence relied on by, the expert bodies such as the NTAGI 72 | P a g e and the Subject Expert Committee (SEC), the body which sends recommendations to the Central Drugs Standard Control Organisation, while deliberating on the applications and data of the vaccine manufacturers, and the names and institutional relationships of the experts who participated in each of these meetings. Mr. Bhushan relied on the 59 th Report of the Parliamentary Standing Committee on Health and Family Welfare, in support of his submission on a need for transparency in the decision-making of the CDSCO and other regulatory authorities.

63. In response, the Union of India submitted that the procedure prescribed under the statutory regime was scrupulously followed before granting emergency approval of the vaccines manufactured by Respondent Nos. 4 and 5. As per the extant statutory regime, permission to import or manufacture new drugs including vaccines or to undertake clinical trials is granted by the Central Drugs Standard Control Organisation (CDSCO). The CDSCO, in consultation with the SEC, evaluates the applications for grant of such permission, which are to be accompanied with data as required under the Second Schedule to the New Drugs and Clinical Trials Rules, 2019 (hereinafter, the 2019 Rules) framed under the Drugs and Cosmetics Act, 1940. The SEC 73 | P a g e is a statutory body, constituted by the CDSCO under Rule 100 of the 2019 Rules, comprising group of experts with specialisation in relevant fields. According to the Union of India, the SEC looks into the details of trials and results presented before it and examines them, interacts with the developers of the vaccines and gives them appropriate directions and eventually makes recommendations in writing, by way of a resolution, reflecting the collective opinion of all the domain experts. We were informed that the trials have been registered on the database of the Clinical Trials Registry India, which is hosted at the ICMRs National Institute of Medical Statistics. The provisions in relation to Accelerated Approval Process under the Second Schedule to the 2019 Rules were pointed out to this Court, which stipulate that accelerated approval process may be allowed to a new drug for a disease or condition taking into account its severity, rarity, or prevalence and the availability or lack of alternative treatments, provided that there is a prima facie case of the product being of meaningful therapeutic benefit over the existing treatment. It is further stated that After granting accelerated approval for such drug, the post marketing trials shall be required to validate the anticipated clinical benefit . It was submitted that applying these provisions on 74 | P a g e Accelerated Approval Process, the CDSCO, in detailed consultation with the SEC and after examining the efficacy of the

vaccine and its effects, granted permission for restricted emergency use of COVAXIN and COVISHIELD, as manufactured by Respondent Nos. 4 and 5, respectively.

64. As regards COVAXIN (Whole Virion Inactivated Corona Virus Vaccine), the Union of India stated that application for permission to manufacture the vaccine was made by Bharat Biotech on 23.04.2020. The CDSCO, in consultation with the SEC, granted permission to Bharat Biotech for conducting Phase I/II clinical trials on 29.06.2020 and Phase III clinical trials on 23.10.2020. Respondent No. 4 submitted interim safety and immunogenicity data of Phase I and Phase II clinical trials carried out in the country, along with safety data, including Serious Adverse Events data, of the ongoing Phase III clinical trial in the country. The data provided by Respondent No.4 from the various phases were evaluated and analysed by the SEC, which consisted of eminent experts from the fields of microbiology, medicine, pulmonary medicine, paediatrics and immunology and immunogenetics. The resolutions of the various meetings of the SEC, which also required the presence of the developer / manufacturer with the necessary information, have been put up on the 75 | P a g e website of the MoHFW at every stage. In its meeting dated 02.01.2021, observing that on receiving further updated data, justification and request for consideration of the proposal in the wake of a new mutation of the COVID-19 virus, and on recognising that the data generated till then showed that the vaccine had the potential to target mutated coronavirus strains, the SEC recommended for grant of permission for restricted use in emergency situation in public interest in clinical trial mode, as an abundant precaution. While granting such permission, Respondent No. 4 was directed to continue the ongoing Phase III clinical trial and submit data from the trial, as and when available. Approval for restricted use in emergency situation in clinical trial mode with various conditions / restrictions was granted by the CDSCO to Respondent No. 4 to manufacture COVAXIN on 03.01.2021.

65. Thereafter, Respondent No. 4 submitted the interim safety and efficacy data of Phase III clinical trial, which was reviewed by the SEC in meetings held periodically. In its meeting conducted on 10.03.2021, the SEC, after detailed deliberation on the updated interim safety and efficacy data of the phase III clinical trial, recommended omission of the condition of the use of the vaccine in clinical trial mode.

76 | P a g e However, it was recommended that the vaccine be continued to be used under restricted use in emergency situation condition. Following expansion of the Governments vaccination drive to include individuals in the age group of 18-45 years, in its meeting held on 23.04.2021, the SEC considered Bharat Biotechs proposal to unblind the trial participants in the said age group. After detailed deliberations, the SEC recommended the unblinding of the participants in the said age group, upon the request of the participants or the principal investigator after completion of two months from the second dose. Eventually, on consideration of relevant data of Phase I and Phase II clinical trials along with safety data of 6 months Phase III clinical trial, including data of serious adverse events till the date, the SEC in its meeting dated 19.01.2022 noted that there had been no safety issues and the vaccine maintained its efficacy, specially to avoid hospitalisation and severe infections in the existing situation as well. Accordingly, the SEC recommended that the status of approval of COVAXIN from the restricted use in emergency situation to the New Drug permission be updated, along with the condition that the firm shall continue to submit data of ongoing clinical

trial and monitor AEFIs. The Union of India pointed out that 77 | P a g e Phase I and Phase II clinical trial reports were published in the Lancet Infectious Diseases Journal, which was publicly available. Further, to the knowledge of the Union of India, Phase III trial publication had been submitted to the Lancet journal by Respondent No. 4 on 02.07.2021, a copy of the manuscript of which has been provided to this Court.

66. COVISHIELD (ChAdOx1 nCoV-19 Corona Virus Vaccine (Recombinant)) manufactured by Respondent No. 5 was developed by the Serum Institute of India in collaboration with Oxford University and AstraZeneca under technology transfer. As the clinical development of the said vaccine, including Phase I clinical trial, was conducted in other countries, Phase II / III clinical trials were conducted by Respondent No. 5 in the country. Application for permission to manufacture COVISHIELD for test, examination and analysis was first made by Respondent No. 5 on 03.05.2020. The safety, immunogenicity and efficacy data of Phase II / III clinical trials of the AstraZeneca vaccine carried out in the United Kingdom, Brazil and South Africa were submitted to the SEC, along with the safety and immunogenicity data from the ongoing Phase II / III clinical trials in India. On reviewing this data as well as the approval dated 30.12.2020 granted by the United Kingdoms Medicines and Healthcare Products 78 | P a g e Regulatory Authority (hereinafter, the UK-MHRA) for the AstraZeneca vaccine along with its conditions / restrictions, the SEC, in its meeting dated 01.01.2021, noted that the safety and immunogenicity data from the Indian study was comparable with that of the overseas clinical trial data. After detailed deliberation and taking into account the emerging situation, the SEC recommended grant of permission for restricted emergency use of the vaccine, subject to various regulatory provisions and conditions, including requirement to submit relevant data from the ongoing clinical trials nationally and internationally at its earliest. Eventually, in its meeting dated 19.01.2022, the SEC considered the request of Respondent No. 5 to grant permission to manufacture the vaccine, excluding the conditions for restricted use in emergency situation and other conditions, on the lines of Marketing Authorisation by the UK-MHRA for the parent vaccine. After detailed deliberation and consideration of safety, immunogenicity and efficacy data from Indian and overseas clinical trials, amongst other data, the SEC recommended grant of New Drug permission or regular approval, with conditions that data of ongoing clinical trials and vaccine shall continue to be supplied and AEFIs shall continue to be monitored.

79 | P a g e

67. We were directed to Rule 25 of the 2019 Rules, framed under the Drugs and Cosmetics Act, 1940, which provides that the clinical trial shall be conducted in accordance with approved clinical trial protocol and other related documents as per the requirements of Good Clinical Practices (GCP) guidelines and the other rules. The expert committee set up by the CDSCO under Rule 25(vi) in consultation with clinical experts formulated the GCP guidelines for generation of data on drugs. The Ethical Principles, which are part of the said guidelines, protect principles of privacy and confidentiality of human subjects of research. The learned Solicitor General also relied upon para 2.4.4 of the GCP guidelines, which require safeguarding of the confidentiality of research data that might lead to identification of individual subjects. He further referred to the important role played by the Ethics Committee under Rule 11 of the 2019 Rules, which includes safeguarding the rights,

safety and well-being of trial subjects in accordance with the said rules. The 2019 Rules also empower the Ethics Committee to discontinue or suspend the clinical trial in case it concludes that the trial is likely to compromise the right, safety or well-being of the trial subject. As per the ICMRs National Ethical Guidelines 80 | Page for Biomedical and Health Research involving Human Participants, the four basic ethical principles for conducting biomedical and health research are (i) respect for persons (autonomy), (ii) beneficence, (iii) non-malfeasance and (iv) justice. These four basic principles have been expanded into 12 general principles, including the principle of ensuring privacy and confidentiality which requires maintaining the privacy of potential participants, her / his identity and records, with access given to only those authorised. As regards transparency of functioning of expert bodies, it was submitted by the Union of India that recommendations of the SEC in all its meetings are uploaded on the website of the CDSCO. Additionally, the detailed minutes of NTAGI meetings were already available in public domain, which can be downloaded from both the ICMR and the MoHFW websites.

68. The contention of Respondent No. 4 is that COVAXIN has undergone all clinical trials. In Phase III, trials revealed a 77.8% efficacy against symptomatic COVID-19 disease. The findings of the clinical trials have been published in reputed peer-reviewed journals and are readily available on the website of Respondent No.4. A reference was made by Respondent No. 4 to the WHO Statement on Clinical Trials, to submit that it is only the key outcomes and findings which 81 | Page are required to be made publicly available. It was contended that Respondent No. 4 is in compliance with the WHO Statement on Clinical Trials as the key outcomes and results of the Phase III clinical trial have been published in the Lancet. On behalf of Respondent No. 5, it was submitted that the clinical data generated during the trials had been submitted to the regulatory authorities for obtaining permissions / licences etc. Further, the peer-reviewed study of the partial clinical data of Phase II / III trials had already been published in reputed scientific journals, which included all the information necessary for safeguarding the public as well as informing them of the credibility and efficacy of the vaccine. According to Respondent No. 5, the raw data of the clinical trials served no greater public purpose than the data which was already available in the public domain. All applicable medico-legal, scientific and ethical requirements had been strictly adhered to by Respondent No. 5.

69. In rejoinder, the learned counsel for the Petitioner argued that there is no transparency in the process of approvals of vaccines and relevant data is not always placed before the NTAGI. He referred to a news article in The Wire, according to which Jayaprakash Muliyil, a member of the NTAGI had stated that the NTAGI had not recommended 82 | Page vaccination of children in the age group of 12-14 years. He also drew the attention of this Court to non-supply of relevant data to the NTAGI at the time of approval of the Rotavac vaccine against rotavirus. The Petitioner further complained of the haste shown in grant of emergency approval to Respondent No. 4. The Petitioner has sought support of a decision of the United States District Court for the Northern District of Texas dated 06.01.2022 in Public Health and Medical Professionals for Transparency v. Food and Drug Administration, which highlighted the need for transparency in disclosure of clinical trial data. It was reiterated by the Petitioner that privacy of individuals would not be at risk as their personal identification data can be redacted before disclosing segregated data of clinical trials.

70. It is settled law that courts cannot take judicial notice of facts stated in a news item published in a newspaper. A statement of fact contained in a newspaper is merely hearsay and therefore, inadmissible in evidence, unless proved by the maker of the statement appearing in court and deposing to have perceived the fact reported. 48 In the absence of anything on record in the present case to substantiate the statement made by Mr. Jayaprakash Muliyil, 48 Laxmi Raj Shetty v. State of Tamil Nadu (1988) 3 SCC 319 83 | P a g e member of the NTAGI, we are not inclined to take judicial notice of the news article reported in The Wire, even more so in light of the affidavit filed on behalf of the Union of India stating that the relevant data was examined by the expert bodies at all stages before granting emergency use approval to the vaccines. We are also of the opinion that the evidence relating to the approval process of the Rotavac vaccine has no relevance to the dispute in this case. On the basis of the said two incidents, it cannot be concluded that the emergency use approval to COVISHIELD and COVAXIN recommended by the SEC are not in accordance with the statutory regime.

71. At this stage, it is worthwhile to refer to the statutory regime in place. According to Rule 19 of the 2019 Rules, no person, institution or organisation shall conduct clinical trial of a new drug or investigational new drug, except in accordance with the permission granted by the Central Licensing Authority (i.e., the CDSCO) and without following the protocol approved by the Ethics Committee for clinical trial, registered in accordance with the provisions of Rule 8. Rule 19 (2) of the 2019 Rules provides that every person associated with the conduct of clinical trial of a new drug or investigational new drug shall follow the general principles 84 | P a g e and practices as specified in the First Schedule. The methodology to be adopted in a clinical trial is provided for in the First Schedule to the 2019 Rules, relevant clauses of which are as under: -

> GENERAL PRINCIPLES AND PRACTICES FOR CLINICAL TRIAL
>
> 1. General Principles. (1) The principles and guidelines for protection of trial subjects as described in Third Schedule as well as Good Clinical Practices guidelines shall be followed in conduct of any clinical trial. xxx
>
> 4. Conduct of Clinical Trial. Clinical trial should be conducted in accordance with the principles as specified in Third Schedule. Adherence to the clinical trial protocol is essential and if amendment of the protocol becomes necessary the rationale for the amendment shall be provided in the form of a protocol amendment. Serious adverse events shall be reported during clinical trial in accordance with these Rules.

xxx

6. Reporting. Report of clinical trial shall be documented in accordance with the approaches specified in Table 6 of the Third Schedule. The report shall be certified by the principal investigator or if no principal investigator is designated then by each of the participating investigators of the study. It is clear from the above, that there are stringent statutory requirements which have to be complied with by the manufacturers of vaccines and other participants, during different stages of clinical trials of vaccines. Further, we also 85 | P a g e note that the GCP guidelines are statutorily

required to be followed.

72. The GCP guidelines further elaborate on the role of the Ethics Committee. According to the GCP guidelines, the Ethics Committee is an independent review board or a committee comprising of medical / scientific and non-medical / non-scientific members, whose responsibility it is to verify the protection of the rights, safety and well-being of human subjects involved in a study. The independent review provides public reassurance by objectively, independently and impartially reviewing and approving the Protocol, the suitability of the investigator(s), facilities, methods and material to be used for obtaining and documenting Informed Consent of the study subjects and adequacy of confidentiality safeguards. Para 2.4 of the GCP guidelines deal with ethical and safety considerations, which provide that all research involving human subjects should be conducted in accordance with the ethical principles contained in the current version of the Declaration of Helsinki, as annexed to the guidelines. Amongst the principles to be followed, the GCP guidelines require adherence to the principles of accountability and transparency and principles of public domain:

86 | Page Principles of accountability and transparency, whereby the research or experiment will be conducted in a fair, honest, impartial and transparent manner, after full disclosure is made by those associated with the Study of each aspect of their interest in the Study, and any conflict of interest that may exist; and whereby, subject to the principles of privacy and confidentiality and the rights of the researcher, full and complete records of the research inclusive of data and notes are retained for such reasonable period as may be prescribed or considered necessary for the purposes of post-research monitoring, evaluation of the research, conducting further research (whether by the initial researcher or otherwise) and in order to make such records available for scrutiny by the appropriate legal and administrative authority, if necessary. xxx Principles of public domain, whereby the research and any further research, experimentation or evaluation in response to, and emanating from such research is brought into the public domain so that its results are generally made known through scientific and other publications subject to such rights as are available to the researcher and those associated with the research under the law in force at that time.

73. The GCP guidelines have been formulated following the Declaration of Helsinki. The relevant portion of the said Declaration is as follows:-

> Privacy and Confidentiality
>
> 24. Every precaution must be taken to protect the privacy of research subjects and the confidentiality of their personal information.

87 | Page Research Registration and Publication and Dissemination of Results

36. Researchers, authors, sponsors, editors and publishers all have ethical obligations with regard to the publication and dissemination of the results of research. Researchers have a duty to make publicly available the results of their research on human subjects and are accountable for the completeness and accuracy of their reports. All parties should adhere to accepted guidelines for

ethical reporting. Negative and inconclusive as well as positive results must be published or otherwise made publicly available. Sources of funding, institutional affiliations and conflicts of interest must be declared in the publication. Reports of research not in accordance with the principles of this Declaration should not be accepted for publication. It is profitable to refer to the relevant portion of the WHO Statement on Clinical Trials, which is as under: -

> Reporting timeframes for clinical trials Clinical trial results are to be reported according to the timeframes outlined below. Reporting is to occur in BOTH of the following two modalities.
>
> 1. The main findings of clinical trials are to be submitted for publication in a peer reviewed journal within 12 months of study completion and are to be published through an open access mechanism unless there is a specific reason why open access cannot be used, or otherwise made available publicly at most within 24 months of study completion.

2. In addition, the key outcomes are to be made publicly available within 12 months of study completion by posting to the results section of the primary clinical trial 88 | P a g e registry. Where a registry is used without a results database available, the results should be posted on a free-to-access, publicly available, searchable institutional website of the Regulatory Sponsor, Funder or Principal Investigator.

74. The GCP guidelines are being scrupulously followed, according to the Union of India. The principles of public domain in the GCP guidelines provide for research, experimentation or evaluation in response to the research to be brought into the public domain. The results of the clinical trials are generally to be made known through scientific and other publications. The requirement of publication, according to the WHO, also relates to the main findings of clinical trials to be published in a peer-reviewed journal and the key outcomes to be made publicly available, within 12 months of study completion. The Petitioner complains of opaqueness in clinical trials as the general public do not have access to, and the opportunity to be aware of, all the necessary details by segregated clinical trial data (primary datasets) not being available. There is no challenge by the Petitioner to the GCP guidelines. As required by the WHO Statement on Clinical Trials and the GCP guidelines, findings of the clinical trials and the key outcomes of the trials have been published. In light of the existing statutory regime, we do not see it fit to 89 | P a g e mandate the disclosure of primary clinical trial data, when the results and key findings of such clinical trials have already been published.

75. After examining the judgment of the United States District Court for the Northern District of Texas (hereinafter, the US District Court), we are afraid that the said decision cannot be said to be relevant for adjudication of the dispute in the present case. The grievance of the plaintiff in the said case pertained to all data and information for the Pfizer vaccine, enumerated under the relevant provisions of the Freedom of Information Act, not being provided by the United States Food and Drug Administration. The US District Court referred to the Freedom of Information Act to hold that the citizenry has a right to be provided with the relevant information pertaining to the Pfizer vaccine

and that such information is often useful only if it is timely. The US District Court directed expeditious completion of the plaintiffs request after concluding that the request under the Freedom of Information Act was of paramount importance. We note that with respect to COVAXIN and COVISHIELD, results of clinical trials have been published in accordance with our statutory regime in place. Reliance placed by the Petitioner on European Medicines Agency policy on 90 | P a g e publication of clinical data for medicinal products for human use is also not relevant as the GCP guidelines relating to the disclosure of clinical trial data, framed under the 2019 Rules, currently govern the field of disclosure of clinical trial data in India.

76. An analysis of the submissions made by the learned counsel appearing for the parties and a close scrutiny of the material placed on record would show that there is a strict statutory regime in force for grant of approvals to vaccines. Specialist bodies established under the provisions of the Drugs and Cosmetics Act, 1940 and the rules framed thereunder comprise of domain experts in the relevant field, who conduct a thorough scrutiny of the material produced by the manufacturers before granting approval. The information provided on behalf of the Union of India substantiates that the data provided by the vaccine manufacturers was considered by the SEC over a period of time and several conditions were imposed at the time of recommending approvals, which have been modified or lifted subsequently on availability of further data arising from the clinical trials before the SEC, as can be seen from the minutes of the meetings of the SEC, available on the website of the MoHFW.

91 | P a g e We do not agree with the submission on behalf of the Petitioner that emergency approvals to the vaccines were given in haste, without properly reviewing the data from clinical trials. We are also of the opinion that the Parliamentary Standing Committee report relied upon by Mr. Bhushan is not relevant and the lapses pointed out therein pertain to the year 2011, which have no obvious connection to the grant of approval to Respondent Nos. 4 and 5 for the restricted emergency use of their respective vaccines. As long as the relevant information relating to the minutes of the meetings of the regulatory bodies and the key outcomes and findings of the trials are available in public domain, the Petitioner cannot contend that every minute detail relating to clinical trials be placed in public domain to enable an individual to take an informed, conscious decision to be vaccinated or not. Given the widespread affliction caused by the virus, there was an imminent need of manufacturing vaccines which would keep the infection at bay. We would like to highlight that both the vaccines have been approved by the WHO as well. A perusal of the material placed on record would show that there is material compliance with the procedure prescribed under the Drugs and Cosmetics Act, 1940 and the 2019 Rules, before grant of approval for the 92 | P a g e emergency use of the two vaccines. However, it is made clear that subject to the protection of privacy of individual subjects and to the extent permissible by the 2019 Rules, the relevant data which is required to be published under the statutory regime and the WHO Statement on Clinical Trials shall be made available to the public without undue delay, with respect to the ongoing post-marketing trials of COVAXIN and COVISHIELD as well as ongoing clinical trials or trials that may be conducted subsequently for approval of other COVID- 19 vaccines / vaccine candidates.

III. Improper collection and reporting of AEFIs

77. The contention of the Petitioner is that there have been several adverse effects from vaccines, including deaths. The Petitioner has sought to fault the Governments mechanisms in place for handling of the adverse events. According to the Petitioner, during Phase III trials, where small controlled trials of a limited number of participants are conducted, a significant increase in adverse events may not be seen. But after licensure, when the vaccines are administered to the masses, rare reactions show up, which is why Phase IV post-marketing trials are legally mandated. It was pointed out by the Petitioner that there has been a 93 | P a g e revision of the rules by the WHO for classifying AEFIs in 2018. As per the revised mechanism, only reactions that are previously acknowledged to be caused by the vaccine are classified as vaccine-related reactions. Reactions observed during post-marketing surveillance are not considered as consistent with causal association with vaccine, if a significant increase in such reactions during Phase III trials had not been recorded. According to the Petitioner, this acquires significance in the context of trials conducted in this country, as the control trial in Phase III did not go on in the manner intended, with several members of the original control group prematurely unblinded and offered the vaccine. The Petitioner contends that owing to dilution of Phase III control trials prematurely, there are no controls to compare against, making it difficult to ascertain which adverse events are caused by the vaccine. Therefore, reactions which are not known reactions to the vaccine are not considered AEFIs. In light of this, it is necessary for the authorities to carefully monitor all vaccine recipients and publicly record all adverse events.

78. Taking this argument further, the Petitioner contended that the adverse events reporting system in India is not transparent, with obscure investigation and follow-up of 94 | P a g e deaths and other serious adverse events after COVID-19 vaccination. The Petitioner relied on a letter published in The Hindu on 17.03.2021, written by a group of experts in public health, ethics, medicine, law, and journalism to the Minister for Health & Family Welfare and the DCGI, appealing for time-bound and transparent investigation following deaths and serious adverse effects after COVID-19 vaccination. A presentation made by the National AEFI Committee in a meeting held on 31.03.2021 was referred to by the Petitioner to claim that complete documentation was not available for all the severe and serious adverse events (including deaths) that had occurred till the time. Additionally, it was contended that no data pertaining to the AEFIs already classified nor any analysis of the same had been published publicly till date. The Petitioner also drew the attention of this Court to the Vaccine Adverse Event Reporting System (VAERS) in place in the United States, which published all vaccine injury reports every Friday, received till about a week prior to the release date. It was brought to the notice of this Court that 77,314 adverse events have been reported in India as on 12.03.2022, amounting to 0.004% of the total vaccination. The Petitioner has pointed out that the percentage of adverse events 95 | P a g e reported in Europe is much larger than the percentage identified in India, which would show that correct figures are not being published by the Government.

79. On behalf of the Union of India, the procedures and protocols for monitoring of adverse event following immunisation under the National Adverse Event Following Immunisation Surveillance Guideline were elaborated upon. The National Adverse Event Following Immunisation Surveillance Secretariat, established in the Immunisation Technical Support Unit in 2012, had staff dedicated for managing Adverse Event Following Immunisation surveillance system. It was further strengthened

by the National Adverse Event Following Immunisation Surveillance Technical Collaborating Centre, comprising of experts from Lady Hardinge Medical College and Allied Hospitals in New Delhi. Adverse Event Following Immunisation Committees were formed at the national and state levels to provide guidance to the National AEFI Surveillance and carry out documentation, investigation and causality assessment, besides training and orientation of health care workers and others involved in AEFI. According to the Union of India, a foolproof protocol for reporting and causality assessment for any AEFI with Universal Immunisation Program (UIP) and 96 | P a g e Non-UIP vaccines has been established. The National AEFI Committee gets periodical reports regarding minor AEFIs, severe AEFIs and serious AEFIs. Online reporting of all serious and severe AEFIs at the district level to be communicated to relevant authorities at the state / national level is done on a web-based portal, SAFEVAC (Surveillance and Action for Events Following Vaccination). All serious and severe adverse events following vaccination even at district level are uploaded online on SAFEVAC. It was submitted on behalf of the Union of India that case details, scanned copies of reports are uploaded on SAFEVAC, which also has facilities for generating dashboards and line-lists at different levels.

80. Further, a similar feature of reporting of all AEFIs (including minor) by the vaccinator was made available on the Co-WIN portal. District Immunisation Officers (DIOs) were given the facility to report AEFI cases about which they have information from such individuals who do not have access to Co-WIN. Departmental orders and standard operating procedures have been issued for further investigations and sharing of hospital records by the DIOs through Co-WIN. The Union of India has brought to the notice of this Court that an alignment with the Pharmacovigilance Programme of India (PvPI) under Indian 97 | P a g e Pharmacopoeia Commission has been developed for receipt of information regarding AEFI cases from around 300 Adverse Drug Reaction Monitoring Centers in medical colleges and large hospitals. The Union of India has highlighted that information from the PvPI and the CDSCO are collated and studied, in case of any new, previously unknown events identified through AEFI surveillance. A press release of the MoHFW dated 17.02.2017 titled Maximum Possible Marks to Indian NRA in WHO Assessment has been placed before this Court to state that the AEFI Surveillance System in India (which is in use for COVID-19 vaccination) has been approved by global experts in an assessment conducted by the WHO in 2017. Given the novel nature of the virus, membership of the National AEFI Committee has been expanded to include neurologists, cardiologists, respiratory medicine specialists and medical specialists, with even States / Union Territories requested to expand their AEFI Committees on a similar scale to strengthen AEFI surveillance for COVID-19 vaccines. Causality assessment of AEFI cases is conducted at the state and the national levels by experts trained as per the causality assessment checklist, based on the definition and algorithm developed by the WHO. Once approved by experts of the National AEFI Committee, results of causality 98 | P a g e assessment of AEFI cases are made available in the public domain and are shared with the CDSCO, amongst other authorities, for appropriate regulatory action.

81. As regards the present status of AEFI surveillance for COVID-19 vaccination, it was submitted that as the causality assessment of reported AEFI cases is a time-consuming process, a method of rapid review and assessment had been initiated at the national level to quickly review available information in each case and look for trends in reporting of specific events or unusual cases

requiring further early investigation and assessment. All cases of serious and severe AEFIs, including reported deaths, are subjected to rapid reviews, analysis and causality assessment done by a team of trained subject experts. It was clarified that mere reporting of AEFI case should not be attributed to the vaccine unless proved by the causality assessment analysis. The National Expert Group on Vaccine Administration for COVID- 19 (NEGVAC), an additional body of experts, is also involved in providing guidance on vaccine safety and surveillance, thus, aiding in the prompt identification of AEFIs for the purpose of identifying and understanding evolving trends in the disease and taking prompt action. 2,116 serious and severe AEFIs have been reported from 1,19,38,44,741 doses 99 | P a g e of COVID-19 vaccine administered till 24.11.2021. While a report of rapid review and analysis completed for 495 cases had been submitted, a further report of 1,356 serious and severe AEFI cases had been presented to the NEGVAC and the rapid review and analysis of balance cases was underway. Press releases around a report on bleeding and clotting events following COVID-19 vaccination being submitted to the MoHFW by the National AEFI Committee and on clarification on deaths following vaccination and process of causality assessment were placed before this Court. Therefore, the Union of India submitted that there was continuous monitoring and examination of AEFI cases in India and there is no basis for the allegations around AEFIs not being properly collected and lack of transparency in their investigation.

82. From the material placed before us, we note that the National AEFI Surveillance Secretariat has been functioning for 10 years and as has been pointed out, there is a well- established protocol in place for identification and monitoring of AEFIs. The website of the MoHFW carries the results of causality assessment of AEFI cases, from which the public can obtain relevant information pertaining to AEFIs. We have been informed that a thorough causality assessment analysis 100 | P a g e of AEFIs is carried out by experts and not every severe disease and death can be attributed to vaccination. Reactions are examined by experts specifically trained to undertake causality analysis before notifying such reactions as adverse events arising from vaccination. There is a well- defined mechanism for collection of data relating to adverse events that occur due to COVID-19 vaccines and the Government of India has taken steps to direct all concerned medical professionals at the ground level to report adverse events. Even medical practitioners at private hospitals are associated with reporting of adverse events. Therefore, we are not inclined to accept the broad-strokes challenge mounted by the Petitioner that the surveillance system of AEFIs in this country is faulty and the correct figures of those who have suffered any side effects, severe reactions or deaths post-inoculation have not been disclosed.

83. As regards the contention of the Petitioner on abandoning of Phase III trials, we note that unblinding of participants during the Phase III trial was done on the recommendation of the SEC. The Union of India has emphasized that at every stage, the deliberations of domain experts, which involved discussions with the manufacturers, focused on safety and immunogenicity of the vaccines and it 101 | P a g e was only when there was consensus among domain experts that it was safe to extend the immunisation drive beyond the category of healthcare workers / frontline workers, the appropriate decisions were taken. In doing so, the available trial data, trajectory of the pandemic, evidence, future contingencies and several other factors have always been heeded. There is no challenge to the decision of the SEC, a body of domain experts, as being unreasonable or arbitrary, nor have we been called upon to determine whether adequate time was devoted to recognise all

relevant reactions as vaccine-related reactions prior to such unblinding. What the Petitioner seeks is the monitoring of all adverse events and publication of the results of investigation. The Union of India has painstakingly taken this Court through the details of the procedure followed to closely monitor, review and escalate the incidence of AEFIs to appropriate authorities. As regards previously unknown / unidentified reactions seen during the monitoring of AEFIs at the time of vaccine administration, the Union of India has elaborated on the role of the PvPI and the CDSCO, which collate and study such reactions. We believe this adequately addresses the Petitioners concerns, as this Court has been informed that previously unidentified events are also being 102 | P a g e taken into consideration and investigated. We trust the Union of India to have the appropriate authorities ensure that this leg of the AEFI surveillance system is not compromised with while meeting the requirements of the rapid review and assessment system followed at the national level.

84. The Petitioner had taken issue with the present system to the extent it allows only DIOs or the vaccinators to report AEFIs. According to the Petitioner, the repository of AEFIs should be as detailed as the VAERS in the United State of America. The Petitioner further submitted that individuals and doctors must be able to report adverse events, with the reporter being given a unique identification number and the reports being openly accessible. The response of the Union of India on this issue is that the DIOs have been instructed to set up a network with private hospitals to report AEFIs. Training has been provided to state officers, medical officers, private practitioners and frontline health workers on their role in AEFI surveillance. Even auxiliary nurse midwives have been instructed to notify all AEFIs. However, we are in agreement with the suggestion made by the Petitioner that there should be a mechanism by which individuals and private doctors should be permitted to report suspected 103 | P a g e adverse events. Information relating to adverse effects following immunisation is crucial for the purpose of understanding the safety of the vaccines that are being administered, apart from being instrumental in further scientific studies around the pandemic. There is an imminent need for collection of requisite data of adverse events and wider participation of people in reporting the adverse events is necessary for the purpose of gathering correct information. Thus, the Union of India is directed to facilitate the reporting of suspected adverse events by individuals and private doctors on a virtual platform and the reports so made shall be publicly accessible after being given unique identification numbers, without listing any personal or confidential data of the persons reporting. All necessary steps to create awareness of, and to navigate, this platform for self-reporting shall be effectuated by the Government, roping in and training relevant participants right from the ground level of vaccine administration.

IV. Vaccination of Children

85. The opinion of the Petitioner is that children are at almost no risk from COVID-19 and instances of previously healthy children requiring hospitalisation due to COVID-19 are exceedingly rare. While referring to articles in the Nature 104 | P a g e and the Lancet, the Petitioner contended that scientific evidence shows that risk of administering vaccines to children outweigh the benefits offered by the vaccine in children. The Petitioner further submitted that serological studies would show that a large number of children have already acquired antibodies to COVID-19. The Petitioner has highlighted the risk of myocarditis associated with the mRNA vaccines, on the basis of which, several European countries have recently stopped the use of Moderna vaccines for those under the

age of 30. He has also pointed out that these risks had not been identified in the initial vaccine trials as the trial size was too small to uncover rare risks, which were discovered after mass vaccination. The Petitioner has sought for results as well as the primary data of clinical trials conducted on the paediatric population to be made public.

86. In response thereto, the Union of India contended that paediatric vaccination is advised by global agencies such as the WHO, the UNICEF and the CDC. Expert opinion in India is in tune with global consensus in favour of vaccination of children. We are informed that 8,91,39,455 doses of COVAXIN have been administered to individuals in the age group of 15 to 18 years as on 12.03.2022. The AEFIs 105 | P a g e reported are 1,739 minor complaints, 81 serious complaints and 6 severe. According to the Union of India, the said data would show that the vaccine does not pose threat to the safety of children. As regards the clinical trials, para 2.4.6.2 of the GCP guidelines were relied on to show that children are not required to be involved in research that could be carried out equally well with adults and further that, for the clinical evaluation of a new drug, study in children should be carried out after the Phase III clinical trials in adults. It has been stated that paediatric vaccination was considered at a stage where more than substantial data on safety and immunogenicity of COVAXIN in adults was available. To avoid any risks, clinical trials were also conducted on a limited number of children as per the protocol approved by domain experts. Having found no serious adverse event in the said trials, paediatric vaccination was initiated in a phased manner, starting from the eldest paediatric age group of 15 to 18 years. On 12.05.2021, on the basis of recommendations of the SEC, the CDSCO granted permission to Respondent No. 4 to conduct Phase II / Phase III clinical trials of COVAXIN for the age group of 2 to 18 years. Thereafter, Respondent No. 4 had submitted an application for grant of permission to manufacture COVAXIN paediatric 106 | P a g e vaccines for emergency use, which was subsequently granted by the CDSCO. It was argued on behalf of the Union of India that expert opinion is to the effect that paediatric vaccinations are always preventive in nature and are administered to avoid any risk of infection and of prolonged clinical symptoms.

87. This Court cannot sit in judgment of leading scientific analysis relating to the safety of paediatric vaccination. Experts in science may themselves differ in their opinions while taking decisions on matters related to safety and allied aspects, but that does not entitle the Court to second-guess expert opinion, on the basis of which the Government has drawn up its policies. The decision taken by the Union of India to vaccinate paediatric population in this country is in tune with global scientific consensus and expert bodies like the WHO, the UNICEF and the CDC have also advised paediatric vaccination. It would not only be beyond our jurisdiction but also hazardous if this Court were to examine the accuracy of such expert opinion, based on competing medical opinions. As already stated, the scope of judicial review does not entail the Court embarking upon such misadventures. Therefore, we reject the contention of the 107 | P a g e Petitioner that this Court has to intervene in paediatric vaccination on the ground that it is unscientific.

88. With respect to results of clinical trials, we note that the Union of India has stated that the results of clinical trials of COVAXIN for paediatric population have already been published. We also note that for the age group of 12 to 14 years, Biological Es Corbevax is being administered. Keeping in line with the WHO Statement on Clinical Trials, the Declaration of Helsinki and the GCP

guidelines, we direct the Union of India to ensure that key findings and results of the clinical trials of Corbevax be published at the earliest, if not already done. Neither vaccine is an mRNA vaccine and to this extent, the apprehensions of the Petitioner with respect to the associated risks of mRNA vaccines are unfounded in the present situation.

Conclusion

89. In conclusion, we have summarised our findings on the various issues considered by us, below:

(i) Given the issues urged by the Petitioner have a bearing on public health and concern the fundamental rights of individuals in this country, we are not inclined to 108 | P a g e entertain any challenge to the maintainability of the Writ Petition.

(ii) As far as judicial review of policy decisions based on expert opinion is concerned, there is no doubt that wide latitude is provided to the executive in such matters and the Court does not have the expertise to appreciate and decide on merits of scientific issues on the basis of divergent medical opinion. However, this does not bar the Court from scrutinising whether the policy in question can be held to be beyond the pale of unreasonableness and manifest arbitrariness and to be in furtherance of the right to life of all persons, bearing in mind the material on record.

(iii) With respect to the infringement of bodily integrity and personal autonomy of an individual considered in the light of vaccines and other public health measures introduced to deal with the COVID-19 pandemic, we are of the opinion that bodily integrity is protected under Article 21 of the Constitution and no individual can be forced to be vaccinated. Further, personal autonomy of an individual, which is a recognised facet of the protections guaranteed under Article 21, encompasses the right to refuse to undergo any medical treatment in 109 | P a g e the sphere of individual health. However, in the interest of protection of communitarian health, the Government is entitled to regulate issues of public health concern by imposing certain limitations on individual rights, which are open to scrutiny by constitutional courts to assess whether such invasion into an individuals right to personal autonomy and right to access means of livelihood meets the threefold requirement as laid down in K.S. Puttaswamy (supra), i.e., (i) legality, which presupposes the existence of law; (ii) need, defined in terms of a legitimate State aim; and (iii) proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them.

(iv) On the basis of substantial material filed before this Court reflecting the near-unanimous views of experts on the benefits of vaccination in addressing severe disease from the infection, reduction in oxygen requirement, hospital and ICU admissions, mortality and stopping new variants from emerging, this Court is satisfied that the current vaccination policy of the Union of India is informed by relevant considerations and cannot be said to be unreasonable or manifestly arbitrary. Contrasting scientific opinion coming forth from certain quarters to 110 | P a g e the effect that natural immunity offers better protection against COVID-19 is not pertinent for determination of the issue before us.

(v) However, no data has been placed by the Union of India or the States appearing before us, controverting the material placed by the Petitioner in the form of emerging scientific opinion which appears to indicate that the risk of transmission of the virus from unvaccinated individuals is almost on par with that from vaccinated persons. In light of this, restrictions on unvaccinated individuals imposed through various vaccine mandates by State Governments / Union Territories cannot be said to be proportionate. Till the infection rate remains low and any new development or research finding emerges which provides due justification to impose reasonable and proportionate restrictions on the rights of unvaccinated individuals, we suggest that all authorities in this country, including private organisations and educational institutions, review the relevant orders and instructions imposing restrictions on unvaccinated individuals in terms of access to public places, services and resources, if not already recalled. It is clarified that in the context of the rapidly-evolving situation presented 111 | Page by the COVID-19 pandemic, our suggestion to review the vaccine mandates imposed by States / Union Territories, is limited to the present situation alone and is not to be construed as interfering with the lawful exercise of power by the executive to take suitable measures for prevention of infection and transmission of the virus. Our suggestion also does not extend to any other directions requiring maintenance of COVID-appropriate behaviour issued by the Union or the State Governments.

(vi) As regards non-disclosure of segregated clinical data, we find that the results of Phase III clinical trials of the vaccines in question have been published, in line with the requirement under the statutory regime in place, the GCP guidelines and the WHO Statement on Clinical Trials. The material provided by the Union of India, comprising of minutes of the meetings of the SEC, do not warrant the conclusion that restricted emergency use approvals had been granted to COVISHIELD and COVAXIN in haste, without thorough review of the relevant data. Relevant information relating to the meetings of the SEC and the NTAGI are available in public domain and therefore, challenge to the procedures adopted by the expert 112 | Page bodies while granting regulatory approval to the vaccines on the ground of lack of transparency cannot be entertained. However, we reiterate that subject to the protection of privacy of individual subjects, with respect to ongoing clinical trials and trials that may be conducted subsequently for COVID-19 vaccines, all relevant data required to be published under the extant statutory regime must be made available to the public without undue delay.

(vii) We do not accept the sweeping challenge to the monitoring system of AEFIs being faulty and not reflecting accurate figures of those with severe reactions or deaths from vaccines. We note that the role of the Pharmacovigilance Programme of India and the CDSCO, as elaborated upon by the Union of India, collates and **studies previously unknown reactions** seen during monitoring of AEFIs at the time of vaccine administration and we trust the Union of India to ensure that this leg of the AEFI surveillance system is not compromised with, while meeting the requirements of the rapid review and assessment system followed at the national level for AEFIs.

113 | Page

(viii) We are also of the opinion that information relating to adverse effects following immunisation is crucial for creating awareness around vaccines and their efficacy, apart from being instrumental in further scientific studies around the pandemic. Recognising the imperative need for collection of requisite data of adverse events and wider participation in terms of reporting, the Union of India is directed to facilitate reporting of suspected adverse events by individuals and private doctors on an accessible virtual platform. These reports shall be made publicly accessible, without compromising on protecting the confidentiality of the persons reporting, with all necessary steps to create awareness of the existence of such a platform and of the information required to navigate the platform to be undertaken by the Union of India at the earliest.

(ix) On paediatric vaccination, we recognise that the decision taken by the Union of India to vaccinate children in this country is in tune with global scientific consensus and expert bodies like the WHO, the UNICEF and the CDC and it is beyond the scope of review for this Court to second-guess expert opinion, on the basis of which the Government has drawn up its policy. Keeping in line with 114 | P a g e the WHO Statement on Clinical Trials and the extant statutory regime, we direct the Union of India to ensure that key findings and results of the relevant phases of clinical trials of vaccines already approved by the regulatory authorities for administration to children, be made public at the earliest, if not already done.

90. We express our gratitude to the learned counsel on either side for their able assistance in enabling this Court to reach the above conclusion.

91. The Writ Petition is disposed of accordingly.

.....................................J. [L. NAGESWARA RAO] ....J. [B. R. GAVAI] New Delhi, May 2, 2022 115 | P a g e

M.A. v. De Villa, [2021] O.J. No. 2900

Ontario Judgments

Ontario Superior Court of Justice

E.M. Morgan J.

Heard: By written submissions.

Judgment: May 27, 2021.

Court File No.: CV-21-661284

[2021] O.J. No. 2900 | 2021 ONSC 3828

RE: M.A. and L.A. (Minors represented by their Litigation Guardian Renata Dziak), E.P. and R.P. (Minors represented by their Litigation Guardian Catherine Braund-Pereira), L.S. (Minor represented by his Litigation Guardian Bojan Sajlovic), N.K. (Minor represented by his Litigation Guardian Helena Kosin) (Students at the Toronto District School Board), Nancy O'Brien (Toronto District School Board Teacher); G.M., W.M., J.M., and L.M. (Minors represented by their Litigation Guardian Scarlett Martyn), M.D. (Minor represented by Litigation Guardian Lindsay Denike) (Students at the Durham District School Board), Katrina Wiens (Teacher at Durham District School Board); M.L.J. and M.G.J. (Minors represented by their Litigation Guardian Angela Johnston), C.V., E.W., and M.V. (Minors represented by their Litigation Guardian Jeff Varcoe) (Students at the Halton District School Board), David Sykes (Teacher, Resource Consultant for the Deaf, Provincial Schools Authority); N.M. (Minor represented by his Litigation Guardian Lorie Lewis) J.R.B. (Minor represented by his Litigation Guardian Jocelyne Bridle), Children's Health Defence (Canada), and Educators for Human Rights, Applicants, and Eileen De Villa, (Chief Medical Officer, City of Toronto Public Health), City of Toronto, Dr. Lawrence Loh, (Chief Medical Officer for Peel Public Health), Hamidah Meghani, (Chief Medical Officer for Halton Public Health), Robert Kyle, (Chief Medical Officer for Durham Public Health), Dr. Nicola Mercer, (Chief Medical Officer for Wellington-Dufferin-Guelph Public Health), Dr. David Williams (Ontario Chief Medical Officer of Health), The Attorney General for Ontario, The Minister of Education, The Minister of Health and Long-Term Care, The Toronto District School Board, The Halton District School Board, The Durham District School Board, Robert Hochberg, Principal at Runnymede Public School, Superintendent Debbie Donsky of Toronto District School Board, Johns and Janes Does (Officials of the Defendants Minister of Education, Health and Long-Term Care and School Boards), Respondents

(6 paras.)

Counsel

Rocco Galati, for the Applicants.

Padriac Ryan, for the Respondents.

ENDORSEMENT

E.M. MORGAN J.

1 Counsel for the Attorney General of Ontario has written to the Court asking for a ruling in writing for this Application to be dismissed as being frivolous and vexatious. The Applicants bring a Charter challenge against numerous public officials alleging that the formulation and implementation of various public health policies and measures relating to the ongoing COVID 19 pandemic violate the rights of Canadians.

2 I do not have before me a full record. I only have the Notice of Application issued April 9, 2021, setting out the grounds for the Application and the remedies sought.

3 The grounds described in the Notice are wide-ranging and, perhaps, a tad outlandish in content and tone. Without the benefit of a complete record and full legal argument, however, I would not want to opine on whether the Application promises to be a success or failure. Counsel for the Attorney General obviously believes that the entire litigation is problematic. But the Notice of Application does cite known grounds of Charter challenge while at the same time it seems to stretch existing legal concepts in an effort to perhaps make new law.

4 It strikes me that there are serious legal challenges awaiting the Applicants, not the least of which is that some of their claims at first blush appear to be potentially in the jurisdiction of Divisional Court rather than this Court. But those questions require the Court to have before it an Application Record, and not just a Notice. They also require the input of counsel. As it is, I only have a letter from counsel for the Attorney General and it does not appear that counsel for the Applicants has had notice of the Attorney General's request.

5 For the moment, I can only repeat the words of the Court of Appeal in *Khan v. Krylov & Company*, 2017 ONCA 625, at para. 12: "Rule 2.1 is an extremely blunt instrument. It is reserved for the clearest of cases, where the hallmarks of frivolous, vexatious, or abusive litigation are plainly evident on the face of the pleading. Rule 2.1 is not meant to be an easily accessible alternative to a pleadings motion, a motion for summary judgment, or a trial." The Notice of Application does not meet this test. I cannot say that the Application is frivolous and vexatious within the meaning of Rule 2.1.01 of the *Rules of Civil Procedure*.

6 This Application is in need of some case management, and the sooner the better. Counsel for the Attorney General and counsel for the Applicants are to be in touch with my assistant in order to schedule a case conference prior to any responding materials being served.

E.M. MORGAN J.

End of Document

Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and LeBel, Deschamps,* Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

Heard: December 13, 2011;

Judgment: March 8, 2013.

File No.: 33880.

[2013] 1 S.C.R. 623 | [2013] 1 R.C.S. 623 | [2013] S.C.J. No. 14 | [2013] A.C.S. no 14 | 2013 SCC 14

Manitoba Metis Federation Inc., Yvon Dumont, Billy Jo De La Ronde, Roy Chartrand, Ron Erickson, Claire Riddle, Jack Fleming, Jack McPherson, Don Roulette, Edgar Bruce Jr., Freda Lundmark, Miles Allarie, Celia Klassen, Alma Belhumeur, Stan Guiboche, Jeanne Perrault, Marie Banks Ducharme and Earl Henderson, Appellants; v. Attorney General of Canada and Attorney General of Manitoba, Respondents, and Attorney General for Saskatchewan, Attorney General of Alberta, Métis National Council, Métis Nation of Alberta, Métis Nation of Ontario, Treaty One First Nations and Assembly of First Nations, Interveners.

(303 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Case Summary

Subsequent History:

* Editor's Note: Deschamps J. took no part in the judgment.

Catchwords:

Aboriginal law — Métis — Crown law — Honour of the Crown — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible [page624] recipients — Whether Canada failing to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the Manitoba Act, 1870.

Aboriginal law — Métis — Fiduciary duty — Canadian government agreeing in 1870 to grant Métis children shares of 1.4 million acres of land and to recognize existing Métis landholdings — Promises set out in ss. 31 and 32 of the Manitoba Act, 1870, a constitutional document — Errors and delays interfering with division and granting of land among eligible recipients — Whether Canada in breach of fiduciary duty to Métis.

Limitation of actions — Declaration — Appellants seeking declaration in the courts that Canada breached obligations to implement promises made to the Métis people in the Manitoba Act, 1870 — Whether statute

of limitations can prevent courts from issuing declarations on the constitutionality of Crown conduct — Whether claim for declaration barred by laches.

Civil procedure — Parties — Standing — Public interest standing — Manitoba Act, 1870, providing for individual land entitlements — Whether federation advancing collective claim on behalf of Métis people should be granted public interest standing.

Summary:

After Confederation, the first government of Canada embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement. Canada became the titular owner of Rupert's Land and the Red River Settlement; however, the French-speaking Roman Catholic Métis, the dominant demographic group in the Red River Settlement, viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. In the face of armed resistance, Canada had little choice but to adopt a diplomatic approach. The Red River settlers agreed to become part of Canada, and Canada agreed to grant 1.4 million acres of land to the Métis children (subsequently set out in s. 31 of the *Manitoba Act*) and to recognize existing landholdings (subsequently set out in s. 32 of the *Manitoba Act*). The Canadian government began the process of implementing s. 31 in early [page625] 1871. The land was set aside, but a series of errors and delays interfered with dividing the land among the eligible recipients. Initially, problems arose from errors in determining who had a right to a share of the land promised. As a result, two successive allotments were abandoned; the third and final allotment was not completed until 1880. The lands were distributed randomly to the eligible Métis children living within each parish.

While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. Initially, Manitoba moved to curb speculation and improvident sales of the children's interests, but in 1877, it changed course, allowing sales of s. 31 entitlements.

Eventually, it became apparent that the number of eligible Métis children had been underestimated. Rather than starting a fourth allotment, the Canadian government provided that remaining eligible children would be issued with scrip redeemable for land. The scrip was based on 1879 land prices; however, when the scrip was delivered in 1885, land prices had increased so that the excluded children could not acquire the same amount of land granted to other children. In the decades that followed, the position of the Métis in the Red River Settlement deteriorated. White settlers soon constituted a majority in the territory and the Métis community began to unravel.

The Métis sought a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*. The trial judge dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. He also found that the challenged Manitoba [page626] statutes were constitutional, and, in any event, the claim was barred by limitations and the doctrine of laches. Finally, he found that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward. A five-member panel of the Manitoba Court of Appeal dismissed the appeal.

Held (Rothstein and Moldaver JJ. dissenting): The appeal should be allowed in part. The federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

Per McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ.: The MMF should be granted standing. The action advanced is a collective claim for declaratory relief for the purposes of reconciling the descendants of the Métis people of the Red River Valley and Canada. It merits allowing the body representing the collective Métis interest to come before the court.

The obligations enshrined in ss. 31 and 32 of the *Manitoba Act* did not impose a fiduciary duty on the government. In the Aboriginal context, a fiduciary duty may arise in two ways. First, it may arise as a result of the Crown assuming discretionary control over specific Aboriginal interests. Where the Crown administers lands or property in which Aboriginal peoples have an interest, such a duty may arise if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest. The interest must be a communal Aboriginal interest in land that is integral to the nature of the Métis distinctive community and their relationship to the land. It must be predicated on historic use and occupation, and cannot be established by treaty or by legislation. Second, and more generally, a fiduciary duty may arise if there is (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary; (2) a defined person or class of persons vulnerable to a fiduciary's control; and (3) a legal or substantial practical interest of the beneficiary that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[page627]

Although the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, the Métis are Aboriginal, and they had an interest in the land, the first test for fiduciary duty is not made out because neither the words of s. 31 nor the evidence establish a pre-existing communal Aboriginal interest held by the Métis. Their interests in land arose from their personal history, not their shared distinct Métis identity. Nor was a fiduciary duty established on the basis of an undertaking by the Crown. While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests. Section 32 simply confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province. It did not constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders.

However, the Métis are entitled to a declaration that the federal Crown failed to act with diligence in implementing the land grant provision set out in s. 31 of the *Manitoba Act*, in accordance with the honour of the Crown. The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Canadian sovereignty. Where this is at stake, it requires the Crown to act honourably in its dealings with the Aboriginal peoples in question. This flows from the guarantee of Aboriginal rights in s. 35(1) of the Constitution. The honour of the Crown is engaged by an explicit obligation to an Aboriginal group enshrined in the Constitution. The Constitution is not a mere statute; it is the very document by which the Crown asserted its sovereignty in the face of prior Aboriginal occupation. An explicit obligation to an Aboriginal group in the Constitution engages the honour of the Crown.

The honour of the Crown speaks to *how* obligations that attract it must be fulfilled, so the duties that flow from it vary with the situation. In the context of the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that [page628] the Crown: (1) take a broad purposive approach to the interpretation of the promise; and (2) act diligently to fulfill it. The question is whether, viewing the Crown's conduct as a whole in the context of the case, it acted with diligence to pursue the fulfillment of the purposes of the obligation. The duty to act diligently is a narrow and circumscribed duty. Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown, and there is no guarantee that the purposes of the promise will be achieved. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise.

Section 31 of the *Manitoba Act* is a solemn constitutional obligation to the Métis people of Manitoba, an Aboriginal people, and it engaged the honour of the Crown. Its immediate purpose was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. By contrast, s. 32 was a benefit made generally available to all settlers and did not engage the honour of the Crown.

Although the honour of the Crown obliged the government to act with diligence to fulfill s. 31, it acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade, substantially defeating a purpose of s. 31. This was inconsistent with the behaviour demanded by the honour of the Crown: a government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

None of the government's other failures -- failing to prevent Métis from selling their land to speculators, issuing scrip in place of land, and failing to cluster family allotments -- were in themselves inconsistent with the honour of the Crown. That said, the impact of these measures was exacerbated by the delay inconsistent with [page629] the honour of the Crown: it increased improvident sales to speculators; it meant that when the children received scrip, they obtained significantly less than the 240 acres provided to those who took part in the initial distribution, because the price of land had increased in the interim; and it made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

It is unnecessary to consider the constitutionality of the implementing statutes because they are moot.

The Métis claim based on the honour of the Crown is not barred by the law of limitations. Although claims for personal remedies flowing from unconstitutional statutes may be time-barred, the Métis seek no personal relief and make no claim for damages or for land. Just as limitations acts cannot prevent the courts from issuing declarations on the constitutionality of legislation, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct. So long as the constitutional grievance at issue here remains outstanding, the goals of reconciliation and constitutional harmony remain unachieved. In addition, many of the policy rationales underlying limitations statutes do not apply in an Aboriginal context. A declaration is a narrow remedy and, in some cases, may be the only way to give effect to the honour of the Crown.

Nor is the claim barred by the equitable doctrine of laches. Given the context of this case, including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants, delay on the part of the appellants cannot, by itself, be interpreted as some clear act which amounts to acquiescence or waiver. It is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. Furthermore, Canada has not changed its position as a result of the delay. This suffices to find that the claim is not barred by laches. However, it is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a Constitutional provision has not been fulfilled as required by the honour of the Crown.

Per Rothstein and Moldaver JJ. (dissenting): There is agreement with the majority that there was no fiduciary duty here, that no valid claims arise from s. 32 of the *Manitoba Act*, that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants, and that the MMF has standing to bring these claims. However, the majority proposes a new common law constitutional obligation derived from the honour of the Crown. The courts below did not consider this issue and the parties did not argue it before this Court. This is an unpredictable expansion of the scope of the duties engaged under the honour of the Crown. The claim based on the honour of the Crown is also barred by both limitations periods and laches.

While a duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations, and while a faster process would most certainly have been better, the duty crafted by the majority creates an unclear rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict. It is not clear when an obligation rises to the "solemn" level that triggers the duty, what types of legal documents will give rise to solemn obligations, whether an obligation with a treaty-like character imposes higher obligations than other constitutional provisions, and whether it is sufficient for the obligation to be owed to an Aboriginal group. The idea that how the government is obliged to perform a constitutional obligation depends on how closely it resembles a treaty should be rejected. It would be a significant expansion of Crown liability to permit a claimant to seek relief so long as the promise was made to an Aboriginal group, without proof of an Aboriginal interest sufficient to ground a fiduciary duty, and based on actions that would not constitute a breach of fiduciary duty.

Even if the honour of the Crown was engaged and required the diligent implementation of s. 31, and even if this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations and the equitable doctrine of laches. [page631] Limitations and laches cannot fulfill their purposes if they are not universally applicable. Limitations periods apply to the government as they do to all other litigants both generally and in the area of Aboriginal claims. This benefits the legal system by creating certainty and predictability, and serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

Limitations periods have existed in Manitoba continuously since 1870, and, since 1931, Manitoba limitations legislation has provided a six-year limitation period for all causes of action, whether the cause of action arose before or after the legislation came into force. Manitoba has a 30-year ultimate limitation period. The Crown is entitled to the benefit of those limitations periods. The policy rationales underlying limitations periods do not support the creation of an exemption from those periods in this case. Manitoba legislation does not contain an exception from limitations periods for declaratory judgments and no such exception should be judicially created. In this case, the risk that a declaratory judgment will lead to additional remedies is fully realized: the Métis plan to use the declaration in extra-judicial negotiations with the Crown, so the declaration exposes the Crown to an obligation long after the time when the limitations period expired.

Moreover, this Court has never recognized a general exception from limitations for constitutionally derived claims. Rather, it has consistently held that limitations periods apply to factual claims with constitutional elements. While limitations periods do not apply to prevent a court from declaring a statute unconstitutional, the Métis' claim about unconstitutional statutes is moot. The remaining declaration sought concerns factual issues and alleged breaches of obligations which have always been subject to limitation periods. In suggesting that the goal of reconciliation must be given priority in the Aboriginal context, it appears that the majority has departed from the principle that the same policy rationales that support limitations generally should apply to Aboriginal claims.

These claims are also subject to laches. Laches can be used to defend against equitable claims that have [page632] not been brought in a sufficiently timely manner, and as breaches of fiduciary duty can be subject to laches, it would be fundamentally inconsistent to permit certain claims based on the honour of the Crown to escape the imputation of laches. Both branches of laches are satisfied: the Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As to acquiescence, the trial judge found that the Métis had the required knowledge in the 1870s, and that finding has not been shown to be an error. The suggestion that it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights is fundamentally at odds with the common law approach to changes in the law. Delay in making the grants cannot be both the wrong alleged and the reason the Crown cannot access the defence of laches: laches are always invoked as a defence by a party alleged to have wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven the allegations, the defence of laches is rendered illusory. The imbalance in power between the Métis and the government did not undermine their knowledge, capacity or freedom to the extent required to prevent a finding of acquiescence. The inference that delays in the land grants caused the vulnerability of the Métis was neither made by the trial judge nor supported by the record. In any event, laches are imputed against vulnerable people just as limitations periods are applied against them.

As to reliance, had the claim been brought promptly, the unexplained delays referred to as evidence for the Crown acting dishonourably may well have been accounted for, or the government might have been able to take steps to satisfy the Métis community.

Finally, while not doing so explicitly, the majority departs from the factual findings of the trial judge, absent a finding of palpable and overriding error, in two main areas: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention, a lack of diligence, or that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty [page633] derived from the honour of the Crown, assuming that any such duty exists.

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[page635]

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APPEAL from a judgment of the Manitoba Court of Appeal (Scott C.J.M. and Monnin, Steel, Hamilton and Freedman JJ.A.), 2010 MBCA 71, 255 Man. R. (2d) 167, 486 W.A.C. 167, [2010] 12 W.W.R. 599, [2010] 3 C.N.L.R. 233, 216 C.R.R. (2d) 144, 94 R.P.R. (4) 161, [2010] M.J. No. 219 (QL), 2010 CarswellMan 322, affirming a decision of MacInnes J., 2007 MBQB 293, 223 Man. R. (2d) 42, [2008] 4 W.W.R. 402, [2008] 2 C.N.L.R. 52, [2007] M.J. No. 448 (QL), 2007 CarswellMan 500. Appeal allowed in part, Rothstein and Moldaver JJ. dissenting.

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[page637]

Written submissions only by *Joseph J. Arvay*, *Q.C.*, *David C. Nahwegahbow* and *Bruce Elwood*, for the intervener the Assembly of First Nations.

The judgment of McLachlin C.J. and LeBel, Fish, Abella, Cromwell and Karakatsanis JJ. was delivered by

McLACHLIN C.J. and KARAKATSANIS J.

I. Overview

1 Canada is a young nation with ancient roots. The country was born in 1867, by the consensual union of three colonies - United Canada (now Ontario and Quebec), Nova Scotia and New Brunswick. Left unsettled was whether the new nation would be expanded to include the vast territories to the west, stretching from modern Manitoba to British Columbia. The Canadian government, led by Prime Minister John A. Macdonald, embarked on a policy aimed at bringing the western territories within the boundaries of Canada, and opening them up to settlement.

2 This meant dealing with the indigenous peoples who were living in the western territories. On the prairies, these consisted mainly of two groups - the First Nations, and the descendants of unions between white traders and explorers and Aboriginal women, now known as Métis.

3 The government policy regarding the First Nations was to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises.

4 The government policy with respect to the Métis population - which, in 1870, comprised 85 percent of the population of what is now Manitoba - was less clear. Settlers began pouring into the region, displacing the Métis' social and political [page638] control. This led to resistance and conflict. To resolve the conflict and assure peaceful annexation of the territory, the Canadian government entered into negotiations with representatives of the Métis-led provisional government of the territory. The result was the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), which made Manitoba a province of Canada.

5 This appeal is about obligations to the Métis people enshrined in the *Manitoba Act*, a constitutional document. These promises represent the terms under which the Métis people agreed to surrender their claims to govern themselves and their territory, and become part of the new nation of Canada. These promises were directed at enabling the Métis people and their descendants to obtain a lasting place in the new province. Sadly, the expectations of the Métis were not fulfilled, and they scattered in the face of the settlement that marked the ensuing decades.

6 Now, over a century later, the descendants of the Métis people seek a declaration in the courts that Canada breached its obligation to implement the promises it made to the Métis people in the *Manitoba Act*.

7 More particularly, the appellants seek a declaration that (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires*.

8 It is not disputed that there was considerable delay in implementing the constitutional provisions. The main issues are (1) whether Canada failed to act in accordance with its legal obligations, and (2) whether the Métis' claim is too late and thus barred by the doctrine of laches or by any [page639] limitations law, be it the English limitations law in force at the time the claims arose, or the subsequent limitations acts enacted by Manitoba: *The Limitation of*

Actions Act, 1931, S.M. 1931, c. 30; *The Limitation of Actions Act, 1931*, R.S.M. 1940, c. 121; *The Limitation of Actions Act*, R.S.M. 1970, c. L150; collectively referred to as "*The Limitation of Actions Act*".

9 We conclude that s. 31 of the *Manitoba Act* constitutes a constitutional obligation to the Métis people of Manitoba, an Aboriginal people, to provide the Métis children with allotments of land. The immediate purpose of the obligation was to give the Métis children a head start over the expected influx of settlers from the east. Its broader purpose was to reconcile the Métis' Aboriginal interests in the Manitoba territory with the assertion of Crown sovereignty over the area that was to become the province of Manitoba. The obligation enshrined in s. 31 of the *Manitoba Act* did not impose a fiduciary or trust duty on the government. However, as a solemn constitutional obligation to the Métis people of Manitoba aimed at reconciling their Aboriginal interests with sovereignty, it engaged the honour of the Crown. This required the government to act with diligence in pursuit of the fulfillment of the promise. On the findings of the trial judge, the Crown failed to do so and the obligation to the Métis children remained largely unfulfilled. The Métis claim based on the honour of the Crown is not barred by the law of limitations or the equitable doctrine of laches. We therefore conclude that the Métis are entitled to a declaration that Canada failed to implement s. 31 as required by the honour of the Crown.

10 We agree with the courts below that the s. 32 claim is not established, and find it unnecessary to consider the constitutionality of the implementing statutes.

II. The Constitutional Promises and the Legislation

11 Section 31 of the *Manitoba Act*, known as the children's grant, set aside 1.4 million acres of land to be given to Métis children:

> **31.** And whereas, it is expedient, towards the extinguishment of the Indian Title to the lands in the Province, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he may deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province at the time of the said transfer to Canada, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine.

12 Section 32 of the *Manitoba Act* provided for recognition of existing landholdings, where individuals asserting ownership had not yet been granted title:

> **32.** For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:-
>
> (1) All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.
>
> (2) All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

> (3) All titles by occupancy with the sanction and under the license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of land in that part of the Province in which the Indian Title has been extinguished, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

> (4) All persons in peaceable possession of tracts of land at the time of the transfer to Canada, in those parts of the Province in which the Indian Title has not been extinguished, shall have the right of pre-emption of the same, on such terms and conditions as may be determined by the Governor in Council.
>
> (5) The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown.

13 During the 1870s and 1880s, Manitoba passed five statutes, now long spent and repealed, dealing with the technical requirements to transfer interests in s. 31 lands. The appellants seek to have the statutes declared *ultra vires* pursuant to the *Constitution Act, 1867*. Alternatively, they argue that the statutes were inoperative by virtue of federal paramountcy.

III. Judicial Decisions

14 The trial judge, MacInnes J. (as he then was), engaged in a thorough review of the facts: 2007 MBQB 293, 223 Man. R. (2d) 42. He found that while dishonesty and bad faith were not established, government error and inaction led to lengthy delay in implementing ss. 31 and 32, and left 993 Métis children who were entitled to a grant with scrip instead of land. However, he dismissed the claim for a declaration on the ground that ss. 31 and 32 of the *Manitoba Act* gave rise to neither a fiduciary duty nor a duty based on the honour of the Crown. [page642] The trial judge took the view that a fiduciary duty required proof that the Aboriginal people held the land collectively prior to 1870. Since the evidence established only individual landholdings by the Métis, their claim was "fundamentally flawed". He said of the action that "[i]t seeks relief that is in essence of a collective nature, but is underpinned by a factual reality that is individual": para. 1197.

15 The trial judge concluded that, in any event, the claim was barred by *The Limitation of Actions Act* and the doctrine of laches. He also found that Manitoba's various legislative initiatives regarding the land grants were constitutional. Finally, he held that the Manitoba Metis Federation Inc. ("MMF") should not be granted standing in the action, since the individual plaintiffs were capable of bringing the claims forward.

16 A five-member panel of the Manitoba Court of Appeal, *per* Scott C.J.M., dismissed the appeal: 2010 MBCA 71, 255 Man. R. (2d) 167. It rejected the trial judge's view that collective Aboriginal title to land was essential to a claim that the Crown owed a fiduciary duty to Aboriginal peoples. However, the court found it unnecessary to determine whether the Crown in fact owed a fiduciary duty to the Métis, since the trial judge's findings of fact concerning the conduct of the Crown did not support any breach of such a duty.

17 The Court of Appeal also rejected the assertion that the honour of the Crown had been breached. The honour of the Crown, in its view, was [page643] subsidiary to the fiduciary claim and did not itself give rise to an independent duty in this situation.

18 Finally, the court held that the Métis' claim for a declaration was, in any event, statute-barred, and that the issue of the constitutional validity of the Manitoba legislation was moot. It also declined to interfere with the trial judge's discretionary decision to deny standing to the MMF.

IV. Facts

19 This appeal concerns events that occurred over a century ago. Despite the difficulties imposed by the lack of live witnesses and distant texts, the trial judge made careful and complete findings of fact on all the elements relevant to the legal issues. The Court of Appeal thoroughly reviewed these findings and, with limited exceptions, confirmed them.

20 The completeness of these findings, which stand largely unchallenged, make it unnecessary to provide a detailed narrative of the Métis people, the Red River Settlement, and the conflict that gave rise to the *Manitoba Act* and Manitoba's entry into Canada - events that have inspired countless tomes and indeed, an opera. We content ourselves with a brief description of the origins of the Red River Settlement and the events that give rise to the appellants' claims.

21 The story begins with the Aboriginal peoples who inhabited what is now the province of Manitoba - the Cree and other less populous nations. In the late 17th century, European adventurers and explorers passed through. The lands were claimed nominally by England which granted the Hudson's Bay Company, a company of fur traders operating out of London, control over a vast territory called Rupert's Land, which included modern Manitoba. Aboriginal peoples continued to occupy the territory. In addition to the original First Nations, a new Aboriginal group, the Métis, arose - people [page644] descended from early unions between European adventurers and traders, and Aboriginal women. In the early days, the descendants of English-speaking parents were referred to as half-breeds, while those with French roots were called Métis.

22 A large - by the standards of the time - settlement developed the forks of the Red and Assiniboine Rivers on land granted to Lord Selkirk by the Hudson's Bay Company in 1811. By 1869, the settlement consisted of 12,000 people, under the governance of the Hudson's Bay Company.

23 In 1869, the Red River Settlement was a vibrant community, with a free enterprise system and established judicial and civic institutions, centred on the retail stores, hotels, trading undertakings and saloons of what is now downtown Winnipeg. The Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government.

24 In the meantime, Upper Canada (now Ontario), Lower Canada (now Quebec), Nova Scotia and New Brunswick united under the *British North America Act* of 1867 (now *Constitution Act, 1867*) to become the new country of Canada. The country's first government, led by Sir John A. Macdonald, was intent on westward expansion, driven by the dream of a nation that would extend from the Atlantic to the Pacific and provide vast new lands for settlement. England agreed to cede Rupert's Land to Canada. In recognition of the Hudson's Bay Company's interest, Canada paid it GBP300,000 and allowed it to retain some of the land around its trading posts in the Northwest. In 1868, the Imperial Parliament cemented the deal with *Rupert's Land Act, 1868* (U.K.), 31 & 32 Vict., c. 105.

[page645]

25 Canada, as successor to the Hudson's Bay Company, became the titular owner of Rupert's Land and the Red River Settlement. However, the reality on the ground was more complex. The French-speaking Roman Catholic Métis viewed with alarm the prospect of Canadian control leading to a wave of English-speaking Protestant settlers that would threaten their traditional way of life. When two survey parties arrived in 1869 to take stock of the land, the matter came to a head.

26 The surveyors were met with armed resistance, led by a French-speaking Métis, Louis Riel. On November 2, 1869, Canada's proposed Lieutenant Governor of the new territory, William McDougall, was turned back by a mounted French Métis patrol. On the same day, a group of Métis, including Riel, seized Upper Fort Garry (now downtown Winnipeg), the Settlement's principle fortification. Riel called together 12 representatives of the English-speaking parishes and 12 representatives of the French-speaking Métis parishes, known as the "Convention of 24". At their second meeting, he announced the French Métis intended to form a provisional government, and asked for the support of the English. The English representatives asked for time to confer with the people of their parishes. The meeting was adjourned until December 1, 1869.

27 When the meeting reconvened, they were confronted with a proclamation made earlier that day by McDougall that the region was under the control of Canada. The group rejected the claim. The French Métis drafted a list of demands that Canada must satisfy before the Red River settlers would accept Canadian control.

28 The Canadian government adopted a conciliatory course. It invited a delegation of "at least two residents" to Ottawa to present the demands of the settlers and confer with Parliament. The provisional government responded by delegating [page646] a priest, Father Ritchot, a judge, Judge Black, and a local businessman named Alfred Scott to go to Ottawa. The delegates - none of whom were Métis, although Riel nominated them - set out for Ottawa on March 24, 1870.

29 Canada had little choice but to adopt a diplomatic approach to the Red River settlers. As MacInnes J. found at trial:

> Canada had no authority to send troops to the Settlement to quell the French Métis insurrection. Nor did it have the necessary troops. Moreover, given the time of year, there was no access to the Settlement other than through the United States. But, at the time, there was a concern in Canada about possible annexation of the territory by the United States and hence a reluctance on the part of Canada to seek permission from the United States to send troops across its territory to quell the insurrection and restore authority. [para. 78]

30 The delegates arrived in Ottawa on April 11, 1870. They met and negotiated with Prime Minister Macdonald and the Minister of Militia and Defence, George-Étienne Cartier. The negotiations were part of a larger set of negotiations on the terms on which Manitoba would enter Canada as a province. It emerged that Canada wanted to retain ownership of public lands in the new province. This led to the idea of providing land for Métis children. The parties settled on a grant to Métis children of 1.4 million acres of land (s. 31) and recognition of existing landholdings (s. 32). Parliament, after vigorous debate and the failure of a motion to delete the section providing the children's grant, passed the *Manitoba Act* on May 10, 1870.

31 The delegates returned to the Red River Settlement with the proposal, and, on June 24, 1870, Father Ritchot addressed the Convention of 40, now called the Legislative Assembly of Assiniboia, to [page647] advocate for the adoption of the *Manitoba Act*. The Assembly was read a letter from Minister Cartier which promised that any existing land interest contemplated in s. 32 of the *Manitoba Act* could be converted to title without payment. Minister Cartier guaranteed that the s. 31 children's grants would "be of a nature to meet the wishes of the half-breed residents" and the division of grant land would be done "*in the most effectual and equitable manner*": A.R., vol. XI, at p. 196 (emphasis added). On this basis, the Assembly voted to accept the *Manitoba Act*, and enter the Dominion of Canada. Manitoba became part of Canada by Order in Council of the Imperial government effective July 15, 1870.

32 The Canadian government began the process of implementing s. 31 in early 1871. The first step was to set aside 1.4 million acres, and the second was to divide the land among the eligible recipients. A series of errors and delays interfered with accomplishing the second step in the "effectual" manner Minister Cartier had promised.

33 The first problem was the erroneous inclusion of all Métis, including heads of families, in the allotment, contrary to the terms of s. 31, which clearly provided the lands were to be divided among the children of the Métis heads of families. On March 1, 1871, Parliament passed an Order in Council declaring that all Métis had a right to a share in the 1.4 million acres promised in s. 31 of the *Manitoba Act*. This order, which would have created more grants of smaller acreage, was made over the objections raised by McDougall, then the former Lieutenant Governor of Rupert's Land, in the House of Commons. Nevertheless, the federal government began planning townships based on 140-acre lots, dividing the 1.4 million acres among approximately 10,000 recipients. This was the first allotment.

[page648]

34 In 1873, the federal government changed its position, and decided that only Métis children would be entitled to s. 31 grants. The government also decided that lands traditionally used for haying by the Red River settlers could not be used to satisfy the children's land grant, as was originally planned, requiring additional land to be set aside to constitute the 1.4 million acres. The 1873 decision was clearly the correct decision. The problem is that it took the government over three years to arrive at that position. This gave rise to the second allotment.

35 In November 1873, the government of Sir John A. Macdonald was defeated and a new Liberal government formed in early 1874. The new government, without explanation, did not move forward on the allotments until early 1875. The Liberal government finally, after questions in Parliament about the delay and petitions from several parishes, appointed John Machar and Matthew Ryan to verify claimants entitled to the s. 31 grants. The process of verifying those entitled to grants commenced five years after the *Manitoba Act* was passed.

36 The next set of problems concerned the Machar/Ryan Commission's estimate of the number of eligible Métis children. Though a census taken in 1870 estimated 7,000 Métis children, Machar and Ryan concluded the number was lower, at 5,088, which was eventually rounded up to 5,833 to allow for even 240-acre plots. This necessitated a third and final allotment, which began in 1876, but was not completed until 1880.

37 While the allotment process lagged, speculators began acquiring the Métis children's yet-to-be granted interests in the s. 31 lands, aided by a range of legal devices. Initially, the Manitoba legislature moved to block sales of the children's interests to speculators, but, in 1877, it passed legislation [page649] authorizing sales of s. 31 interests once the child obtained the age of majority, whether or not the child had received his or her allotment, or even knew of its location. In 1878, Manitoba adopted further legislation which allowed children between 18 and 21 to sell their interests, so long as the transaction was approved by a judicial officer and the child's parents. Dr. Thomas Flanagan, an expert who testified at trial, found returns on judicial sales were the poorest of any type of s. 31 sale: C.A., at para. 152.

38 Eventually, it became apparent that the Acting Agent of Dominion Lands, Donald Codd had underestimated the number of eligible Métis children - 993 more Métis children were entitled to land than Codd had counted on. In 1885, rather than start the allotment yet a fourth time, the Canadian government provided by Order in Council that the children for whom there was no land would be issued with $240 worth of scrip redeemable for land. Fifteen years after the passage of the *Manitoba Act*, the process was finally complete.

39 The position of the Métis in the Red River Settlement deteriorated in the decades following Manitoba's entry into Confederation. White settlers soon constituted a majority in the territory and the Métis community began to unravel. Many Métis sold their promised interests in land and moved further west. Those left amounted to a small remnant of the original community.

V. Issues

40 The appellants seek numerous declarations, including: (1) in implementing the *Manitoba Act*, the federal Crown breached fiduciary obligations owed to the Métis; (2) the federal Crown failed to implement the *Manitoba Act* in a manner [page650] consistent with the honour of the Crown; and (3) certain legislation passed by Manitoba affecting the implementation of the *Manitoba Act* was *ultra vires.* These claims give rise to the following issues:

A. Does the Manitoba Metis Federation have standing in the action?
B. Is Canada in breach of a fiduciary duty to the Métis?
C. Did Canada fail to comply with the honour of the Crown in the implementation of ss. 31 and 32 of the *Manitoba Act*?
D. Were the Manitoba statutes related to implementation unconstitutional?
E. Is the claim for a declaration barred by limitations?
F. Is the claim for a declaration barred by laches?

VI. Discussion

A. *Does the Manitoba Metis Federation Have Standing in the Action?*

41 Canada and Manitoba take no issue with the private interest standing of the individual appellants. However, they argue that the MMF has no private interest in the litigation and fails the established test for public interest standing on the third step of the test set out in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, as the individual plaintiffs clearly demonstrate another reasonable and effective manner for the case to be heard.

[page651]

42 The courts below denied the MMF public interest standing to bring this action. At trial, MacInnes J. found that the MMF would fail the third step of the test set out in *Canadian Council of Churches*, on the ground that the individual plaintiffs demonstrate another reasonable and effective manner for the case to be heard. The Court of Appeal declined to interfere with MacInnes J.'s discretionary standing ruling.

43 The courts below did not have the benefit of this Court's decision in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524. In that case, the Court rejected a strict approach to the third requirement for standing. The presence of other claimants does not necessarily preclude public interest standing; the question is whether this litigation is a reasonable and effective means to bring a challenge to court. The requirements for public interest standing should be addressed in a flexible and generous manner, and considered in light of the underlying purposes of setting limits on who has standing to bring an action before a court. Even if there are other plaintiffs with a direct interest in the issue, a court may consider whether the public interest plaintiff will bring any particularly useful or distinct perspective to the resolution of the issue at hand.

44 As discussed below, the action advanced is not a series of claims for individual relief. It is rather a collective claim for declaratory relief for the purposes of reconciliation between the descendants of the Métis people of the Red River Valley and Canada. The *Manitoba Act* provided for individual entitlements, to be sure. But that does not negate the fact that the appellants advance a collective claim of the Métis people, based on a promise made to them in return for their agreement to recognize Canada's sovereignty over them. This collective claim merits allowing the body representing the collective Métis [page652] interest to come before the Court. We would grant the MMF standing.

45 For convenience, from this point forward in these reasons, we will refer to both the individual plaintiffs and the MMF collectively as "the Métis".

B. *Is Canada in Breach of a Fiduciary Duty to the Métis?*

(1) When a Fiduciary Duty May Arise

46 The Métis say that Canada owed them a fiduciary duty to implement ss. 31 and 32 of the *Manitoba Act* as their trustee. This duty, they say, arose out of their Aboriginal interest in lands in Manitoba, or directly from the promises made in ss. 31 and 32.

47 Fiduciary duty is an equitable doctrine originating in trust. Generally speaking, a fiduciary is required to act in the best interests of the person on whose behalf he is acting, to avoid all conflicts of interest, and to strictly account for all property held or administered on behalf of that person. See *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47.

48 The relationship between the Métis and the Crown, viewed generally, is fiduciary in nature. However, not all dealings between parties in a fiduciary relationship are governed by fiduciary obligations.

49 In the Aboriginal context, a fiduciary duty may arise as a result of the "Crown [assuming] discretionary control over specific Aboriginal interests": *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 18. The focus is on the particular interest that [page653] is the subject matter of the dispute: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 83. The content of the Crown's fiduciary duty towards Aboriginal peoples varies with the nature and importance of the interest sought to be protected: *Wewaykum*, at para. 86.

50 A fiduciary duty may also arise from an undertaking, if the following conditions are met:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

(*Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 36)

(2) Did the Métis Have a Specific Aboriginal Interest in the Land Giving Rise to a Fiduciary Duty?

51 As discussed, the first way a fiduciary duty may arise is where the Crown administers lands or property in which Aboriginal peoples have an interest: *Guerin v. The Queen*, [1984] 2 S.C.R. 335, at p. 384. The duty arises if there is (1) a specific or cognizable Aboriginal interest, and (2) a Crown undertaking of discretionary control over that interest: *Wewaykum*, at paras. 79-83; *Haida Nation*, at para. 18.

52 There is little dispute that the Crown undertook discretionary control of the administration of the land grants under ss. 31 and 32 of the *Manitoba Act*, meeting the second requirement. The issue is whether the first condition is met - is there a "specific or cognizable Aboriginal interest"? The trial judge held that the Métis failed to establish a specific, cognizable interest in land. The Court of Appeal found it unnecessary to decide the point, in [page654] view of its conclusion that in any event, no breach was established.

53 The fact that the Métis are Aboriginal and had an interest in the land is not sufficient to establish an Aboriginal interest in land. The interest (title or some other interest) must be distinctly Aboriginal; it must be a communal Aboriginal interest in the land that is integral to the nature of the Métis distinctive community and their relationship to the land: see *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, at para. 37. The key issue is thus whether the Métis *as a collective* had a specific or cognizable *Aboriginal* interest in the ss. 31 or 32 land.

54 The Métis argue that s. 31 of the *Manitoba Act* confirms that they held a pre-existing specific Aboriginal interest in the land designated by s. 31. Section 31 states that the land grants were directed "*towards the extinguishment of the Indian Title to the lands in the Province*", and that the land grant was for "*the benefit of the families of the half-breed residents*". This language, the Métis argue, acknowledges that the Métis gave the Crown control over their homeland in the Red River Settlement in exchange for a number of provisions in the *Manitoba Act*, a constitutional document. The Métis say speeches in the House of Commons by the framers of the *Manitoba Act*, Prime Minister Macdonald and George-Étienne Cartier, confirm that the purpose of s. 31 was to extinguish the "Indian Title" of the Métis. The Métis urge that the *Manitoba Act* must be read broadly in light of its purpose of bringing Manitoba peaceably into Confederation and assuring a future for the Métis as landholders and settlers in the new province: see *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at para. 17.

55 Canada replies that s. 31 does not establish pre-existing Aboriginal interest in land. It was an [page655] instrument directed at settling grievances, and the reference to "Indian Title" does not establish that such title actually existed. It was up to the Métis to prove that they held an Aboriginal interest in land prior to the *Manitoba Act*, and they have not done so, Canada argues. Canada acknowledges that individual Métis people held individual parcels of land, but it denies that they held the collective Aboriginal interest necessary to give rise to a fiduciary duty.

56 The trial judge's findings are fatal to the Métis' argument. He found as a fact that the Métis used and held land individually, rather than communally, and permitted alienation. He found no evidence that the Métis asserted they held Indian title when British leaders purported to extinguish Indian title, first in the Settlement belt and then throughout the province. He found that the Red River Métis were descended from many different bands. While individual Métis held interests in land, those interests arose from their personal history, not their shared Métis identity. Indeed the trial judge concluded Métis ownership practices were incompatible with the claimed Aboriginal interest in land.

57 The Métis argue that the trial judge and the Court of Appeal erred in going behind the language of s. 31 and demanding proof of a collective Aboriginal interest in land. They assert that Aboriginal title was historically uncertain, and that the Crown's practice was to accept that any organized Aboriginal group had title and to extinguish that title by treaty, or in this case, s. 31 of the *Manitoba Act*.

58 Even if this was the Crown's practice (a doubtful assumption in the absence of supporting evidence), it does not establish that the Métis held either Aboriginal title or some other Aboriginal interest in specific lands as a group. An Aboriginal interest in land giving rise to a fiduciary duty cannot be established by treaty, or, by extension, [page656] legislation. Rather, it is predicated on historic use and occupation. As Dickson J. stated in *Guerin*:

> The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive or legislative provision. [Emphasis added; p. 379.]

59 In summary, the words of s. 31 do not establish pre-existing communal Aboriginal title held by the Métis. Nor does the evidence: the trial judge's findings of fact that the Métis had no communal Aboriginal interest in land are fatal to this contention. It follows that the argument that Canada was under a fiduciary duty in administering the children's land because the Métis held an Aboriginal interest in the land must fail. The same reasoning applies to s. 32 of the *Manitoba Act*.

(3) Did the Crown Undertake to Act in the Best Interests of the Métis, Giving Rise to a Fiduciary Duty?

60 This leaves the question of whether a fiduciary duty is established on the basis of an undertaking by the Crown. To recap, this requires:

> (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely [page657] affected by the alleged fiduciary's exercise of discretion or control.

(*Elder Advocates*, at para. 36)

61 The first question is whether an undertaking has been established. In order to elevate the Crown's obligations to a fiduciary level, the power retained by the Crown must be coupled with an undertaking of loyalty to act in the beneficiaries' best interests in the nature of a private law duty: *Guerin*, at pp. 383-84. In addition, "[t]he party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake": *Elder Advocates*, at para. 31.

62 While s. 31 shows an intention to benefit the Métis children, it does not demonstrate an undertaking to act in their best interests, in priority to other legitimate concerns, such as ensuring land was available for the construction of the railway and opening Manitoba for broader settlement. Indeed, the discretion conferred by s. 31 to determine "such mode and on such conditions as to settlement and otherwise" belies a duty of loyalty and an intention to act in the best interests of the beneficiary, forsaking all other interests.

63 Nor did s. 32 constitute an undertaking on the part of the Crown to act as a fiduciary in settling the titles of the Métis landholders. It confirmed the continuance of different categories of landholdings in existence shortly before or at the creation of the new province (C.A., at paras. 673 and 717), and applied to all landholders (C.A., at para. 717; see also paras. 674 and 677).

[page658]

(4) Conclusion on Fiduciary Duty

64 We conclude that Canada did not owe a fiduciary duty to the Métis in implementing ss. 31 and 32 of the *Manitoba Act*.

C. *Did Canada Fail to Comply With the Honour of the Crown in the Implementation of Sections 31 and 32 of the Manitoba Act?*

(1) The Principle of the Honour of the Crown

65 The appellants argue that Canada breached a duty owed to the Métis based on the honour of the Crown. The phrase "honour of the Crown" refers to the principle that servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign.

66 The honour of the Crown arises "from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people": *Haida Nation*, at para. 32. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to "the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection": see *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42. This "Protection", though, did not arise from a paternalistic desire to protect the Aboriginal peoples; rather, it was a recognition of their strength. Nor is the honour of the Crown a paternalistic concept. The comments of Brian Slattery with respect to fiduciary duty resonate here:

> The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a "weaker" or "primitive" people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, [page659] that their rights would be better protected by reliance on the Crown than by self-help.

("Understanding Aboriginal Rights" (1987), 66 *Can. Bar Rev.* 727, at p. 753)

The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty. As stated in *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24:

> The duty of honour derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation. It has been enshrined in s. 35(1) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal rights and titles. Section 35(1) has, as one of its purposes, negotiation of just settlement of Aboriginal claims. In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question.

67 The honour of the Crown thus recognizes the impact of the "superimposition of European laws and customs" on pre-existing Aboriginal societies: *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 248, *per* McLachlin J., dissenting. Aboriginal peoples were here first, and they were never conquered (*Haida Nation*, at para. 25); yet, they became subject to a legal system that they did not share. Historical treaties were framed in that unfamiliar legal system, and negotiated and drafted in a foreign language: *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 52; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at pp. 142-43, *per* La Forest J. The honour of the Crown characterizes the "special relationship" that arises out of this colonial practice: *Little Salmon*, at para. 62. As explained by Brian Slattery:

> ... when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control [page660] over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship between the Crown and Aboriginal peoples, which requires the Crown to deal honourably with Aboriginal peoples.

("Aboriginal Rights and the Honour of the Crown" (2005), 29 S.C.L.R. (2d) 433, at p. 436)

(2) When Is the Honour of the Crown Engaged?

68 The honour of the Crown imposes a heavy obligation, and not all interactions between the Crown and Aboriginal people engage it. In the past, it has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty. As stated in *Badger*:

> ... the honour of the Crown is always at stake in its dealing with Indian people. Interpretations of treaties and statutory provisions which have an impact upon treaty or aboriginal rights must be approached in a manner which maintains the integrity of the Crown. [para. 41]

69 This Court has also recognized that the honour of the Crown is engaged by s. 35(1) of the *Constitution Act, 1982*. In *R. v. Sparrow*, [1990] 1 S.C.R. 1075, the Court found that s. 35(1) restrains the legislative power in s. 91(24), in accordance with the "high standard of honourable dealing": p. 1109. In *Haida Nation*, this Court explained that "[i]t is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees": para. 20. Because of its connection with s. 35, the honour of the Crown has been called a "constitutional principle": *Little Salmon*, at para. 42.

70 The application of these precedents to this case indicates that the honour of the Crown is also engaged by an explicit obligation to an Aboriginal group that is enshrined in the Constitution. The [page661] Constitution is not a mere statute; it is the very document by which the "Crow[n] assert[ed its] sovereignty in the face of prior Aboriginal occupation": *Taku River*, at para. 24. See also *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911, at para. 9. It is at the root of the honour of the Crown, and an explicit obligation to an Aboriginal group placed therein engages the honour of the Crown at its core. As stated in *Haida Nation*, "[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably": para. 17 (emphasis added).

71 An analogy may be drawn between such a constitutional obligation and a treaty promise. An "intention to create obligations" and a "certain measure of solemnity" should attach to both: *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1044; *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 24-25. Moreover, both types of promises are made for the overarching purpose of reconciling Aboriginal interests with the Crown's sovereignty. Constitutional obligations may even be arrived at after a course of consultation similar to treaty negotiation.

72 The last element under this rubric is that the obligation must be explicitly owed to an Aboriginal group. The honour of the Crown will not be engaged by a constitutional obligation in which Aboriginal peoples simply have a strong interest. Nor will it be engaged by a constitutional obligation owed to a group partially composed of Aboriginal peoples. Aboriginal peoples are part of Canada, and they do not have special status with respect to constitutional obligations owed to Canadians as a whole. But a constitutional obligation explicitly directed at an Aboriginal group invokes its "special relationship" with the Crown: *Little Salmon*, at para. 62.

[page662]

(3) What Duties Are Imposed by the Honour of the Crown?

73 The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to *how* obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:

(1) The honour of the Crown gives rise to a fiduciary duty when the Crown assumes discretionary control over a specific Aboriginal interest (*Wewaykum*, at paras. 79 and 81; *Haida Nation*, at para. 18);

(2) The honour of the Crown informs the purposive interpretation of s. 35 of the *Constitution Act, 1982*, and gives rise to a duty to consult when the Crown contemplates an action that will affect a claimed but as of yet unproven Aboriginal interest (*Haida Nation*, at para. 25);

(3) The honour of the Crown governs treaty-making and implementation (*Province of Ontario v. Dominion of Canada* (1895), 25 S.C.R. 434, at p. 512, *per* Gwynne J., dissenting; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, at

para. 51), leading to requirements such as honourable negotiation and the avoidance of the appearance of sharp dealing (*Badger*, at para. 41); and

(4) The honour of the Crown requires the Crown to act in a way that accomplishes the intended purposes of treaty and statutory grants to Aboriginal peoples (*R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, [page663] and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; *Badger*, at para. 47).

74 Thus, the duty that flows from the honour of the Crown varies with the situation in which it is engaged. What constitutes honourable conduct will vary with the circumstances.

75 By application of the precedents and principles governing this honourable conduct, we find that when the issue is the implementation of a constitutional obligation to an Aboriginal people, the honour of the Crown requires that the Crown: (1) takes a broad purposive approach to the interpretation of the promise; and (2) acts diligently to fulfill it.

76 The first branch, purposive interpretation of the obligation, has long been recognized as flowing from the honour of the Crown. In the constitutional context, this Court has recognized that the honour of the Crown demands that s. 35(1) be interpreted in a generous manner, consistent with its intended purpose. Thus, in *Haida Nation*, it was held that, unless the recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982* extended to yet unproven rights to land, s. 35 could not fulfill its purpose of honourable reconciliation: para. 27. The Court wrote, at para. 33: "When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable." A purposive approach to interpretation informed by the honour of the Crown applies no less to treaty obligations. For example, in *Marshall*, Binnie J. rejected a proposed treaty interpretation on the grounds that it was not "consistent with the honour and integrity of the Crown... . The trade arrangement must be interpreted in a manner which gives meaning and substance to the promises made by the Crown": para. 52.

77 This jurisprudence illustrates that an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose. Thus, the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation.

78 Second, the honour of the Crown requires it to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests.

79 This duty has arisen largely in the treaty context, where the Crown's honour is pledged to diligently carrying out its promises: *Mikisew Cree First Nation*, at para. 51; *Little Salmon*, at para. 12; see also *Haida Nation*, at para. 19. In its most basic iteration, the law assumes that the Crown always intends to fulfill its solemn promises, including constitutional obligations: *Badger*; *Haida Nation*, at para. 20. At a minimum, sharp dealing is not permitted: *Badger*. Or, as this Court put it in *Mikisew Cree First Nation*, "the honour of the Crown [is] pledged to the fulfilment of its obligations to the Indians": para. 51. But the duty goes further: if the honour of the Crown is pledged to the fulfillment of its obligations, it follows then that the honour of the Crown requires the Crown to endeavour to ensure its obligations are fulfilled. Thus, in review proceedings under the *James Bay and Northern Québec Agreement*, the participants are expected to "carry out their work with due diligence": *Quebec (Attorney General) v. Moses*, 2010 SCC 17, [2010] 1 S.C.R. 557, at para. 23. As stated by Binnie J. in *Little Salmon*, at para. 12: "It is up to the parties, when treaty issues arise, to act diligently to advance their respective interests. Good government requires that decisions be taken in a timely way." This duty applies whether the obligation arises in a treaty, as in the precedents outlined above, or in the Constitution, as here.

80 To fulfill this duty, Crown servants must seek to perform the obligation in a way that pursues the purpose behind the promise. The Aboriginal group must not be left "with an empty shell of a treaty promise": *Marshall*, at para. 52.

81 It is a narrow and circumscribed duty, which is engaged by the extraordinary facts before us. This duty, recognized in many authorities, is not a novel addition to the law.

82 Not every mistake or negligent act in implementing a constitutional obligation to an Aboriginal people brings dishonour to the Crown. Implementation, in the way of human affairs, may be imperfect. However, a persistent pattern of errors and indifference that substantially frustrates the purposes of a solemn promise may amount to a betrayal of the Crown's duty to act honourably in fulfilling its promise. Nor does the honour of the Crown constitute a guarantee that the purposes of the promise will be achieved, as circumstances and events may prevent fulfillment, despite the Crown's diligent efforts.

83 The question is simply this: Viewing the Crown's conduct as a whole in the context of the case, did the Crown act with diligence to pursue the fulfillment of the purposes of the obligation?

(4) The Argument That Failure to Act Diligently in Implementing Section 31 Should Not Be Considered by This Court

84 Our colleague Rothstein J. asserts that the parties did not argue that lack of diligent implementation of s. 31 was inconsistent with the honour of the Crown, and that we should not therefore consider this possibility.

[page666]

85 We agree with our colleague that new developments in the law must be approached with caution where they have not been canvassed by the parties to the litigation. However, in our view this concern does not arise here.

86 The honour of the Crown was at the heart of this litigation from the beginning. Before the courts below and in this Court, the Métis argued that the conduct of the government in implementing s. 31 of the *Manitoba Act* breached the duty that arose from the honour of the Crown. They were supported in this contention by a number of interveners. In oral argument, the intervener the Attorney General for Saskatchewan stated that the honour of the Crown calls for "a broad, liberal, and generous interpretation", and acts as "an interpretive guide post to the public law duties ... with respect to the implementation of Section 31": transcript, at p. 67. The intervener Métis Nation of Alberta argued that s. 31 is an unfulfilled promise here, which the honour of the Crown demands be fulfilled by reconciliation through negotiation. The intervener the Métis Nation of Ontario argued that s. 31 "could not be honoured by a process that ultimately defeated the purpose of the provision": transcript, at p. 28.

87 These submissions went beyond the argument that the honour of the Crown gave rise to a fiduciary duty, raising the broader issue of whether the government's conduct generally comported with the honour of the Crown. Canada understood this: it argued in its factum that while the Crown intends to fulfill its promises, the honour of the Crown in this case does not give rise to substantive obligations to do so.

88 In short, all parties understood that the issue of what duties the honour of the Crown might raise, [page667] apart from a fiduciary duty, was on the table, and all parties presented submissions on it.

89 It is true that the Métis and the interveners supporting them did not put the argument in precisely the terms of the reasons. While they argued that the government's conduct in implementing s. 31 did not comport with the honour of the Crown, they did not express this alleged failure in terms of failure to comply with a duty of diligent implementation. However, this was implicit in their argument, given that the failure to diligently implement s. 31 lay at the heart of their grievance.

90 For these reasons, we conclude that it is not inappropriate to consider and resolve the question of what duties the honour of the Crown gave rise to in connection with s. 31 of the *Manitoba Act*, not just as they impact on the argument that the government owed a fiduciary duty to the Métis, but more broadly.

(5) Did the Solemn Promise in Section 31 of the *Manitoba Act* Engage the Honour of the Crown?

91 As outlined above, the honour of the Crown is engaged by constitutional obligations to Aboriginal groups. Section 31 of the *Manitoba Act* is just such a constitutional obligation. Section 31 conferred land rights on yet-to-be-identified individuals - the Métis children. Yet the record leaves no doubt that it was a promise made to the Métis people collectively, in recognition of their distinct community. The honour of the Crown is thus engaged here.

92 To understand the nature of s. 31 as a solemn obligation, it may be helpful to consider its [page668] treaty-like history and character. Section 31 sets out solemn promises - promises which are no less fundamental than treaty promises. Section 31, like a treaty, was adopted with "the intention to create obligations ... and a certain measure of solemnity": *Sioui*, at p. 1044; *Sundown*. It was intended to create legal obligations of the highest order: no greater solemnity than inclusion in the Constitution of Canada can be conceived. Section 31 was conceived in the context of negotiations to create the new province of Manitoba. And all this was done to the end of reconciling the Métis Aboriginal interest with the Crown's claim to sovereignty. As the trial judge held:

> ... the evidence establishes that this [s. 31] grant, to be given on an individual basis for the benefit of the families, albeit given to the children, was given for the purpose of recognizing the role of the Métis in the Settlement both past and to the then present, for the purpose of attempting to ensure the harmonious entry of the territory into Confederation, mindful of both Britain's condition as to treatment of the settlers and the uncertain state of affairs then existing in the Settlement, and for the purpose of giving the children of the Métis and their families on a onetime basis an advantage in the life of the new province over expected immigrants. [Emphasis added; para. 544.]

93 Section 31, though, is not a treaty. The trial judge correctly described s. 31 as a constitutional provision crafted for the purpose of resolving Aboriginal concerns and permitting the creation of the province of Manitoba. When the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. Justice MacInnes wrote:

> Canada, to the knowledge of Macdonald and Cartier, was in a difficult position having to complete the steps necessary for the entry of Rupert's Land into Canada. An insurrection had occurred at Red River such that, in the view of both Canada and Britain, a void in the lawful governance of the territory existed. Canada, as a result [page669] of McDougall's conduct on December 1, 1869, had in a practical sense claimed the territory for Canada, but the legal transfer of the territory from Britain had not yet occurred. Accordingly, Canada had no lawful authority to govern the area. Furthermore, there was neither the practical ability nor the will for Canada or the Imperial Government to enforce authority and in that sense, the purpose of the discussions or negotiations between the Red River delegates and Macdonald and Cartier was to bring about in a peaceful way the entry of the territory into Canada, thereby giving Canada the opportunity to peacefully take over the territory and its governance and be able to move forward with its goal of nation building. [para. 649]

94 Section 31 is a constitutional obligation to an Aboriginal group. In accordance with the principles outlined above, the honour of the Crown is engaged by s. 31 and gives rise to a duty of diligent, purposive fulfillment.

(6) Did Section 32 of the *Manitoba Act* Engage the Honour of the Crown?

95 We agree with the Court of Appeal that the honour of the Crown was not engaged by s. 32 of the *Manitoba Act.* Unlike s. 31, it was not a promise made specifically to an Aboriginal group, but rather a benefit made generally available to all settlers, Métis and non-Métis alike. The honour of the Crown is not engaged whenever an Aboriginal person accesses a benefit.

(7) Did the Crown Act Honourably in Implementing Section 31 of the *Manitoba Act*?

96 The trial judge indicated that, although they did not act in bad faith, the government servants may have been negligent in administering the s. 31 grant. He held that the implementation of the obligation was within the Crown's discretion and that it had a discretion to act negligently: "Mistakes, even negligence, on the part of those responsible for implementation of the grant are not sufficient to successfully attack Canada's exercise of discretion [page670] in its implementation of the grant" (para. 943 (emphasis added)). The Court of Appeal took a similar view: see para. 656.

97 Based on the arguments before them and the applicable precedents, the trial judge and the Court of Appeal did not focus on what we take as the central issue in the case: whether the government's implementation of s. 31 comported with the duty of the Crown to diligently pursue implementation of the provision in a way that would achieve its objectives. The question is whether the Crown's conduct, viewed as a whole and in context, met this standard. We conclude that it did not.

98 The broad purpose of s. 31 of the *Manitoba Act* was to reconcile the Métis community with the sovereignty of the Crown and to permit the creation of the province of Manitoba. This reconciliation was to be accomplished by a more concrete measure - the prompt and equitable transfer of the allotted public lands to the Métis children.

99 The prompt and equitable implementation of s. 31 was fundamental to the project of reconciliation and the entry of Manitoba into Canada. As the trial judge found, s. 31 was designed to give the Métis a head start in the race for land and a place in the new province. This required that the grants be made while a head start was still possible. Everyone concerned understood that a wave of settlement from Europe and Canada to the east would soon sweep over the province. Acknowledging the need for timely implementation, Minister Cartier sent a letter to the meeting of the Manitoba Legislature charged with determining whether to accept the *Manitoba Act*, assuring the Métis that the s. 31 grants would "be of a nature to meet the wishes of the half-breed residents" and that the division of land would be done "in the most effectual and equitable manner".

[page671]

100 The Métis allege Canada failed to fulfill its duties to the Métis people in relation to the children's grant in four ways: (1) inexcusably delaying distribution of the s. 31 lands; (2) distributing lands via random selection rather than ensuring family members received contiguous parcels; (3) failing to ensure s. 31 grant recipients were not taken advantage of by land speculators; and (4) giving some eligible Métis children $240 worth of scrip redeemable at the Land Titles Office instead of a direct grant of land. We will consider each in turn.

(a) *Delay*

101 Contrary to the expectations of the parties, it took over 10 years to make the allotments of land to Métis children promised by s. 31. Indeed, the final settlement, in the form not of land but of scrip, did not occur until 1885. This delay substantially defeated a purpose of s. 31.

102 A central purpose of the s. 31 grant, as found by MacInnes J., was to give "families of the Métis through their children a head start in the new country in anticipation of the probable and expected influx of immigrants": para. 655. Time was then plainly of the essence, if the goal of giving the Métis children a real advantage, relative to an impending influx of settlers from the east, was to be achieved.

103 The government understood this. Prime Minister Macdonald, on May 2, 1870, just before addressing Parliament, wrote that the land was

> to be distributed as soon as practicable amongst the different heads of half breed families according to the number of children of both sexes then existing in each [page672] family under such legislative enactments, which may be found advisable to secure the transmission and holding of the said lands amongst the half breed families. - To extinguish Indian claims - ... [Emphasis added.]

And Minister Cartier, as we know, confirmed that the "guarantee" would be effected "in the most effectual and equitable manner".

104 Yet that was not what happened. As discussed earlier in these reasons, implementation was delayed by many government actions and inactions, including: (1) starting off with the wrong class of beneficiaries, contrary to the wording of s. 31 and objections in the House of Commons; (2) taking three years to rectify this error; (3) commissioning a report in 1875 that erroneously lowered the number of eligible recipients and required yet a third allotment; (4) completing implementation only in 1885 by giving scrip to eligible Métis denied land because of mistakes in the previous three iterations of the allotment process; (5) long delays in issuing patents; and (6) unexplained periods of inaction. In the meantime, settlers were pouring in and the Manitoba Legislature was passing various acts dealing in different and contradictory ways with how Métis could sell their yet-to-be-realized interests in land.

105 The delay was noted by all concerned. The Legislative Council and Assembly of Manitoba complained of the delay on February 8, 1872, noting that new settlers had been allowed to take up land in the area. In early 1875, a number of Métis parishes sent petitions to Ottawa complaining of the delay, saying it was having a "damaging effect upon the prosperity of the Province": C.A., at para. 123. The provincial government also in that year made a request to the Governor General that the process be expedited. In 1883, the Deputy Minister of the Interior, A. M. Burgess, said this: "I am every day grieved and heartily sick when I [page673] think of the disgraceful delay ... .": A.R., vol. XXI, at pp. 123-24; see also C.A., at para. 160.

106 This brings us to whether the delay was inconsistent with the duty imposed by the honour of the Crown to act diligently to fulfill the purpose of the s. 31 obligation. The Court of Appeal did not consider this question. But like the trial judge, it concluded that inattention and carelessness were likely factors:

> With respect to those known events that contributed to the delay (prominent among them the cancellation of the first two allotments, the slow pace of the allotment process in the third and final round, the erroneous inclusion of adults as beneficiaries for the s. 31 grants, and the long delays in the issuance of patents), mistakes were made and it is difficult to avoid the inference that inattention or carelessness may have been a contributing factor. [para. 656]

107 As discussed above, a negligent act does not in itself establish failure to implement an obligation in the manner demanded by the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

108 The record and findings of the courts below suggest a persistent pattern of inattention. The government was warned of the initial error of including all Métis, yet took three years to cancel the first faulty allotment and start a second. An inexplicable delay lies between the first and second allotments, from 1873 to 1875. The government had changed, to be sure. But as the Court of Appeal found, there is no explanation in the record as to "why it took the new government over a year to address the continuing delays in moving ahead with the allotments": para. 126. The Crown's obligations cannot be suspended simply because there is a change in government. The second allotment, when [page674] it finally took place, was aborted in 1876 because of a report that underestimated eligible recipients. But there is no satisfactory explanation why a third and final allotment was not completed until 1880. The explanation offered is simply that those in charge did not have adequate time to devote to the task because of other government priorities, and they did not wish to delegate the task because information about the grants might fall into the hands of speculators.

109 We take no issue with the finding of the trial judge that, with one exception, there was no bad faith or misconduct on the part of the Crown employees: paras. 1208-9. However, diligence requires more than simply the absence of bad faith. The trial judge noted that the children's grants "were not implemented or administered without error or dissatisfaction": para. 1207. Viewing the matter through the lens of fiduciary duty, the trial judge found this did not rise to a level of concern. We take a different view. The findings of the trial judge indicate consistent inattention and a consequent lack of diligence.

110 We conclude that, viewing the conduct of the Crown in its entirety and in the context of the situation, including the need for prompt implementation, the Crown acted with persistent inattention and failed to act diligently to achieve the purposes of the s. 31 grant. Canada's argument that, in some cases, the delay secured better prices for Métis who sold is undermined by evidence that many Métis sold potential interests for too little, and, in any event, it does not absolve the Crown of failure to act as its honour required. The delay in completing the s. 31 distribution was inconsistent with the behaviour demanded by the honour of the Crown.

[page675]

(b) *Sales to Speculators*

111 The Métis argue that Canada breached its duty to the children eligible for s. 31 grants by failing to protect them from land speculators. They say that Canada should not have permitted sales before the allotments were granted to the children or before the recipients attained the age of majority.

112 Canada responds that the Crown was not obliged to impose any restraint on alienation, and indeed would have been criticized had it done so. It says that the Métis already had a history of private landholding, including buying and selling property. They say that the desire of many Métis to sell was not the result of any breach of duty by the Crown, but rather simply reflected that the amount of land granted far exceeded Métis needs, and many Métis did not desire to settle down in Manitoba.

113 The trial judge held that restricting the alienability of Métis land would have been seen as patronizing and been met with disfavour amongst the Métis. The Court of Appeal agreed, and added that, "practically speaking, next to nothing could have been done to prevent sales of and speculation in s. 31 lands in the absence of an absolute prohibition against sales of any kind": para. 631. It added that some Métis received more land than they needed, and many were leaving the settlement to follow the buffalo hunt, making the ability to sell their interests valuable.

114 We see no basis to interfere with the finding that many eligible Métis were determined to sell their lots or the conclusion that a prohibition on sales would have been unacceptable. This said, we note that the 10-year delay in implementation of the land grants increased sales to speculators. Persons concerned at the time urged that information about [page676] the location of each child's individual allotment be made public as early as possible to give potential claimants a sense of ownership and avert speculative sell-offs. This did not happen: evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 53. Dr. Flanagan concluded "[t]he Metis were already selling their claims to participate in the grant, and being able to sell the right to a particular piece of land rather than a mere right to participate in a lottery would indeed have enhanced the prices they received": p. 54. Until the Métis acquired their s. 31 grants, they provided no benefit to the children, and a cash offer from a speculator would appear attractive. Moreover, as time passed, the possibility grew that the land was becoming less valuable, as the Métis could not effectively protect any timber or other resources that might exist on the plots they might someday receive from exploitation by others.

115 In 1873, the Manitoba government, aware of the improvident sales that were occurring, moved to curb speculation by passing *The Half-Breed Land Grant Protection Act*, S.M. 1873, c. 44, which permitted vendors to repudiate sales. The preamble to that legislation recognized that "very many persons entitled to participate in the said grant in evident ignorance of the value of their individual shares have agreed severally to sell their right to the same to speculators, receiving therefor only a trifling consideration". However, with *An Act to amend the Act passed in the 37th year of Her Majesty's reign, entitled "The Half-Breed Land Grant Protection Act"*, S.M. 1877, c. 5 ("*The Half-Breed Land Grant Amendment Act, 1877*"), Manitoba changed course, so that a Métis child who made a bad bargain was stuck with it. *An Act to enable certain children of Half-breed heads of families to convey their land*, S.M. 1878, c. 20 ("*The Half-Breed Land Grant Act, 1878*"), followed. It allowed Métis children between 18 and 21 years of age to sell their s. 31 entitlement with parental [page677] consent, so long as they appeared in front of one judge or two justices of the peace.

116 Dr. Flanagan found that 11 percent of the sample examined sold their lands prior to learning the location of their grant, and received "markedly lower prices" as a result: "Metis Family Study", A.R., vol. XXVII, at p. 53. The

Court of Appeal concluded that the price received by Métis who sold after allotment was about twice that received by those who sold before allotment: para. 168.

117 The honour of the Crown did not demand that the grant lands be made inalienable. However, the facts on the ground, known to all, made it all the more important to complete the allotment without delay and, in the interim, to advise Métis of what holdings they would receive. By 1874, in their recommendations as to how the allotment process should be carried out, both Codd and Lieutenant Governor Alexander Morris implicitly recognized that delay was encouraging sales at lower prices; nevertheless, allotment would not be complete for six more years. Until allotments were known and completed, delay inconsistent with the honour of the Crown was perpetuating a situation where children were receiving artificially diminished value for their land grants.

(c) *Scrip*

118 Due to Codd's underestimation of the number of eligible children, 993 Métis were left out of the 1.4 million-acre allotment in the end. Instead, they received scrip redeemable for land at a land title office. Scrip could also be sold for cash on the open market, where it was worth about half its face value: C.A., at para. 168.

[page678]

119 The Métis argue that Canada breached its duty to the children who received scrip because s. 31 demanded that land, not scrip, be distributed; and because scrip was not distributed until 1885, when at going land prices, Métis who received scrip could not acquire the 240 acres granted to other children.

120 We do not accept the Métis' first argument that delivery of scrip instead of land constituted a breach of s. 31 of the *Manitoba Act*. As long as the 1.4 million acres was set aside and distributed with reasonable equity, the scheme of the *Manitoba Act* was not offended. It was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis that would be inaccurate to some degree. The issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled.

121 The Métis' second argument is that the value of scrip issued was deficient. The government decided to grant to each left-out child $240 worth of scrip, based on a rate of $1 per acre. While the Order in Council price for land was $1 an acre in 1879, by 1885, when the scrip was delivered, most categories of land were priced at $2 or $2.50 an acre at the land title office: A.R., vol. XXIV, at p. 8. The children who received scrip thus obtained a grant equivalent to between 96 and 120 acres, significantly less than the 240 acres provided to those who took part in the initial distribution. The delay resulted in the excluded children receiving less land than the others. This was a departure from the s. 31 promise that the land would be divided in a roughly equal fashion amongst the eligible children.

122 The most serious complaint regarding scrip is that Canada took too long to issue it. The process was marred by the delay and mismanagement that typified the overall implementation of the s. 31 grants. Canada recognized in 1884 that a significant number of eligible children would not receive the [page679] land to which they were entitled, yet it did nothing to provide a remedy to the excluded beneficiaries for almost a year. The trial judge observed:

> By memorandum to the Minister of the Interior dated May 1884, Deputy Minister A.M. Burgess wrote that there were about 500 claimants whose applications had been approved but whose claims were unsatisfied because the land had been "exhausted". He was unable to explain the error, but recommended that scrip be issued to the children.
>
> For whatever reason action was postponed until April 1885 when Burgess submitted another report in which he explained how this shortage occurred. Burgess recommended as equitable that the issue of scrip to each half-breed child who has since proved his or her claim should be for $240.00, the same to be accepted as in full satisfaction of such claim. The $240.00 was based upon 240 acres (being the size of the individual grant) at the rate of $1.00 per acre. [paras. 255-56]

123 We conclude that the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention inconsistent with the honour of the Crown that typified the s. 31 grants.

(d) *Random Allotment*

124 The Métis assert that the s. 31 lands should have been allotted so that the children's lots were contiguous to, or in the vicinity of, their parents' lots. At a minimum, they say siblings' lands should have been clustered together. They say that this was necessary to facilitate actual settlement, rather than merely sale, of the s. 31 lands, so as to establish a Métis homeland.

125 Canada responds that it would not have been possible to settle all the Métis children on lots contiguous to their parents. Many families had a large number of children, and each child was entitled to a 240-acre lot. They argue that in the circumstances, a random allotment was reasonable.

126 The trial judge found there was no agreement to distribute the land in family blocks. He observed that while the French Métis generally wanted grants contiguous to where they were residing and were not overly concerned with the value of the land, the English Métis were interested in selecting the most valuable allotments available even if they were not adjacent to their family lots. He also observed that the lottery was not random throughout the province: each parish received an allotment of land in its area and then distributed land within that allotment randomly to the individual Métis children living in the parish. He concluded that it was difficult to conceive how the land could have been administered other than by random lottery without creating unfairness and divisiveness within each parish. Further, because of the size of the grants, it would be hard to give a family a series of 240-acre contiguous parcels without interfering with neighbouring families' ability to receive the same. Moreover, a random lottery gave each child within the parish an equal chance at receiving the best parcel available. Finally, there was little, if any, complaint about the random selection from those present at the time. The Court of Appeal agreed, noting that Lieutenant Governor Archibald attempted to accommodate Métis wishes for the placement of a parish's allotments.

127 Given the finding at trial that the grant was intended to benefit the individual children, not establish a Métis land base, we accept that random selection within each parish was an acceptable way to distribute the land consistent with the purpose of the s. 31 obligation. This said, the delay in [page681] distributing land, and the consequential sales prior to patent, may well have made it more difficult for Métis to trade grants amongst themselves to achieve contiguous parcels.

(8) Conclusion on the Honour of the Crown

128 The s. 31 obligation made to the Métis is part of our Constitution and engages the honour of the Crown. The honour of the Crown required the Crown to interpret s. 31 in a purposive manner and to diligently pursue fulfillment of the purposes of the obligation. This was not done. The Métis were promised implementation of the s. 31 land grants in "the most effectual and equitable manner". Instead, the implementation was ineffectual and inequitable. This was not a matter of occasional negligence, but of repeated mistakes and inaction that persisted for more than a decade. A government sincerely intent on fulfilling the duty that its honour demanded could and should have done better.

D. *Were the Manitoba Statutes Related to Implementation Unconstitutional?*

129 The Métis seek a declaration that the impugned eight statutes passed by Manitoba were *ultra vires* and therefore unconstitutional or otherwise inoperative by virtue of the doctrine of paramountcy.

130 Between 1877 and 1885, Manitoba passed five statutes that regulated the means by which sales of s. 31 lands could take place by private contract or court order. They dealt with the technical requirements to transfer interests in s. 31 lands. These included: permitting sales by a s. 31 allottee who was over 21 years of age (*The Half-Breed Land Grant Amendment Act, 1877*); allowing sales of grants by Métis between 18 and 21 years of age with parental consent and consent of the child supervised [page682] by a judge or two justices of the peace (*The Half-Breed Land Grant Act, 1878*); and settling issues as to the sufficiency of documentation necessary to pass good title in anticipation of the introduction of the Torrens system (*An Act relating to the Titles of Half-Breed Lands*, S.M. 1885, c. 30). The Manitoba statutes were consolidated in the *Half-Breed Lands Act*, R.S.M. 1891, c. 67, and eventually repealed by *The Statute Law Revision and Statute Law Amendment Act, 1969*, S.M. 1969 (2nd Sess.), c. 34, s. 31.

131 In *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279, a preliminary motion to strike was brought by Canada in respect of this litigation. Wilson J. stated:

> The Court is of the view also that the subject matter of the dispute, inasmuch as it involves the constitutionality of legislation ancillary to the *Manitoba Act, 1870* is justiciable in the courts and that declaratory relief may be granted in the discretion of the court in aid of extra-judicial claims in an appropriate case. [Emphasis added; p. 280.]

This statement is not a ruling or a pre-determination on whether the review of the repealed statutes in this action is moot. The *Dumont* decision recognizes that a declaration *may* be granted - in the discretion of the court - in aid of extra-judicial relief in an appropriate case. The Court simply decided that it was not "plain and obvious" or "beyond doubt" that the case would fail: p. 280.

132 These statutes have long been out of force. They can have no future impact. Their only significance is as part of the historic matrix of the Métis' claims. In short, they are moot. To consider their constitutionality would be a misuse of the Court's time. We therefore need not address this issue.

[page683]

E. *Is the Claim for a Declaration Barred by Limitations?*

133 We have concluded that Canada did not act diligently to fulfill the specific obligation to the Métis contained in s. 31 of the *Manitoba Act*, as required by the honour of the Crown. For the reasons below, we conclude that the law of limitations does not preclude a declaration to this effect.

134 This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. The constitutionality of legislation has always been a justiciable question: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. The "right of the citizenry to *constitutional* behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is *ultra vires*: *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused, [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).

135 Thus, this Court has found that limitations of actions statutes cannot prevent the courts, as guardians of the Constitution, from issuing declarations on the constitutionality of legislation. By extension, limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct.

[page684]

136 In this case, the Métis seek a declaration that a provision of the *Manitoba Act* - given constitutional authority by the *Constitution Act, 1871* - was not implemented in accordance with the honour of the Crown, itself a "constitutional principle": *Little Salmon*, at para. 42.

137 Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted honourably. Rather, they seek a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.

138 The respondents argue that this claim is statute-barred by virtue of Manitoba's limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring "actions grounded on accident, mistake or other equitable ground of relief" six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(k). Breach of fiduciary duty is an "equitable ground of relief". We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13.

139 However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not [page685] act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

140 What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.

141 Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:

> The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the [page686] real analysis that ought to be undertaken, which is one of reconciliation and justification.

("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)

Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: "*Wewaykum*: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004), *U.B.C. L. Rev.* 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

142 In this case, the claim is not stale - it is largely based on contemporaneous documentary evidence - and no third party legal interests are at stake. As noted by Canada, the evidence provided the trial judge with "an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*": R.F., at para. 7.

143 Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available. As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations' factum, at para. 31. Were the Métis in this action seeking personal remedies, the [page687] reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

144 We conclude that the claim in this case is a claim for a declaration of the constitutionality of the Crown's conduct toward the Métis people under s. 31 of the *Manitoba Act*. It follows that *The Limitation of Actions Act* does not apply and the claim is not statute-barred.

F. *Is the Claim for a Declaration Barred by Laches?*

145 The equitable doctrine of laches requires a claimant in equity to prosecute his claim without undue delay. It does not fix a specific limit, but considers the circumstances of each case. In determining whether there has been delay amounting to laches, the main considerations are (1) acquiescence on the claimant's part; and (2) any change of position that has occurred on the defendant's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 76-80.

146 As La Forest J. put it in *M. (K.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40:

> Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[page688]

La Forest J. concluded as follows:

> What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine. [Emphasis added; pp. 77-78.]

147 Acquiescence depends on knowledge, capacity and freedom: *Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912. In the context of this case - including the historical injustices suffered by the Métis, the imbalance in power that followed Crown sovereignty, and the negative consequences following delays in allocating the land grants - delay by itself cannot be interpreted as some clear act by the claimants which amounts to acquiescence or waiver. As explained below, the first branch of the *Lindsay* test is not met here.

148 The trial judge found that the delay in bringing this action was unexplained, in part because other constitutional litigation was undertaken in the 1890s: paras. 456-57. Two Manitoba statutes were challenged, first in the courts, and then by petition to the Governor General in Council: paras. 431-37. The trial judge inferred that many of the signatories to the petition would have been Métis: para. 435. While we do not contest this factual finding, we do question the legal inference drawn from it by the trial judge. Although many signatories were Métis, the petitioners were, in fact, a broader group, including many signatories and community leaders who were not Métis. For example, as noted by the trial judge, neither Archbishop Taché nor Father Ritchot - leaders in "the French Catholic/Métis community" - were Métis: para. 435. The actions of this large community say little, in law, about the ability of the Métis to seek a declaration based on the honour of the Crown. They do not [page689] establish acquiescence by the Métis community in the existing legal state of affairs.

149 Furthermore, in this rapidly evolving area of the law, it is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights. As it is, the Métis commenced this claim before s. 35 was entrenched in the Constitution, and long before the honour of the Crown was elucidated in *Haida Nation*. It is difficult to see how this could constitute acquiescence in equity.

150 Moreover, a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of both parties: see *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 22. Canada was aware that there would be an influx of settlers and that the Métis needed to get a head start before that transpired, yet it did not work diligently to fulfill its constitutional promise to the Métis, as the honour of Crown required. The Métis did not receive the intended head start, and following the influx of settlers, they found themselves increasingly marginalized, facing discrimination and poverty: see, e.g., trial, at para. 541; C.A., at paras. 95, 244 and 638; A.F., at para. 200. Although bad faith is neither claimed nor needed here, the appellants point to a letter written by Sir John A. Macdonald, which suggests that this marginalization may even have been desired:

> ... it will require a considerable management to keep those wild people quiet. In another year the present residents will be altogether swamped by the influx of strangers who will go in with the idea of becoming industrious and peaceable settlers.

(October 14, 1869, A.R., vol. VII, at p. 65)

151 Be that as it may, this marginalization is of evidentiary significance only, as we cannot - and need not - unravel history and determine the precise causes of the marginalization of the Métis community in Manitoba after 1870. All that need be said (and all that is sought in the declaration) is that the central promise the Métis obtained from the Crown in order to prevent their future marginalization - the transfer of lands to the Métis children - was not carried out with diligence, as required by the honour of the Crown.

152 The second consideration relevant to laches is whether there was any change in Canada's position as a result of the delay. The answer is no. This is a case like *M. (K.)*, where La Forest J. observed that it could not be seen how the "plaintiff ... caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb": p. 77, quoting R. P. Meagher, W. M. C. Gummow and J. R. F. Lehane, *Equity Doctrines and Remedies* (2nd ed. 1984), at p. 755.

153 This suffices to answer Canada's argument that the Métis claim for a declaration that the Crown failed to act in accordance with the honour of the Crown is barred by laches. We add this, however. It is difficult to see how a court, in its role as guardian of the Constitution, could apply an equitable doctrine to defeat a claim for a declaration that a provision of the Constitution has not been fulfilled as required by the honour of the Crown. We note that, in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, at p. 357, Lamer C.J. noted that the doctrine of laches does not apply to a constitutional division of powers question. (See also *Attorney General of Manitoba v. Forest*, [1979] 2 S.C.R. 1032.) The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises.

VII. Disposition

154 The appeal is allowed in part. We conclude that the appellants are entitled to the following declaration:

That the federal Crown failed to implement the land grant provision set out in s. 31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

155 The appellants are awarded their costs throughout.

The reasons of Rothstein and Moldaver JJ. were delivered by

ROTHSTEIN J. (dissenting)

I. Introduction

156 In this case, the majority has created a new common law constitutional obligation on the part of the Crown - one that, they say, is unaffected by the common law defence of laches and immune from the legislature's undisputed authority to create limitations periods. They go this far notwithstanding that the courts below did not consider the issue, and that the parties did not argue the issue before this Court. As a result of proceeding in this manner, the majority has fashioned a vague rule that is unconstrained by laches or limitation periods and immune from legislative redress, making the extent and consequences of the Crown's new obligations impossible to predict.

157 While I agree with several of the majority's conclusions, I respectfully disagree with their conclusions on the scope of the duty engaged by the honour of the Crown and the applicability of limitations and laches to this claim.

158 The appellants, herein referred to collectively as the "Métis" made four main claims before this Court. Their primary claim was that [page692] the Crown owed the Métis a fiduciary duty arising from s. 31 of the *Manitoba Act, 1870*, S.C. 1870, c. 3 ("*Manitoba Act*"), and that this duty had been breached. As evidence of the breach of fiduciary duty, the Métis pointed to several factors: the random allocation of the land grants, the delay in allocation of the land, and the allocation of scrip instead of land to some Métis children. These claims make up the bulk of the argument in the Métis' factum.

159 The Métis also raised three other claims in less detail. First, they claimed that provincial statutes were *ultra vires* or inoperative due to the doctrine of paramountcy. Second, they claimed that the Crown did not fulfill its fiduciary duty under, or simply did not properly implement, s. 32 of the *Manitoba Act*. Finally, they claimed a failure to fulfill constitutional obligations, obligations that they state engaged the honour of the Crown. However, they did not elaborate on what duties the honour of the Crown should trigger on these facts.

160 The bulk of these claims were dismissed by the Chief Justice and Justice Karakatsanis and I am in agreement with them on those claims. I agree with their conclusion that there was no fiduciary duty here and therefore the claim for breach of fiduciary duty must fail. I agree that there are no valid claims arising from s. 32 of the *Manitoba Act* and that any claims that might have arisen from the now repealed Manitoba legislation on the land grants are moot, as those acts have long since been out of force. I agree with the majority that the random allocation of land grants was an acceptable means for Canada to implement the s. 31 land grants. Finally, I accept that the Manitoba Metis Federation has standing to bring these claims.

161 However, in my view, after correctly deciding all of these issues and consequently dismissing the vast majority of the claims raised on this appeal, my colleagues nonetheless salvage one aspect of the Métis' claims by expanding the scope of the duties that are engaged under the honour of the Crown. These issues were not the [page693] focus of the parties' submissions before this Court or the lower courts. Moreover, the new duty derived from the honour of the Crown that my colleagues have created has the potential to expand Crown liability in unpredictable ways. Finally, I am also of the opinion that any claim based on honour of the Crown was, on the facts of this case, barred by both limitations periods and laches. As a result, I would find for the respondents and dismiss the appeal.

II. Facts

162 While I agree with my colleagues' broad outlines of the facts of this case, I take issue with a number of the specific inferences or conclusions that they draw from the record.

163 As in all appellate reviews, the trial judge's factual findings should not be interfered with absent palpable and overriding error (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10). While the majority does not do so explicitly, aspects of their review and use of the facts depart from the findings of fact made by the trial judge.

However, at no point do they show that the trial judge made any palpable and overriding error in reaching his conclusions. Nor did the Métis claim that the findings I describe below were based on palpable and overriding error.

164 There are two main areas in which the majority reasons have departed from the factual findings of the trial judge, absent a finding of palpable and overriding error: (1) the extent of the delay in distributing the land, and (2) the effect of that delay on the Métis. In my view, the majority's departure from the appropriate standard of appellate review in these areas calls their analysis into question.

A. *Extent and Causes of the Delay*

165 The majority concludes that the record and findings of the courts below suggest a "persistent pattern of inattention". This pattern leads them to find that the duty of diligent fulfillment of solemn promises derived from the honour of the Crown [page694] was breached. In their view, there was a significant delay in implementing the land grants and this delay substantially defeated the purpose of s. 31. I respectfully disagree.

(1) Historical Evidence

166 Historical evidence was presented at trial and the bulk of it was accepted by the trial judge. Based on that evidence and on the reasons of the trial judge, I have summarized the process of how the land grants were distributed below. Though I accept the finding of the trial judge that there was a lengthy delay in the distribution of the land grants, this history reveals a steady and persistent effort to distribute the land grants in the face of significant administrative challenges and an unstable political environment. While a faster process would most certainly have been better, I cannot accept the majority's conclusion that this evidence reveals a pattern of inattention **-** a finding that is nowhere to be found in the reasons of the trial judge.

(a) *The Census*

167 The first Lieutenant Governor of Manitoba, A. G. Archibald, conducted a census which was completed on December 9, 1870. It would have been impossible to begin the allocation process without a reasonable estimate of how many Métis were owed land.

(b) *The Survey*

168 While the census was in progress, the Lieutenant Governor was also instructed to advise the government on a system for surveying the province. An order in council on April 25, 1871, adopted the survey method that Lieutenant Governor Archibald had proposed. The land needed to be surveyed before it was allocated and the Dominion lands survey was a formidable administrative challenge. The Court of Appeal acknowledged that "the evidence makes it clear that selection of the 1.4 million acres, all of which Canada was obliged [page695] to grant, would have been unworkable in the absence of a survey". The survey of the settlement belt was completed in the years 1871-74.

(c) *Selection of the Townships*

169 Once enough of the survey was complete, the Lieutenant Governor was able to take the next step in the process by selecting which townships would be distributed to the Métis. Lieutenant Governor Archibald received instructions to begin this process on July 17, 1872. The process of selecting the townships required the Lieutenant Governor to consult with the Métis of each parish to determine which areas should be selected. This consultation process took several months. Such consultation cannot be characterized as persistent inattention to the situation of the Métis.

170 While this process was taking place, there was a change in Lieutenant Governor. On December 31, 1871, Lieutenant Governor Archibald had resigned, realizing that he had lost Prime Minister Macdonald's confidence. He was not replaced, however, until the fall of 1872 when Lieutenant Governor Alexander Morris was sworn in. Archibald continued to serve until Morris took over. These types of changes in government inevitably lead to time being lost. Any such delay cannot, without more, be attributed to inattention.

171 By February 22, 1873, the preparatory work was sufficiently advanced that Lieutenant Governor Morris was able to begin drawing lots for the individual grants of 140 acres. He was able to draw lots at the rate of about 60 per hour.

(d) *Events Giving Rise to the Second Allotment*

172 Early in 1873, concern was expressed about whether it was proper for the heads of Métis families to share in the land grant. As a result, in April 1873, the federal government determined that a stricter interpretation of s. 31 should be adopted. Participation in the land grant was limited to the "children of half-breed heads of families" (trial, at [page696] para. 202). As a result of this change, the number of recipients was significantly reduced, which meant that larger allotments would be required to distribute the entire 1.4 million acres. On August 5, 1873, Lieutenant Governor Morris was instructed to cancel the previous allotments. On August 16, 1873, Morris began the second allotment.

173 This change meant that all of the drawing of the allotments up until that point had to be discarded. However, this was not the result of inattention. Rather, the federal government was taking care to make sure that the land grant was distributed correctly, to the right beneficiaries. The government had originally received advice from Lieutenant Governor Archibald that, in order to achieve the purposes of the land grant, it would be necessary to include the heads of the Métis families. While the Lieutenant Governor's interpretation was not consistent with the text of s. 31, it was an interpretation that was based on an effort to understand the purpose of the text and give meaning to the phrase "towards the extinguishment of the Indian Title to the lands". While the necessity of starting over no doubt resulted in some delay, it was not caused by inattention.

(e) *The Fall of Sir John A. Macdonald's Government*

174 On November 5, 1873, Sir John A. Macdonald's government resigned. On January 22, 1874, an election was held. The opening of Parliament under Prime Minister Alexander Mackenzie was on March 26, 1874. David Laird became Minister of the Interior responsible for Dominion Lands. In the fall of 1874, Minister Laird went to Manitoba to gather information on all phases of the land question. According to Dr. Flanagan, Laird's notebook shows that he considered the appointment of a commission "to enumerate those entitled to land rights under the *Manitoba Act*, including the children's grant under s. 31" (evidence of Dr. Thomas Flanagan, A.R., vol. XXVI, at p. 11).

[page697]

(f) *The Machar/Ryan Commission*

175 An April 26, 1875 order in council established a commission to take applications for patents from those entitled to participate in the land grants under the *Manitoba Act*. By order in council on May 5, 1875, John Machar and Matthew Ryan were appointed commissioners and went to Manitoba in the summer of 1875. By the end of 1875, the commissioners had prepared returns for all parishes. These returns were approved and constituted what was seen as an authoritative list of those entitled to share in the land grant. However, because there was a concern that this list was not in fact complete, Ryan, having become a magistrate in the North-West Territories, and Donald Codd in the Dominion Lands Office, were authorized to receive further applications by Métis children or heads of families who had not been able to appear before the commission in 1875 because they had emigrated from Manitoba.

(g) *The Patents*

176 On August 31, 1877, the first batch of patents arrived in Winnipeg. After completion of the drawings for a parish, issue of patents usually took one to two years. In the interim, posters were prepared within a few weeks of the approval of the allotment to inform recipients as to the location of their allotments. Most of the patents were issued by 1881, however allotments continued to be approved for some years thereafter. Over 6,000 patents had to be issued under s. 31 of the *Manitoba Act*, on top of over 2,500 under s. 32.

(h) *The Late Applications*

177 In order to get their share of the land grant, the Métis had to file claims with the government. Because of the migration that was already underway, a certain number of these claims were filed late. While the government had anticipated some late claims, the number had been underestimated. As a [page698] result, claims continued to be filed after the 1.4 million acres had already been allocated. On April 20, 1885, an order in council granted the Métis children scrip rather than land, for those children who had submitted late applications.

178 The deadline for filing claims to the $240 scrip for children was May 1, 1886. However, it was not strictly enforced and the late applications continued to trickle in. The government extended the deadline at least four times. In the end, 993 scrips for $240 (worth $238,320) were issued to the Métis children or their heirs.

(2) Evidence of Delay

179 My colleagues point to a number of delays including errors in determining the class of beneficiaries, errors in estimating the number of beneficiaries, long delays in issuing patents and "unexplained periods of inaction". However, these administrative issues must be placed in their proper historical context. At the time, Manitoba was a thinly settled frontier province. There was limited transportation and communications infrastructure and the federal civil service was small. The evidence of Dr. Flanagan was that

> [e]ven with an omniscient, omnicompetent government, it would have taken years to implement the *Manitoba Act*. The objective requirements of carrying out surveys, sorting out claims, and responding to political protests could not be satisfied instantaneously. But, of course, the government of Canada was neither omniscient nor omnicompetent. [p. 171]

Given this context, some "delays" in fulfilling the *Manitoba Act* appear to have been inevitable.

180 The trial judge, at para. 1055, observed that Manitoba was "a fledgling province [that] had just come into existence". Manitoba was far removed from Ottawa, which was the source of the authority for administration of the grant. The trial judge noted, at paras. 155-56, that those involved in [page699] the land grants, including the Lieutenant Governor and the Manitoba legislature, had many challenges to contend with in the establishment of the new province:

> Amongst other things, [the Lieutenant Governor] was to form a government on an interim basis which included selecting and appointing members of his Executive Council, selecting heads of departments of the government, and appointing the members of the Legislative Council. He was to organize electoral divisions, both provincially and federally. He was to undertake a census. He was to provide reports to the Federal Government as to the state of the laws and the system of taxation then existing in the province, and as to the state of the Indian tribes, their numbers, wants and claims, along with any suggestions he might have with reference to their protection and to improvement of their condition. He was to report generally on all aspects of the welfare of the province.
>
> Aside from the foregoing, he also received extensive instructions as to the undertakings which he should fulfill as Lieutenant Governor of the North-West Territories.

181 The majority attributes a three-year delay to the erroneous inclusion of the parents of the Métis children. However, much of the time before the cancellation of the first allotment was devoted to a survey that was used for all subsequent allotments. It is inappropriate to characterize this time as a delay. In my view, the delay stemming from the mistake about the beneficiaries amounts to less than a year, since the actual allocation under the first allotment did not begin until February 1873 and the allotment was cancelled on August 5, 1873.

182 My colleagues also point to an "inexplicable delay" from 1873 and 1875. This period included the time after the fall of Sir John A. Macdonald's government in November 1873. In my view, the change in government followed by the decision to proceed by way of a commission accounts for this time period. This Court must recognize the implications of such a change. Even today, changes in government have policy and practical impacts that delay implementation of government programs. Moreover, it does not [page700] constitute inattention to decide to proceed by way of commission in order to determine who was eligible to share in the land grant.

183 My colleagues criticize the failure of government officials to devote adequate time to the distribution of the allotments. However, there was no evidence tendered regarding the size of the civil service in Manitoba or in Ottawa during the 1870s and 1880s. We do not know how many federal or provincial civil servants there were or the extent of the work and functions they were required to perform. We do know that Lieutenant Governor Morris "wanted to move faster but was hampered by the limited time [Dominion Lands Agent] Donald Codd could devote to the enterprise" (Flanagan, at p. 58). Codd was only able to assist in drawing lots two days a week, until Ottawa sent someone to relieve him at the Lands Office. We have no evidence of what other obstacles there may have been impeding this process.

184 There was another changeover in the Lieutenant Governor from Morris to Joseph-Édouard Cauchon in 1877. While there was no doubt time lost as a result of the change itself, drawing of lots was also delayed as Cauchon was concerned about reports of dissatisfaction he had received. Unfortunately, over a hundred years later, the details of those reports are unclear. It is quite possible that they account for the second delay from 1878 to 1880.

185 The trial judge did not make a finding of negligence. There was also no finding of bad faith. Indeed, the trial judge concluded that there was little evidence of complaint at the time the process was being conducted. The trial judge also made no finding that the relevant government officials lacked diligence or acted with a "pattern of inattention".

186 The majority states, at para. 107, that

> a negligent act does not in itself establish failure to implement an obligation in the manner demanded by [page701] the honour of the Crown. On the other hand, a persistent pattern of inattention may do so if it frustrates the purpose of the constitutional obligation, particularly if it is not satisfactorily explained.

187 I agree, as my colleagues state, that a finding of lack of diligence requires a party to show more than just a negligent act. Here, the trial judge did not even find negligence. Despite this, the majority concludes that there was a lack of diligence. In my respectful opinion, that conclusion is inconsistent with the factual findings of the trial judge.

188 There are gaps in the record. My colleagues appear to rely on these gaps to support their view that the government failed to fulfill the obligations set out in s. 31. In my view, the government cannot, at this late date, be called upon to explain specific delays. This is an insurmountable challenge due to the passage of time and the paucity of the historical record.

189 If this land grant obligation had been made today, we would have expected a more expeditious procedure. However, the obligation was not undertaken by the present day federal government. It was undertaken by the government over 130 years ago, at a time when the government and the country were newly formed and struggling to become established. We cannot hold that government to today's standards when considering circumstances that arose under very different conditions. Indeed the need to avoid the application of a modern standard of conduct to historical circumstances has been noted by this Court in the past: *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 121. To the extent there was delay, on a fair review of the available evidence and findings of the trial judge, it cannot be said to be the result of inattention, much less a persistent pattern of inattention.

B. *Effect of the Delay on the Métis*

190 The majority attributes a number of negative consequences to the length of time that it took for the land grants to be made. In my respectful [page702] view, in so doing they have departed from the factual findings made by the trial judge and drawn inferences that are not supported by the evidence. While the length of time that it took for the land to be distributed may have been frustrating for some of the Métis, it was not the cause of every negative experience that followed for them.

(1) Departure From the Red River Settlement

191 The majority suggests that the marginalization of the Métis and their departure from the Red River Settlement may have been caused by the length of time it took to issue the land grants. This is not supported by the findings of the trial judge or the record. There were other factors at play.

192 The trial judge considered the historical evidence on this point and concluded:

> As the buffalo robe trade was developing strength, agriculture experienced several years of bad crops. From 1844 to 1848, only once, 1845, was the harvest sufficient to feed the Settlement. By the fall of 1848, the Settlement was bordering on starvation. The 1850s brought better crops, but the 1860s were again very poor. The combination of a strong buffalo robe market and very poor crops led to increased abandonment of agriculture by the Métis and some emigration from the Settlement to points west following the buffalo. By 1869, the buffalo were so far west and south of Red River that the buffalo hunt no longer originated in the Settlement. [Emphasis added; para. 50.]

193 Thus, it is clear that emigration from the Red River Settlement began before the s. 31 land grants were contemplated due to the economic forces of declining agriculture and location of the buffalo hunt. The westward retreat of the buffalo herds was a critical factor. The buffalo robe trade was the Métis' primary livelihood and one of the backbones of their economy. This indicates that the Métis' migration was motivated by economic forces, and that the government's actions or inactions were not the sole or even the predominant cause of this phenomenon.

[page703]

194 The majority also attributes to the delay the Métis' inability to trade land to obtain contiguous parcels. With respect, the trial judge concluded that there was no general intention to create a Métis land base and thus, the ability to trade land to obtain contiguous parcels was never one of the objectives of the land grant. The trial judge concluded that only some Métis wanted to obtain contiguous parcels; others preferred to obtain the best land possible. This factual finding is entitled to deference.

195 Finally, my colleagues quote Deputy Minister of the Interior, A. M. Burgess in an effort to suggest that there was general agreement about the existence of the delay and its supposed harmful consequences. Contrary to the majority's suggestions, Burgess's statements cannot be read as a general commentary on the entire land grant process in order to indict the federal government for inattention. Mr. Burgess stated that he was "heartily sick" of the "disgraceful delay which is taking place in issuing patents" (A.R., vol. XXI, at pp. 123-24 (emphasis added)). The issuing of the patents, and any delay that occurred in that process, represented only one aspect of the administrative challenge posed by the land grants. Mr. Burgess also wrote that he had been working night and day on those patents, hardly evidence of a pattern of inattention.

(2) Price Obtained for the Land

196 My colleagues conclude that what they say was a 10-year delay in implementation of the land grants increased sales to speculators. They imply that sales to speculators were harmful to Métis interests. While I accept the finding of the trial judge that some sales were made to speculators for improvident prices, not all sales were bad bargains for the Métis.

197 The trial judge also found that there was evidence of sales which occurred at market prices, sales to people who were not speculators and sales [page704] which were not the result of pressure or conduct of speculators. The trial judge held:

> Overall, while there are many examples of what appear to be individuals having been taken advantage of, it is difficult to assess at this late date whether that was so or whether the price obtained was a fair price given the vagaries of what it was that was being sold and the consequent market value of that. [para. 1057]

It appears that some Métis got higher prices and some Métis got lower prices for their land. For the Métis community as a whole, this may have been a "zero sum game". At this stage it would be entirely speculative to conclude that there was adverse impact on the Métis community as a whole as a result of land sales.

198 My colleagues suggest that as time passed, the possibility grew that the land was becoming less valuable. In my view, this conclusion is not supported by the evidence. In fact, 1880 to 1882 were boom years, where the land would have become even more valuable. The Court of Appeal noted that the vast majority of sales took place between 1877 and 1883. It is incongruous for the Métis descendants as a group to come forward ostensibly on behalf of some of their ancestors who may have benefitted from the delay.

(3) Scrip

199 The majority acknowledges that it was unavoidable that the land would be distributed based on an estimate of the number of eligible Métis and that the estimate would be inaccurate to some degree. They also acknowledge that the issuance of scrip was a reasonable mechanism to provide the benefit to which the excluded children were entitled. However, they find that

> the delayed issuance of scrip redeemable for significantly less land than was provided to the other recipients further demonstrates the persistent pattern of inattention ... . [para. 123]

200 I cannot agree that the delayed issuance of scrip demonstrates a persistent pattern of inattention by the government. Rather, the issuance of scrip [page705] was equally if not more consistent with the late filing of applications - over which the government had little control - and the corresponding underestimate in the number of eligible recipients. That is hardly evidence of government inattention.

201 If there had been no delay and the accurate number of Métis children had been known from the outset, each child would have received less land than they actually did because the recipients of scrip would have been included in the original division. In this sense, then, Canada overfulfilled its obligations under the *Manitoba Act* by providing scrip after the 1.4 million acres were exhausted. The issuance of scrip reflected Canada's commitment to meaningful fulfillment of the obligation, not inattention.

C. *Conclusion on the Facts*

202 Manifestly, the trial judge made findings of delay. Nonetheless these findings and the evidence do not reveal a pattern of inattention. They do not reveal a lack of diligence. Nor do they reveal that the purposes of the land grant were frustrated. That alone would nullify any claim the Métis might have based on a breach of duty derived from the honour of the Crown, assuming that any such duty exists a matter to which I now turn.

III. Analysis

A. *Honour of the Crown*

203 In their reasons, my colleagues develop a new duty derived from the honour of the Crown: a duty to diligently fulfill solemn obligations. Earlier cases spoke mostly to the manner in which courts should interpret treaties and statutory provisions and not to the manner in which governments should execute them. While *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, explicitly leaves the door open to finding additional new Crown duties in the [page706] future, this is not an appropriate case to develop such a duty.

204 A duty of diligent fulfillment may well prove to be an appropriate expansion of Crown obligations. However, the duty crafted in the majority reasons is problematic. The threshold test for what constitutes a solemn obligation is unclear. More fundamentally, however, the scope and definition of this new duty created by the majority were not explored by the parties in their submissions in this Court nor were they canvassed in the courts below, making the expansion of the common law in this way inappropriate on appeal to this Court.

(1) Ambiguity as to What Constitutes a Solemn Obligation

205 In order to trigger this new duty of diligent fulfillment, there must first be a "solemn obligation". But no clear framework is provided for when an obligation rises to this "solemn" level such that it triggers the duty of diligent implementation. Furthermore, the majority reasons are unclear as to what types of legal documents will give rise to solemn obligations: Is it only provisions in the Constitution or does it also include treaties? In para. 75, the majority appears to restrict their conclusion on diligence to constitutional obligations to Aboriginal peoples. But, in para. 79, they note that the duty applies whether the obligation arises in a treaty or in the Constitution. This further reflects the inappropriateness of fashioning new common law rights and obligations without the benefit of consideration by the trial judge or Court of Appeal and in particular without the benefit of argument before this Court.

206 This difficulty is manifested in other aspects of the majority reasons. My colleagues accept that s. 31 was a constitutional provision (para. 94). Adopting the narrowest reading of their holding as to what documents trigger solemn obligations - [page707] one limited to constitutional provisions - it would seem such obligations would be triggered here. The majority nonetheless proceeds to consider how s. 31 of the *Manitoba Act* is similar to a treaty (para. 92). It thus appears that s. 31 engages the honour of the Crown, not just because of its constitutional nature, but also because of its treaty-like character.

207 The idea that certain sections of the Constitution should be interpreted differently or should impose higher obligations on the government than other sections because some of these sections can be analogized to treaties is novel to say the least. I reject the notion that when the government undertakes a constitutional obligation, how it must perform that obligation depends on how closely it resembles a treaty.

208 Setting aside the issue of what types of legal documents might contain solemn obligations, there is also uncertainty in the majority's reasons as to which obligations contained in those documents will trigger this duty. My colleagues assert that for the honour of the Crown to be engaged, the obligation must be specifically owed to an Aboriginal group. While I agree that this is clearly a requirement for engaging the honour of the Crown, this alone cannot be sufficient. As the majority notes, in the Aboriginal context, a fiduciary duty can arise as the result of the Crown assuming discretionary control over a *specific Aboriginal interest*. Reducing honour of the Crown to a test about whether or not an obligation is owed simply to an Aboriginal group risks making claims under the honour of the Crown into "fiduciary duty-light". This new watered down cause of action would permit a claimant who is unable to prove a specific Aboriginal interest to ground a fiduciary duty, to still be able to seek relief so long as the promise was made to an Aboriginal group. Moreover, as the majority acknowledges at para. 108, this new duty can be breached as a result of actions that would not rise to the level required to constitute a breach of fiduciary duty. This new duty, with a broader scope [page708] of application and a lower threshold for breach, is a significant expansion of Crown liability.

(2) Absence of Submissions or Lower Court Decisions on This Issue

209 Even if one were not concerned with the issues identified above, this case was never argued based on this specific duty of diligent fulfillment of solemn obligations arising from the honour of the Crown. The parties made no submissions on a duty of diligent implementation of solemn obligations. The Métis never provided argument as to why the honour of the Crown should be engaged here, what duty it should impose on these facts or how that duty was not fulfilled. As a result, Canada and Manitoba have not had an opportunity to respond on any of these points. This Court does not have the benefit of the necessary opposing perspectives which lie at the heart of our adversarial system.

210 While there is no doubt that the phrase "honour of the Crown" was used in argument before this Court, no submissions of any substance were made as to what duty the honour of the Crown should have engaged on these facts beyond a fiduciary duty, nor were there any submissions on a duty of diligent implementation.

211 During the pleadings phase, honour of the Crown was not mentioned in the Métis' statement of claim and was mentioned only once in passing in their response to particulars (A.R., vol. IV, at p. 110). Before this Court, the Métis referred to honour of the Crown four times in their factum, but never alleged that there was a duty of diligent fulfillment of solemn obligations. Instead, two of the references to the honour of the Crown are contained in their summary of the points in issue and in their [page709] requested order. They also briefly assert that the honour of the Crown required the government to take a liberal approach to interpreting s. 32 and that the honour of the Crown could be used to show one of the elements of a fiduciary obligation under s. 32. They never provided submissions as to what constitutes a solemn obligation nor did they allege specifically that the honour of the Crown required due diligence in the implementation of such solemn obligations. In oral argument before this Court, the only submissions made on honour of the Crown were supplied by the Métis Nation of Alberta and the Attorney General for Saskatchewan. Neither of these interveners, nor the Métis themselves, made submissions about diligence, a new legal test based on patterns of inattention, or solemn obligations.

212 Delineating the boundaries of new legal concepts is prudently done with the benefit of a full record from the courts below and submissions from both parties. Absent these differing perspectives and analysis by the courts below, it is perilous for this Court to embark upon the creation of a new duty under the common law. I believe this concern is manifestly made apparent by the ambiguity in the majority reasons about what legal documents can give rise to solemn obligations.

213 Moreover, it is particularly unsatisfactory to impose a new duty upon a litigant without giving that party an opportunity to make submissions as to the validity or scope of the duty. This inroad on due process is no less concerning when the party to the proceedings is the government. As a result of the majority's reasons, the government's liability to Aboriginal peoples has the potential to be expanded in unforeseen ways. The Crown has not had the opportunity to address what impact this new duty might have on its ability to enter into treaties or make commitments to Aboriginal peoples. It is inappropriate to impose duties on any party, including the government, without giving that party an opportunity to make arguments about the impact that such liability might have. In the case of the government, where the new duty is constitutionally derived and therefore cannot be refined or modified [page710] through ongoing dialogue with Parliament, it is of very serious concern.

214 This Court has always been wary of dramatic changes in the law: see *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 760. In that case, this Court concluded that courts are not well placed to know all of the problems with the current law and more importantly are not able to predict what problems will be associated with the proposed expansion. Courts are not always aware of all of the policy and economic consequences that might flow from the proposed expansion. While this is not a case about the appropriate role for the courts to play relative to the legislature, these same problems are apparent on the facts of this case. Without substantive submissions from the parties, it is difficult for this Court to know how this new duty will operate and what consequences might flow from it. For all these reasons, it is inappropriate to create this new duty as a result of this appeal.

B. *Limitations*

215 Even if one accepts that the honour of the Crown was engaged, that it requires the diligent implementation of s. 31, and that this duty was not fulfilled, any claims arising from such a cause of action have long been barred by statutes of limitations. The majority has attempted to circumvent the application of these limitations periods by characterizing the claim as a fundamental constitutional grievance arising from an "ongoing rift in the national fabric" (para. 140). With respect, there is no legal or principled basis for this exception to validly enacted limitations statutes adopted by the legislature. In my view, these claims must be rejected on the basis that they are time-barred.

(1) Decisions of the Courts Below

216 The present action was commenced on April 15, 1981. The trial judge held that, except for the claims related to the constitutional validity of the Manitoba statutes, there was no question that the [page711] Métis' action was outside the statutorily mandated limitation period and he would have dismissed the action on that basis.

217 The trial judge noted the applicable limitations legislation would have captured these claims. He held that the Métis at the time had knowledge of their rights under s. 31 of the *Manitoba Act* and were engaged in litigation to enforce other rights. From that he inferred that the Métis "chose not to challenge or litigate in respect of s. 31 and s.

32 knowing of the sections, of what those sections were to provide them, and of their rights to litigate" (para. 446). The trial judge concluded that the limitations legislation applied and barred the claims.

218 In the Court of Appeal, Scott C.J.M. noted the trial judge's finding that the Métis knew of their rights and their entitlement to sue more than six years prior to April 15, 1981. The Court of Appeal concluded that the trial judge's factual findings regarding the Métis' knowledge of their rights were entitled to deference. Scott C.J.M. affirmed the trial judge's ruling that the Métis' claim for breach of fiduciary duty with respect to both s. 31 and s. 32 of the Act was statute-barred on the basis that the Métis had not demonstrated that the trial judge misapplied the law or committed palpable and overriding error in arriving at this conclusion.

(2) Limitations Legislation in Manitoba

219 While limitations periods have existed in Manitoba continuously since 1870 by virtue of the application of the laws of England, Manitoba first enacted its own limitations legislation in 1931. *The Limitation of Actions Act, 1931*, S.M. 1931, c. 30, provided for a six-year limitation period for "actions grounded on accident, mistake or other equitable ground of relief" (s. 3(1)(*i*)).

220 There was also a six-year limitation period for any other action not specifically provided for in [page712] that Act or any other act (s. 3(1)(*l*)). *The Limitation of Actions Act, 1931* provided that it applied to "all causes of action whether the same arose before or after the coming into force of this Act" (s. 42). Similar provisions have been contained in every subsequent limitations statute enacted in Manitoba.

221 In my view, the effect of these provisions is that the Métis' claim, whether framed as a breach of fiduciary duty or as breach of some duty derived from honour of the Crown, has been statute-barred since at least 1937.

222 My colleagues are of the view that since this claim is no longer based on breach of fiduciary duty, s. 3(1)(*i*) of *The Limitation of Actions Act, 1931* does not apply to bar these claims. Regardless of how the claims are classified, however, the basket clause of *The Limitation of Actions Act, 1931* contained in s. 3(1)(*l*) would apply to bar the claim since that section is intended to ensure that the six-year limitation period covers any and all causes of action not otherwise provided for by the Act.

223 This claim for a breach of the duty of diligent fulfillment of solemn obligations is a "cause of action" and therefore s. 3(1)(*l*) bars it.

(3) Limitations and Constitutional Claims

224 My colleagues assert that limitations legislation cannot apply to declarations on the constitutionality of Crown conduct. They also state that limitations acts cannot bar claims that the Crown did not act honourably in implementing a constitutional obligation. With respect, these statements are novel. This Court has never recognized a general exception from limitations legislation for constitutionally derived claims. Rather, this Court has consistently held that limitations periods apply to factual claims with constitutional elements.

[page713]

225 The majority notes that limitations periods do not apply to prevent a court from declaring a statute unconstitutional, citing *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181; and *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138. While I agree, the constitutional validity of statutes is not at issue in this case. Instead, this is a case about factual issues and alleged breaches of obligations which have always been subject to limitations periods, including on the facts of *Ravndahl* and *Kingstreet*.

226 *Kingstreet* and *Ravndahl* make clear that there is an exception to the application of limitations periods where a party seeks a declaration that a statute is constitutionally invalid. Here, my colleagues have concluded that the

Métis' claim about unconstitutional statutes is moot. The remaining declaration sought by the Métis has nothing to do with the constitutional validity of a statute.

227 Instead, what the Métis seek in this case is like the personal remedies that the applicants sought in *Kingstreet* and *Ravndahl*. The Métis are asking this Court to rule on a factual dispute about how lands were distributed over 130 years ago. While they are not asking for a monetary remedy, they are asking for their circumstances and the specific facts of the land grants to be assessed. As this Court said in *Ravndahl*:

> Personal claims for constitutional relief are claims brought as an individual *qua* individual for a personal remedy. As will be discussed below, personal claims in this sense must be distinguished from claims which may enure to affected persons generally under an action for a declaration that a law is unconstitutional. [para. 16]

These claims are made by individual Métis and their organized representatives. The claims do not arise from a law which is unconstitutional. Rather, they arise from individual factual circumstances. As [page714] a result, the rule in *Kingstreet* and *Ravndahl* that individual factual claims are barred by limitations periods applies to bar suit in this case.

(4) Policy Rationale for Limitations Periods Applies to These Claims

228 The majority finds that the issue in this case is of such fundamental importance to the reconciliation of the Métis peoples with Canadian sovereignty that invoking a limitations period would be inappropriate. They further conclude that unless this claim is resolved there will be an "ongoing rift in the national fabric".

229 In my view, it is inappropriate to judicially eliminate statutory limitations periods for these claims. Limitations periods are set by the legislatures and are not discretionary. While limitations periods do not apply to claims that seek to strike down statutes as unconstitutional, as I noted above, this is not such a claim.

230 Limitations statutes are driven by specific policy choices of the legislatures. The exceptions in such statutes are also grounded in policy choices made by legislatures. To create a new judicial exception for those fundamental constitutional claims that arise from rifts in the national fabric is to engage directly in social policy, which is not an appropriate role for the courts.

231 Limitations acts have always been guided by policy. In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, this Court identified three groups of policies underlying limitations statutes: those concerning certainty, evidentiary issues, and diligence.

232 The certainty rationale is connected with the concept of repose: "There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations" (*M. (K.) v. M. (H.)*, at p. 29).

[page715]

233 The evidentiary issues were further expanded upon in *Wewaykum*, at para. 121:

> Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

234 Finally, the diligence rationale encourages plaintiffs to not sleep on their rights. An aspect of this concept is the idea that "claims, which are valid, are not usually allowed to remain neglected" (*Riddlesbarger v. Hartford Insurance Co.*, 74 U.S. (7 Wall.) 386 (1868), at p. 390, cited in *United States v. Marion*, 404 U.S. 307 (1971), at p. 322, footnote 14).

235 From these three rationales, limitations law has evolved to include a variety of exceptions which reflect further refinements in the policies that find expression in statutes of limitations. Older limitations acts contained few exceptions but modern statutes recognize certain situations where the strict application of limitations periods would lead to unfairness. For instance, while limitations acts have always included exceptions for minors, exceptions based on capacity have been expanded to recognize claimants with a variety of disabilities. Exceptions have also been created based on the principle of discoverability. However, even as those exceptions have been broadened or added, legislatures have created a counterbalance in the form of ultimate limitations periods which operate to provide final certainty and clarity. None of the legislatively created exceptions, nor their rationales, apply to this case.

(a) *Discoverability*

236 The discoverability principle has its origins in judicial interpretations of when a cause of action "accrues". Discoverability was described [page716] in the English case of *Sparham-Souter v. Town and Country Developments (Essex) Ltd.*, [1976] 1 Q.B. 858 (C.A.), at p. 868, where Lord Denning, M.R. stated:

> ... when building work is badly done and covered up the cause of action does not accrue, and time does not begin to run, until such time as the plaintiff discovers that it has done damage, or ought, with reasonable diligence, to have discovered it.

237 While this judicial discoverability rule was subsequently rejected by the House of Lords, Canadian legislatures moved to amend their limitations acts to take into account the fact that plaintiffs might not always be aware of the facts underlying a claim right away. This evolution was described by this Court in *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 40-42, where it was noted that the British Columbia legislature had amended its limitations legislation to give effect to an earlier judicial decision which postponed "the running of time until the acquisition of knowledge or means of knowledge of the facts giving rise to the cause of action".

238 The discoverability principle is grounded in the idea that, even if there is no active concealment on the part of the defendant giving rise to other ways of tolling limitations periods, the facts underlying a cause of action may still not be accessible to the plaintiff for some time. There is a potential injustice that can arise where a claim becomes statute-barred before a plaintiff was aware of its existence (*M. (K.) v. M. (H.)*, at p. 33).

239 The discoverability principle has been applied in a variety of contexts. In *Kamloops*, the claim arose from negligent construction of the foundation of a house, where there was evidence that the defect was not visible until long after the house was completed. In *M. (K.) v. M. (H.)*, discoverability was used to toll the limitation period until such time as the victim of childhood incest was able to discover "the connection between the harm she has suffered and her childhood history" (p. 35). In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, [page717] at para. 43, this Court delayed the start of a limitation period under Ontario's no-fault insurance scheme until the plaintiff had knowledge of the extent of injuries that would allow him to make a claim within the scheme.

240 The link in these cases is that the plaintiffs were unaware of the specific damage or were not aware of the link between the damage and the actions of the defendant. Limitations law permits exceptions grounded in lack of knowledge of the facts underlying the claim and the connection between those facts, the actions of the defendant and the harm suffered by the plaintiff.

241 The Métis can make no such claim. They were not unaware of the length of time that it took for the land to be distributed at the time that the distribution was occurring. The trial judge found that representations to the federal government by the Legislative Council and Assembly of Manitoba were made about the length of time the process was taking as early as 1872. At the time, a significant proportion of the Manitoba legislature was Métis. Nor can they claim that they were unaware of the connection between the length of time that the distribution was taking and the actions of the government, since the trial judge found that the federal government responded to this 1872 complaint by reiterating that the selection and allocation of land was within the sole control of Canada. Thus, the exception that the majority has created is not consistent even at the level of public policy with the discoverability exceptions that have been created by legislatures.

242 I would also note that while the history of the discoverability exception indicates that there is room for judicial interpretation in limitations law, that interpretation must be grounded in the actual words of the statute. In this case, the majority has not linked their new exception to any aspect of the text of the Act.

(b) *Disability*

243 Tolling limitations periods for minors or those with disabilities is another long-standing exception to the general limitation rules. Section 6 of *The Limitation of Actions Act, 1931* provided that for certain types of claims, a person under a disability had up to two years after the end of that disability to bring an action. These provisions have grown over time. *The Limitation of Actions Act*, C.C.S.M. c. L150, currently in force in Manitoba provides for tolling where a person is a minor or where a person is "in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition" (s. 7).

244 Incapacity due to disability has also been used as the legislative framework for tolling limitations periods for victims of sexual assault by a trusted person or person in authority. The Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 10(2), creates a presumption that the person claiming to have been assaulted was "incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise". This presumption can be rebutted.

245 A victim who suffered sexual assault at the hands of a person in a position of trust, is said to be incapable of bringing a claim because of a variety of factors including

> the nature of the act (personal violation), the perpetrator's position of power over the victim and the abuse of that position act effectively to silence the victim. Moreover, until recently, many victims of sexual assault were subject to social disapproval based on the perception that they were somehow to blame.

(Ontario, Limitations Act Consultation Group, *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (1991), at p. 20)

246 If the discoverability rule has its origins in incapacity to litigate because of lack of knowledge of particular facts underlying the claim such as the damage or the relationship between the damage and the defendant, the exceptions for disability and minors are grounded in a broader view of incapacity:

> Those under legal disability are presumed not to know their rights and remedies and it would be unfair to expect them to proceed diligently in such matters.

(*Murphy v. Welsh*, [1993] 2 S.C.R. 1069, at p. 1080)

247 The Métis were never in a position where they were under a legal disability. As the trial judge found, the Métis were full citizens of Manitoba who wanted to be treated the same as other Canadians. While some sought to entail the s. 31 lands to prevent the children from selling, this view was by no means unanimous. The Métis had always owned land individually and been free to sell it. It is paternalistic to suggest from our modern perspective that the Métis of the 1870s did not know their rights and remedies. This type of paternalism would have been an anathema to the Métis of the time who sought to be treated as equals.

248 The power imbalance that justifies the presumption of incapacity for victims of certain types of sexual assaults is also inapplicable here. Section 31 was enacted *because* of the strength of the Métis community, not because the community was weak or vulnerable or subject to government abuse. While their power in Manitoba declined with the influx of settlers, it is revisionist to suggest that they were in such a weak position in relation to the federal government that the government was able to "silence" them (as described above in para. 245). While many of the recipients of the land grants [page720] were minors, the findings of the trial judge make clear that the children's parents, adults who could have acted on their children's behalf, knew of their rights. The policy that underlies the exception for minors and those with disabilities does not track onto the experience of the Métis.

(c) *Ultimate Limitations Periods*

249 As a counterweight to newer exceptions like discoverability and expanded disability provisions, legislatures have also adopted ultimate limitations periods. The purpose of these ultimate limitations periods is to provide true repose for defendants, even against undiscovered claims. Even if a claim is not discovered, meaning that the basic limitations period has not been engaged, an ultimate limitation period can bar a claim. While basic limitations periods are often in the range of two to six years, ultimate limitations periods are usually 10 to 30 years long.

250 Manitoba has had an ultimate limitations period of 30 years since 1980 (*An Act to Amend The Limitation of Actions Act*, S.M. 1980, c. 28, s. 3). This ultimate limitation period continues in the current act as s. 14(4). Ultimate limitations periods are also in force in many other provinces. The purpose of these ultimate limitations periods was described by the Manitoba Law Reform Commission in their 2010 report on limitations:

> In order to address the important repose aspect of limitations, there must be some ability to ensure that, after a certain period of time, no action may be brought regardless of the claim's discoverability of late occurring damage.

(*Limitations* (2010), at p. 26)

251 As ultimate limitations periods were introduced, many provincial legislatures chose to effectively exempt certain types of Aboriginal claims from them by grandfathering Aboriginal claims into the former acts, which did not contain ultimate limitations periods. This was done in [page721] Alberta and Ontario, and will soon be done in British Columbia: *Limitations Act*, R.S.A. 2000, c. L-12, s. 13; Ontario *Limitations Act, 2002*, s. 2; *Limitation Act*, S.B.C. 2012, c. 13, s. 2 (not yet in force). In my view, this is evidence that legislatures are alive to the issues posed by Aboriginal claims and limitations periods and the choice of whether or not to exempt such claims from basic and ultimate limitations periods is one that belongs to the legislature.

252 There is a fine balance to be struck between expanded ways to toll limitations periods through discovery and incapacity and a strict ultimate limitations period. It is not the place of the courts to tamper with the selection that each of the legislatures and Parliament have chosen by creating a broad general exception for claims that courts find to be fundamental or serious. The type of exception proposed by my colleagues is antithetical to the careful policy development that characterizes this area of the law. The courts are ill-suited for doing this type of work which must be grounded in a clear understanding of how each aspect of the limitations regime works together to produce a fair result.

253 If Parliament or provincial legislatures wanted to exclude factual claims with a constitutional component from limitations periods, then they could do so by statute. As they have not chosen to make an exception for the type of declaration that the Métis seek in this case, it is inappropriate for this Court to do so.

(d) *Role of Reconciliation*

254 My colleagues suggest that the above rationales have little role to play in an Aboriginal context, where the goal of reconciliation must [page722] be given priority. In so doing, the majority's reasons call into question this Court's decisions in *Wewaykum*, at para. 121, and more recently in *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372. In *Lameman*, this Court specifically stated that policy rationales that support limitations periods "appl[y] as much to Aboriginal claims as to other claims" (para. 13 (emphasis added)). Without doing so explicitly, it appears that the majority has departed from the legal certainty created by *Wewaykum* and *Lameman*, in favour of an approach where "reconciliation" must be given priority.

255 Moreover, the legal framework of this claim is very different from a claim based on an Aboriginal right.

Aboriginal rights are protected from extinguishment under s. 35 of the *Constitution Act, 1982*. Aboriginal rights, therefore, constitute ongoing legal entitlements. By contrast, the claims in this case concern a constitutional obligation that was fulfilled over 100 years ago.

(5) Manitoba Legislation Does Not Exempt Declarations From Limitation Periods

256 My colleagues assert that limitations periods should not apply to claims for failure to diligently fulfill solemn obligations arising from the Constitution where the only remedy sought is a declaration. Respectfully, this is a choice to be made by the legislature. In Manitoba, limitations legislation has never contained an exception for declarations. This Court is not empowered to create one.

257 In some other provinces the legislation governing limitations periods provides for specific exceptions where the only remedy sought is a declaration without any consequential relief: Alberta *Limitations Act*, s. 1(i)(i); Ontario *Limitations Act, 2002*, s. 16(1)(a); British Columbia *Limitation Act*, s. 2(1)(d) (not yet in force).

258 These exceptions are contained within the finely tailored legislative schemes as described above. In those provinces where recent amendments have provided for declaratory judgments to be exempt from limitations periods, the limitations legislation also contains provisions that restrict the retroactive application of those exemptions. For example, in Ontario, if a claim was not started before the exemption was enacted and the limitation period under the former act had elapsed, the creation of the new exemption from limitation periods for declaratory judgments would not revive those previously barred claims, even if the only remedy sought was a declaration: Ontario *Limitations Act, 2002*, s. 24. Thus, even where the legislature has seen fit to exempt declarations from limitation periods, it has not done so retroactively.

259 This is unsurprising since changes to limitations periods are rarely made retroactively, because to do so would prejudice those who relied upon those limitations periods in organizing their affairs. Retroactive changes to limitations law mean that potential defendants who were under the impression that claims against them were time-barred would be again exposed to the threat of litigation. In contrast, when a limitations period is changed prospectively, potential defendants were never in a position to rely on a limitation period and would always be on notice as to the possibility of litigation. In effect, if limitations periods were changed retroactively, the certainty rationale would be significantly compromised by depriving defendants of the benefit of limitations protection that they had relied upon up until the change in the law.

260 The issue of whether to exempt declaratory judgments from limitations periods is one that has been canvassed recently in Manitoba. In 2010, the Manitoba Law Reform Commission recommended that an exception be created for declaratory judgments, but this recommendation has not been implemented. In making that recommendation, the Manitoba Law Reform Commission recognized that, while declaratory judgments do not compel [page724] the Crown to act in a particular way, there is still a risk that an exception for declaratory remedies might "undermin[e] the principles that support the establishment of limitations" (*Limitations*, at p. 33). This is because obtaining a declaration can be the first step in obtaining an additional remedy, one that would otherwise be barred by a limitation period.

261 The Manitoba Law Reform Commission noted that this risk was particularly acute in the case of declarations made in respect of the Crown, since there is authority to support the proposition that the Crown does not generally ignore a court declaration (p. 32). While the Crown response to a declaration is not always satisfactory to everyone, the possibility that the declaration will lead to some additional extra-judicial remedy is real. This means that while a declaratory order without consequential relief might appear to have little impact on the certainty created by limitations periods, the result for litigants is not necessarily as benign. There is a risk that a declaratory judgment will lead to additional remedies, even when not ordered by the courts.

262 In my view, that risk is fully realized in this case. As my colleagues note, the Métis do not seek a declaration as an end in itself. Rather, they plan to use the declaration to obtain redress in extra-judicial negotiations with the Crown. This result undermines the certainty rationale for limitation periods by exposing the Crown to an obligation long after the limitation period expired. By exempting the declaration sought by the Métis from limitation periods, the majority has inappropriately stepped into the shoes of the Manitoba legislature.

(6) Effect of Exempting These Claims From Limitations Periods

263 The majority has removed these claims by the Métis from the ordinary limitations regime by arguing that these claims are fundamental [page725] and that a failure to address them perpetuates an "ongoing rift in the national fabric". With respect, the determination that a particular historical injustice amounts to a rift in the national fabric is a political or sociological question. It is not a legally cognizable reason to exempt a claim from the application of limitations periods. Moreover, it leaves the courts in the position of having to assess whether any claim made is sufficiently fundamental to permit them to address it on its merits despite its staleness.

264 Over the course of Canadian history, there have been instances where the Canadian government has acted in ways that we would now consider inappropriate, offensive or even appalling. The policy choice of how to handle these historical circumstances depends on a variety of factors and is therefore one that is best left to Parliament or the government, which have in recent years acted in a variety of ways, including apologies and compensation schemes, to make amends for certain historical wrongs.

265 The reasons of the majority would now have the courts take on a role in respect of these political and social controversies. Where the parties ask for a declaration only and link it to some constitutional principle, the courts will now be empowered to decide those cases no matter how long ago the actions and facts that gave rise to the claim occurred. In my view, this has the potential to open the court system to a whole host of historical social policy claims. While the resolution of historical injustice is clearly an admirable goal, the creation of a judicial exemption from limitations periods for such claims is not an appropriate solution.

266 This exception creates the possibility of indeterminate liability for the Crown, since claims under this new duty will apparently be possible forever. Courts have always been wary of the possibility of indeterminate liability. In *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444, Cardozo C.J. expressed concern about the creation of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This [page726] concern was recognized, albeit more with respect to indeterminate amounts and classes, by this Court in *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66. In my view, as this exception from limitations periods creates liability for an indeterminate time, it is not an appropriate step for this Court to take.

267 The exemption proposed by my colleagues is not aligned with any of the principles that underlie the limitations scheme. It is instead an exception that is virtually limitless in scope, relying, as it does, on a social policy appeal to restore our national fabric rather than accepted legal principles. It cannot be characterized as the type of incremental change that supports the development and evolution of the common law and it is therefore not an appropriate change for the courts to make.

(7) The Crown Is Entitled to the Benefit of Limitations Periods

268 Limitations periods apply to the government as they do to all other litigants. At common law, limitations periods could be used by the Crown to defend against actions, but could not be used by defendants pursued by the Crown (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at pp. 98-99). This is no longer the case as the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, s. 32, specifically provides that provincial limitations periods apply to claims by and against the Crown:

> **32.** Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

The effect of this section is that the provincial limitations legislation in Manitoba applies to the federal Crown. Moreover, even absent this Act, the common law provided that it was possible for the Crown to rely on a limitations period to defend against claims (Hogg, Monahan and Wright, at p. 99).

269 The application of limitations periods to claims against the Crown is clear from the cases generally and also specifically in the area of Aboriginal claims. For example, in both *Wewaykum* and *Lameman*, this Court applied a limitations period to bar an Aboriginal claim against the government.

270 Application of limitations periods to the Crown benefits the legal system by creating certainty and predictability. It also serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.

271 The relevance of limitations periods to claims against the Crown can clearly be seen on the facts of this case. My colleagues rely on "unexplained periods of inaction" and "inexplicable delay" to support their assertion that there is a pattern of indifference. In my view, it cannot reasonably be ruled out that, had this claim been brought in a timely fashion, the Crown might have been able to explain the length of time that it took to allocate the land to the satisfaction of a court. The Crown can no longer bring evidence from the people involved and the historical record is full of gaps. This case is the quintessential example of the need for limitations periods.

C. *Laches*

272 In addition to being barred by the limitation period, these claims are subject to laches. Laches is an equitable doctrine that requires a claimant in equity to prosecute his or her claim without undue delay. In Canada, there are two recognized branches to the doctrine of laches: delays that result from [page728] acquiescence or delays that result in circumstances that make prosecution of the action unreasonable (*M. (K.) v. M. (H.)*, at pp. 76-77, citing *Lindsay Petroleum Co. v. Hurd* (1874), L.R. 5 P.C. 221, at pp. 239-40).

273 The majority finds that the Métis cannot have acquiesced because of their marginalized position in society and the government's role in bringing about that marginalization. They further find that the government did not alter its position in reasonable reliance on the *status quo*, nor would disturbing the current situation give rise to an injustice. Finally, they conclude that given the constitutional aspect of the Métis' claim, it would be inappropriate in any event to apply the doctrine of laches.

274 Respectfully, I cannot agree. The Métis have knowingly delayed their claim by over a hundred years and in so doing have acquiesced to the circumstances and invited the government to rely on that, rendering the prosecution of this action unreasonable. As a result, their claim cannot succeed because it is barred by both branches of the doctrine of laches.

(1) Decisions of the Courts Below

275 The trial judge held that the doctrine of laches acted as a defence to all of the Métis claims. He found that those entitled to benefits under ss. 31 and 32 of the *Manitoba Act* were, at the material time, aware of their rights under the Act and of their right to sue if they so wished. The trial judge held that there was "grossly unreasonable delay" in bringing this action in respect of those rights and the breaches that the Métis now claimed (para. 454). The majority have identified no palpable and overriding error with this conclusion.

276 There is some irony in the majority in this Court crafting its approach around the government's delay and at the same time excusing the Métis' delay in bringing their action for over 100 years.

[page729]

277 The trial judge observed that there was no evidence to explain the delay in making the claim. The only explanations offered came from counsel for the Métis and none of them provided "a justifiable explanation at law for those entitled under s. 31 and s. 32, whether individually or collectively, to have sat on their rights as they did until 1981" (para. 457). Nor, in the trial judge's view, did this delay in the exercise of their rights square with the evidence of Métis individuals and the larger community pursuing legal remedies throughout the 1890s for other claims arising from the *Manitoba Act*. The trial judge held that this amounted to acquiescence in law. Both Canada and Manitoba were prejudiced by the claim not being advanced in a timely fashion due to the incomplete nature of the evidence that was available at trial.

278 The Court of Appeal concluded that laches "may be applied to claims seeking declaratory relief whether declaratory judgments are viewed as equitable in nature or *sui generis*" (para. 342). The Court of Appeal then considered whether laches can operate to bar constitutional claims. It concluded that, while laches cannot be applied to claims based on the division of powers, the claims advanced by the Métis were not of that type. The Court of Appeal decided that it was unnecessary to determine whether laches could be applied to the types of constitutional claims advanced by the Métis because it determined that those claims were moot.

(2) Acquiescence

279 My colleagues suggest, at para. 149, that no one can acquiesce where the law has changed, since it is "unrealistic" to expect someone to have enforced their claim before the courts were prepared to recognize those rights. With respect, this conclusion is at odds with the common law approach to changes in the law. While there is no doubt that the law on Crown duties to Aboriginal people has evolved since the 1870s, defences of general application, including laches, have always applied to claimants despite such changes in the [page730] law (*In re Spectrum Plus Ltd. (in liquidation)*, 2005 UKHL 41, [2005] 2 A.C. 680, at para. 26). The applicability of general defences like limitations periods to evolving areas of the law was also recognized by this Court in *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, at para. 101. My colleagues' approach to acquiescence is a significant change in the law of laches in Canada with potentially significant repercussions.

280 Turning to the specific requirements for the application of acquiescence, I agree with my colleagues that it depends on knowledge, capacity and freedom (*Halsbury's Laws of England* (4th ed. 2003), vol. 16(2), at para. 912). In my view, all three were present on the facts of this case.

281 Justice La Forest, in *M. (K.) v. M. (H.)*, described the required level of knowledge to apply laches:

> ... an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this Court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim. [Emphasis deleted; pp. 78-79.]

282 Given the trial judge's findings, the Métis had this required knowledge in the 1870s. This conclusion amounts to a finding of fact and cannot be set aside absent palpable and overriding error. The majority has not identified any such error.

[page731]

283 Instead of confronting this conclusion on knowledge, my colleagues conclude that the Métis could not acquiesce for three reasons: (1) historical injustices suffered by the Métis; (2) the imbalance in power that followed Crown sovereignty; and (3) the negative consequences following delays in allocating the land grants. I cannot agree with these conclusions.

(a) *Historical Injustices*

284 The main historical injustice discussed by the majority is the very issue of this case: delay in making the land grants. They conclude that the Métis did not receive the benefit that was intended by the land grants, and they imply that this was a cause of the Métis' subsequent marginalization. They suggest that, because laches is an equitable construct, the conscionability of both parties must be considered. While this is no doubt true, they then rely on the facts of the claim to conclude that equity does not permit the government to benefit from a laches defence. Effectively, they conclude that the very wrong that it is alleged the government committed resulted in a level of unconscionability that means they cannot access the defence of laches. With respect, this cannot be so. Laches is always invoked as a defence by a party alleged to have, in some way, wronged the plaintiff. If assessing conscionability is reduced to determining if the plaintiff has proven his or her allegations against the defendant, the defence of laches is rendered illusory.

(b) *Imbalance in Power Following Crown Sovereignty*

285 The evidence is not such that any imbalance in power between the Métis and the government was enough to undermine the knowledge, capacity and freedom of the Métis to the extent required to prevent a finding of acquiescence.

286 At the start of the relevant time period, the Métis were a political and military force to be reckoned with. The majority notes, at para. 23 that "[t]he Métis were the dominant demographic group in the Settlement, comprising around 85 percent of the population, and held leadership positions in business, church and government." They also note that

> [w]hen the *Manitoba Act* was passed, the Métis dominated the Red River provisional government, and controlled a significant military force. Canada had good reason to take the steps necessary to secure peace between the Métis and the settlers. [para. 93]

287 Furthermore, while the power and influence of the Métis declined in the following years, there is no evidence that the Métis reached a point where the imbalance in power was so great that they lost the knowledge, capacity or freedom required to acquiesce. Indeed, throughout the 1890s, applications were brought to the courts regarding disputes over individual allotments governed by s. 31. The Attorney General of Manitoba cites three examples of such litigation: *Barber v. Proudfoot*, [1890-91] 1 W.L.T.R. 144 (Man. Q.B. *en banc*) (a Métis individual sought to have a sale set aside), *Hardy v. Desjarlais* (1892), 8 Man. R. 550 (Q.B.) (the deed of sale was executed prior to the court order approving it, the money was not paid into court until the land was sold at a higher price), and *Robinson v. Sutherland* (1893), 9 Man. R. 199 (Q.B.) (a Métis minor alleged that her father forced her to sell her land contrary to the wishes of her husband). This litigation demonstrates that individual Métis had knowledge of their rights under s. 31 during this time period and had knowledge that they could apply to court in order to enforce their rights.

288 While the power of the Métis had declined by the 1890s, there is no evidence that this prevented them from organizing in such a way as to avail themselves of the courts when they felt their rights were being threatened. Throughout the 1890s [page733] Métis individuals were involved in a series of cases related to the "Manitoba Schools Question".

289 Catholic members of the Métis community collectively appealed to the courts regarding legislation involving denominational schools and twice pursued these issues all the way to the Judicial Committee of the Privy Council (*City of Winnipeg v. Barrett*, [1892] A.C. 445; and *Brophy v. Attorney-General of Manitoba*, [1895] A.C. 202). As these cases were not successful, Archbishop Taché organized a petition, which contained 4,267 signatures, that was submitted to the Governor General. This led to a reference to this Court and a subsequent appeal to the Privy Council.

290 From this evidence the trial judge inferred "that many of the 4,267 signatories [to the petition] would have been Métis" and that it was "clear that those members of the community including their leadership certainly were alive to [their] rights ... and of the remedies they had in the event of an occurrence which they considered to be a breach" (para. 435). My colleagues reject the second inference drawn by the trial judge, again without identifying any palpable and overriding error, stating that the actions of a larger community do not provide evidence of the Métis' ability to seek a declaration based on the honour of the Crown (para. 148). I cannot accept that conclusion. In my view, the evidence demonstrates that, when the rights of the Métis under the *Manitoba Act* were infringed by government action, the Métis were well aware of and able to access the courts for remedies.

291 The trial judge did not conclude that Archbishop Taché and Father Ritchot were Métis; he merely noted that they were leaders of a group that included some Métis and that group had accessed the courts to enforce rights contained in the *Manitoba Act*. This conclusion did not demonstrate any palpable and overriding error. It was reasonable for the trial judge to infer that by signing the petition and being aware of the litigation on denominational schools individual Métis had the [page734] knowledge required under the test described by La Forest J. in *M. (K.) v. M. (H.)*. Both the cases of individual claims under the Manitoba legislation and the cases about the denominational schools show that members of the Métis community had the capacity and freedom to pursue litigation when they saw their rights being affected. In respect of any delay in making land grants, they chose not to do anything until 100 years later. As a result, the Métis acquiesced and laches should be imputed against them.

(c) *Negative Consequences Created by Delays in Allocating the Land Grants*

292 The reasons of the majority suggest that the fact that there was delay in distributing the land is sufficient to lead to the conclusion that the Métis were rendered so vulnerable as to be unable to acquiesce. In my view, this conclusion is untenable as a matter of law. It suggests that no party that suffered injury could ever acquiesce and thus renders the first part of the laches test meaningless. While laches requires consideration of whether the plaintiff had the capacity to bring a claim, this has never been extended to except from laches all who are vulnerable. Laches is imputed against vulnerable people just as limitations periods are applied against them. These doctrines cannot fulfill their purposes if they are not universally applicable.

293 Moreover, I do not accept the implication that the marginalization of the Métis was caused by delays in the distribution of the land grants. As noted above, the Métis community was under pressure for a number of reasons during the 1870s and 1880s. To suggest, as my colleagues do, that delays in the land grants caused the vulnerability of the Métis is to make an inference that was not made by the trial judge and is not supported by the record.

294 In my view, the trial judge was correct in finding that the Métis had acquiesced and that laches could be imputed against them on that basis.

[page735]

(3) Circumstances That Make the Prosecution Unreasonable

295 Though my conclusion on acquiescence would be sufficient to result in imputing laches against the Métis, I am also of the view that the Métis' delay resulted in circumstances that make the prosecution of their claim unreasonable.

296 The majority finds that the delay did not result in circumstances that make prosecution of the claim unreasonable since they do not find that the government reasonably relied on the Métis' acceptance of the *status quo*. I cannot agree. The delay in commencing this suit was some 100 years. This delay has resulted in an incomplete evidentiary record. The unexplained delays that my colleagues refer to as evidence for the Crown acting dishonourably may well have been accounted for had the claim been brought promptly. The effect of this extraordinary delay on the evidentiary record, in a case dependent on establishing the actions of Crown officials over 100 years ago, constitutes circumstances that would make the prosecution unreasonable.

297 Moreover, we cannot know whether, if the claims had been brought at the time, the government might have been able to reallocate resources to allow the grants to be made faster or to take other steps to satisfy the Métis community. It cannot be said that the government did not alter or refrain from altering its position in reliance on the failure of the Métis to bring a claim in a timely manner.

(4) Laches Applies to Equitable Claims Against the Crown

298 The doctrine of laches can be used by all parties, including the Crown, to defend against equitable claims that have not been brought in a sufficiently timely manner. In *Wewaykum*, this Court considered the application of laches to an Aboriginal claim against the Crown and concluded [page736] that laches could act to bar a claim for breach of fiduciary duty. The delay at issue in that case was at least 45 years. The Court in *Wewaykum*, at para. 110, stated that

> [t]he doctrine of laches is applicable to bar the claims of an Indian band in appropriate circumstances: *L'Hirondelle v. The King* (1916), 16 Ex. C.R. 193; *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at p. 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (C.A.), aff'd [1991] 2 S.C.R. 570); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). There are also dicta in two decisions of this Court considering, without rejecting, arguments that laches may bar claims to aboriginal title: *Smith v. The Queen*, [1983] 1 S.C.R. 554, at p. 570; *Guerin*, *supra*, at p. 390.

299 As discussed above in relation to limitations periods, the application of the defence of laches to the Crown is beneficial for the legal system and society generally. The rationales that justify the application of laches for private litigants apply equally to the Crown.

(5) Laches Applies to Claims Under Honour of the Crown

300 The majority concludes that claims for a declaration that a provision of the Constitution was not fulfilled as required by the honour of the Crown ought never to be subject to laches. This is a broad and sweeping declaration, especially considering the conclusion of this Court in *Wewaykum* that breaches of the fiduciary duty could be subject to laches. A fiduciary duty is one duty derived from the honour of the Crown. It is fundamentally inconsistent to permit certain claims (e.g. those based on "solemn obligations" contained in Constitutional documents) derived from the honour of the Crown to escape the imputation of laches while other claims (e.g. those based on the more well-established and narrowly defined fiduciary obligation) are not given such a wide berth. Moreover, this holding will encourage litigants to reframe claims in order to bring themselves within the scope of this new, more [page737] generous exception to the doctrine of laches, which - particularly in light of the ambiguities associated with the new duty - creates uncertainty in the law.

301 My colleagues rely on the holding in *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327, to support their position. In my view, reference to that case is inapposite. Division of powers claims, such as the one considered in *Ontario Hydro*, are based on ongoing legal boundaries between federal and provincial jurisdiction. This claim based on the honour of the Crown is grounded in factual circumstances that occurred over 100 years ago. Just as *Kingstreet* and *Ravndahl* distinguish claims based on factual circumstances from those based on ongoing statutory issues in the context of limitations statutes, so too should this case be distinguished from *Ontario Hydro*.

(6) Conclusion on Laches

302 In my view, both branches of laches are satisfied. The Crown is entitled to the benefit of this equitable defence generally and specifically in relation to claims arising from the honour of the Crown in implementing constitutional provisions. As La Forest J. stated in *M. (K.) v. M. (H.)*, at p. 78, "[u]ltimately, laches must be resolved as a matter of justice as between the parties". Both the Métis and the government are entitled to justice. As a matter of justice, laches applies and precludes granting the equitable remedy sought here.

IV. Conclusion

303 I would dismiss the appeal with costs.

Appeal allowed in part with costs throughout, ROTHSTEIN *and* MOLDAVER JJ. *dissenting.*

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End of Document

Miller (Litigation guardian of) v. Wiwchairyk, [1997] O.J. No. 2695

Ontario Judgments

Ontario Court of Justice (General Division)

Whalen J.

July 2, 1997.

Court File No. 15864/96

[1997] O.J. No. 2695 | 34 O.R. (3d) 640 | 72 A.C.W.S. (3d) 610

Between Derek Miller, Darren Miller and Dwayne Miller, infants by their Litigation guardian Clifford Miller, Clifford Miller and Louis Miller, plaintiffs, and Nicholas Wiwchairyk, Constable Tim Carscadden, William G. Rose, Michipicoten Township Police Service, Michipicoten Police Association and The Halifax Insurance Company, defendants

(7 pp.)

Case Summary

Practice — Pleadings — Striking out pleadings — Grounds, failure to disclose a cause of action or defence.

This was an application to strike a claim and a cross-claim. The respondent, Miller, was injured in a snowmobile accident. Miller was a passenger on a snowmobile operated by Wiwchairyk. Prior to the accident, the applicant police officer, Carscadden, discovered that Wiwchairyk did not have a license to use the machine. Wiwchairyk was given a warning by Carscadden. He was not charged with operating the snowmobile without a license. Miller brought a claim against Carscadden in negligence. Miller's insurer, the respondent Halifax, brought a cross-claim against Carscadden on the same basis. Carscadden sought to strike the claims. He argued that the claims did not disclose a reasonable cause of action. He argued that there was no causal connection between his failure to charge Wiwchairyk and the accident.
HELD: The application was dismissed.

Although Miller and Halifax faced a difficult burden in proving causation, there was a valid cause of action. The complexity and difficulty of the case did not preclude the case from proceeding. Carscadden was entitled to later move for summary judgement if Miller and Halifax did not set out a genuine issue for trial.

Statutes, Regulations and Rules Cited:

Motorized Snow Vehicles Act, R.S.O. 1990, c. M-44. Ontario Rules of Civil Procedure, Rule 21.01(1)(b).

Counsel

J. Douglas Wright for defendants Constable Tim Carscadden, William G. Rose, Michipicoten Township Police Service and Michipicoten Police Association. P. Feifel for plaintiffs, Derek Miller, Darren Miller, Dwayne Miller, Clifford Miller and Louise Miller. J.G. Murphy for defendant, The Halifax Insurance Company.

Introduction

WHALEN J.

1 The defendant Carscadden (hereafter "C") and the other police defendants moved to strike the plaintiffs' claim and the cross-claim of the defendant Halifax Insurance Company pursuant to Rule 21.01(1)(b) of the Rules of Practice. The plaintiffs and Halifax responded to the motion. The defendant Wiwchairyk (hereafter "W") did not appear.

2 For the reasons that follow, the motion will be denied.

Facts

3 On February 19, 1996, the plaintiff, Derek Miller (hereafter "M"), was catastrophically injured in an accident while a passenger on a snow machine owned and operated by W. It is alleged W was driving the snow machine carelessly and at high speed, causing M to be thrown from the vehicle.

4 A month or two before the accident, C (a constable with the Michipicoten Police Service) encountered W who was operating a snow machine without a valid licence or insurance coverage, as required by the Motorized Snow Vehicles Act, R.S.O. 1990, Chapter M-44. It is alleged C advised W "of the possible ramifications to passengers who would be riding with the said defendant, if the said defendant did not have insurance...". C gave W a warning, although it is alleged he told him he should be charged. The plaintiff's say if C had charged W, rather than simply warning him, W would not "in all probability" have driven the snow machine, thereby avoiding the accident in which M was subsequently injured. Therefore, it is claimed C was negligent in failing to charge W and he thus breached a duty of care in respect of a reasonably foreseeable consequence he had in fact warned W about. It is claimed the other police defendants are vicariously liable for C's negligence. These are the facts pleaded in the impugned statement of claim.

The Law

5 Rule 21.01(1)(b) provides:

> 21.01(1) A party may move before a judge,...
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant a judgement accordingly.

6 The parties appearing agreed on the applicable test, namely: assuming the facts pleaded in the statement of claim can be proved, is it "plain and obvious" that the pleading discloses no reasonable cause of action? Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; adopted and applied in R.D. Belanger & Associates Limited v. Stadium Corp. (1991), 5 O.R. (3d) 778 (Ont. C.A.) at page 780. The same test was articulated a little differently, but with same effect in Doe v. Metro Toronto Police (1990), 74 O.R. (2d) 225 (Div. Ct.) at page 229, T-D Bank v: Deloitte, Haskens and Sells (1992), 5 O.R. (3d) 417 (O.C.G.D.) at page 419, and Sun Life Trust Co. V. Scarborough (City), [1994] O.J. No. 2447 (O.C.G.D.) at pages 4 and 5.

7 In Sun Life Trust Co., supra, it was observed the threshold for sustaining a pleading under Rule 20.01 is not a high one, and in T-D Bank v. Deloitte Haskens and Sells, supra, it was suggested the statement of claim in question should be read "generously" for the plaintiff. The action should be struck only if it is certain to fail because it contains a radical defect. Potential length and complexity, the novelty of the cause of action or an apparently strong defence should not be a bar.

8 In Hanson v. Bank of Nova Scotia (1994), 19 O.R. (3d) 142 (Ont. C.A.) at page 145, the court warned of the danger of imposing too high a threshold too early in the process by reminding that the law is a dynamic, ever-evolving process, where categories of relationships giving rise to fiduciary duties and categories of negligence in which a duty of care is owed, are never closed.

Analysis

9 The moving defendants' argument for dismissal rests heavily on the apparent lack of causal connection and proximity between C's act (or failure to act) and the accident itself. They disagreed strongly that C could or ought to have foreseen that charging W might have avoided the accident, or alternatively, that failing to charge him could have led to the accident. They contended the accident was causally too remote from C's contact with W and lacking in contemporaneity. They forcefully argued that M's injuries were the direct cause of the manner in which W had operated the snow machine, and that the injuries would have been the same whether or not W had insurance or a licence at the time. In other words, it was assumptive or speculative to conclude the accident would not have occurred had C charged W by issuing him a ticket, rather than simply giving a warning. The defendants further submitted that the private law duty of care owed by the police to individuals is very limited in such circumstances, and that foreseeability of risk must coexist with a special relationship of proximity: Doe v. Metro Toronto Police, supra, at page 230.

10 At this stage it appears the plaintiffs face a very difficult task establishing the necessary causal connection, proximity and duty of care. I am sceptical of their chances of success and find the moving defendants' submissions very compelling. The court ultimately disposing of the claim will also likely be concerned with the potential negative impact of its decision on the already difficult task of policing, not to mention a concern that police effectively and indirectly be made insurers for those whose remedies may be otherwise limited. There are large policy issues at stake. However, at this early stage in the litigation process, the court should not look beyond the pleadings to determine whether the action has any chance of success: Prete v. Ontario (1994), 16 O.R. (3d) 161 (Ont. C.A.) at pages 170 and 171. The facts in the Doe case exemplify an unusual situation in which the police did not seem at first glance to owe a private duty of care. Yet the plaintiff convinced the court of a potentially valid cause of action. So the cause exists, albeit perhaps narrow and difficult to prove.

11 If I read the pleaded allegation that W would not probably have driven the snow machine in the manner he did on the day in question as a statement of material fact, rather than as a conclusion (ie. if I read it "generously" for the plaintiffs), then it becomes a question of whether the fact can be proven, and once proven, whether it is sufficient in all of the circumstances to establish that the police defendants owed a private duty of care to M. Causation, proximity, remoteness and the existence of a special relationship will necessarily be resolved in the same context.

12 I cannot at this point imagine what the evidence may be, but that detail is not a matter for pleading, and in any event Rule 21.01(2)(b) prohibits the admission of evidence on a motion under Rule 21.01(1)(b).

13 The same may be said of the allegation concerning W's reputation as a snow machine operator, although this may also weigh against the plaintiffs in considering assumption of risk.

14 The claim may be difficult, novel, complex and reaching, but that does not disqualify it from being made.

15 Under Rule 20 the defendants may move for summary Judgment if it is determined there is no genuine issue for trial. It is in such a motion that a court may look beyond the pleadings to ascertain "chance of success". It would be dangerous at the present stage to dismiss the claim without the parties being able to offer sworn testimony so that the court might be in a position to look beyond the pleadings and therefore also assess whether there is a genuine issue for trial.

Order

16 For these reasons I conclude the plaintiffs have met the threshold required in their statement of claim, though barely so, and although I am sceptical of what lies ahead. The motion is therefore dismissed.

17 Given the closeness of the decision and the reservations expressed, this is a case where costs are best left to the discretion of the court finally disposing of the matter.

WHALEN J.

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Nash v. Ontario, [1995] O.J. No. 4043

Ontario Judgments

Court of Appeal for Ontario,

Finlayson, Carthy and Austin JJ.A.

December 22, 1995

Nos. C22206, C22998, C22185

[1995] O.J. No. 4043 | 27 O.R. (3d) 1 | 1995 CanLII 2934 | 59 A.C.W.S. (3d) 1083

Nash et al. v. The Queen in Right of Ontario et al. Nash et al. v. CIBC Trust Corporation et al. Falloncrest Financial Corporation et al. v. The Queen in Right of Ontario

Counsel

Alan J. Lenczner, Q.C., and Ronald G. Chapman, for all appellants except Falloncrest Financial Corp. and Peter Fallon, Sr.

Adrian Hill, for Peter Fallon, Sr.

Joan M. Haberman, for respondents, Attorney General of Ontario and Brian Cass.

Paul B. Schabas and Kathryn M.E. Podrebarac, for respondent, CIBC Trust Corp.

1 BY THE COURT: -- These three appeals, Nash v. Ontario (C22206), Nash v. CIBC Trust Corp. (C22998) and Falloncrest Financial Corp. v. Ontario (C22185), were heard together. They are all from the orders of the Honourable Mr. Justice Ground, wherein he stayed all three actions and struck out portions of the statements of claim in Nash v. Ontario and Falloncrest v. Ontario. While the statements of claim plead three separate and distinct causes of action, the actions arise from the same failed investment in a shopping mall.

Facts

2 The appellants in the Nash actions ("Nash appellants") were investors in Mater's Management Limited ("Mater's"), a business property development company which raised funds by means of syndicated mortgages. The principal of Mater's was Alberto DoCouto. The appellants in the Falloncrest action ("Falloncrest appellants") are Falloncrest Financial Corp. and Falloncrest Properties Inc. ("Falloncrest Companies"), and Peter Fallon, Sr. and Peter Fallon, Jr. The two Fallons were the "directing minds" of the Falloncrest Companies, which acted as mortgage brokers for Mater's projects. The respondent in Nash v. CIBC Trust Corp. was, at material times, Morgan Trust Company of Canada ("Morgan Trust"), a trustee of funds to be invested in mortgages on properties owned or controlled by Mater's. The Nash appellants advanced moneys to Mater's through Morgan Trust.

3 On January 15, 18 and 23, 1990, the Director of the Consumer Protection Division of the Ministry of Consumer and Commercial Relations ("Director") made a series of directions under s. 26(1)(a) of the Mortgage Brokers Act, R.S.O. 1990, c. M.39 ("M.B.A."). The effect of these directions was to freeze the assets of Falloncrest Financial Corp., Peter Fallon, Jr. and Mater's. The Director also appointed Peat Marwick Thorne Inc. to investigate possible contraventions of the M.B.A. by Falloncrest Financial Corp., Peter Fallon, Jr. and Mater's, among others.

4 On January 19, 1990, Morgan Trust brought an application before the Ontario Court (General Division) seeking the appointment of a receiver and manager of Mater's assets. It is pleaded in the Nash actions that this application was instituted on the instructions of the Director. Later in 1990, Mater's was placed in bankruptcy.

5 On January 2, 1992 and at a later date, Peter Fallon, Sr., Peter Fallon, Jr. and Alberto DoCouto were each charged with 26 criminal offences including various counts of fraud, theft and conspiracy in relation to the operations of Falloncrest Financial Corp. These charges were laid following investigations by the Ministry of Financial Institutions under the M.B.A. and by the Ontario Provincial Police. The charges are still outstanding.

6 On September 27, 1994, the Falloncrest appellants commenced an action against the Crown alleging various forms of improper conduct on the part of the Crown. On November 9, 1994, the Nash appellants also commenced an action against the Crown making similar allegations. In the latter action, Dr. Lawrence Nash is acting in three capacities: on his own behalf as an investor in mortgages; as the representative plaintiff under the Class Proceedings Act, 1992, S.O. 1992, c. 6; and as an assignee, pursuant to an order of the Registrar in Bankruptcy, of whatever claim was maintainable by Mater's. On December 14, 1994, the Nash appellants commenced a separate action against Morgan Trust, now CIBC Trust Corporation ("CIBC Trust"), for breach of duty as trustee and for breach of certain terms of the trust agreements.

7 On June 28, 1995, Ground J. struck various paragraphs from the statements of claim in Falloncrest v. Ontario and Nash v. Ontario, ordered particulars with respect to a few other paragraphs in those statements of claim, and stayed both civil actions pending the completion of criminal proceedings against the Fallons and DoCouto. On October 23, 1995, Ground J. also stayed the action Nash v. CIBC Trust Corp. The appellants appeal these rulings.

Issues on Appeal

8 The following issues were raised in this appeal:

1. in both actions against the Crown, whether Ground J. erred in striking claims for breach of statutory duty, negligent performance of a statutory duty or power, and negligent investigation;
2. in both actions against the Crown, whether Ground J. erred in striking claims for unlawful disclosure of confidential information;
3. in the Nash action against the Crown, whether Ground J. erred in striking claims based on the Crown's role and its effect with respect to Morgan Trust's motion for the appointment of a receiver; and
4. whether Ground J. erred in staying the Falloncrest action and the two Nash actions pending the completion of the criminal proceedings against Peter Fallon, Sr., Peter Fallon, Jr. and Alberto DoCouto.

9 The Falloncrest appellants raised other issues, but those are either not contested by the Crown, or were decided in the appellants' favour by Ground J. and are not cross-appealed. During the course of argument before this court, counsel for the Nash and Falloncrest appellants abandoned issue (2) relating to unlawful disclosure of confidential information.

10 With respect to all issues affecting the Nash appellants, the Crown submitted that, as an assignee of Mater's through the bankruptcy process, the Nash appellants' rights are no better than those of Mater's. The effect of this would be to tar the investor plaintiffs with whatever wrongdoing can be attributed to Mater's by reason of the alleged criminality of DoCouto, and also to restrict the plaintiffs to the same defences and arguments that Mater's could raise. Whatever merit this argument may have at trial when there is a factual underpinning to the activities of Mater's, it should not be given effect to at this stage of the proceedings. For our present purposes, we accept the allegations in the pleadings as true. This means that the Nash appellants are entitled to be treated as victims of Mater's and the Falloncrest companies. In any event, Dr. Lawrence Nash is also suing in his personal capacity and as a representative under the Class Proceedings Act, 1992, although the class has not yet been certified, and it is too early to deal with his status as a litigant.

11 We are all of the opinion that the appeals with respect to issues (1) and (3), both involving the striking of claims, should be allowed. The test for determining whether a pleading should be struck was stated by the Supreme Court of Canada in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980, 74 D.L.R. (4th) 321 at p. 336:

> [T]he test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case.

On a motion to strike out a pleading, the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies: Toronto-Dominion Bank v. Deloitte Haskins & Sells (1991), 5 O.R. (3d) 417 at p. 419, 8 C.C.L.T. (2d) 322 (Gen. Div.). Also, the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence: R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991), 5 O.R. (3d) 778 at p. 782 (C.A.).

12 With respect to issue (1), the law relating to breach of statutory duty, negligent performance of a statutory duty or power, and negligent investigation is not so clear that we are prepared to say that these actions must fail. Even the Crown conceded that the law in this area is "muddy". Accordingly, the motions court judge erred in holding that "it is plain, obvious and beyond doubt" that these actions cannot succeed.

13 With respect to issue (3), accepting that the Crown directed Morgan Trust to apply for the appointment of a receiver and that the Crown knew or ought to have known that Mater's would suffer loss as a result, it is not plain and obvious that no reasonable cause of action can be grounded on these facts. The cause of action may or may not be a weak one, but that should be determined at trial. The Nash appellants' claim of improper Crown influence on Morgan Trust should proceed to trial, especially since other issues arising from the same facts will be litigated in any event: Belanger, supra, at p. 782.

14 As to issue (4), no general rule in this jurisdiction requires a stay of civil cases merely because criminal charges relating to the same matter are pending. In fact, a court will normally deny a stay unless the applicant demonstrates that his or her case is an extraordinary or an exceptional one: see Stickney v. Trusz (1973), 2 O.R. (2d) 469 at p. 471, 45 D.L.R. (3d) 275 (H.C.J.), affirmed (1974), 3 O.R. (2d) 538 at p. 538, 46 D.L.R. (3d) 80 (Div. Ct.), affirmed (1974), 3 O.R. (2d) 538 at 539, 46 D.L.R. (3d) 80 at 82 (C.A.), leave to appeal refused [1974] S.C.R. xii, 28 C.R.N.S. 127n.

15 Several reported cases have suggested that the rationale underlying a stay of a civil action pending the conclusion of a related criminal prosecution is the protection of the accused's right to a fair trial: see, for example, Seaway Trust Co. v. Kilderkin Investments Ltd. (1986), 55 O.R. (2d) 545, 29 D.L.R. (4th) 456 (H.C.J.); Belanger v. Caughell (1995), 22 O.R. (3d) 741 (Gen. Div.). In the present case, however, the party moving for the stay is the Crown, and the accused's rights are not at issue. The Crown must, then, show that other extraordinary or exceptional circumstances justify a stay.

16 The cases are clear that the threshold test to be met before a stay is granted is high. The mere fact that criminal proceedings are pending at the same time as civil proceedings is not sufficient ground for a stay of the latter: Stickney v. Trusz, supra. Even the potential disclosure through the civil proceedings of the nature of the accused's defence or of self- incriminating evidence is not necessarily exceptional: see Belanger v. Caughell, supra; Stickney v. Trusz, supra; Seaway Trust Co. v. Kilderkin Investments Ltd., supra. This high threshold test should not be relaxed merely became it is the Crown that requests the stay. An applicant, whether it is the Crown or the accused, must meet the same burden of proving extraordinary or exceptional circumstances. The test is not on a balance of convenience for the Crown and something higher for the accused. To the extent that the motions court judge held that it is, he erred.

17 In our opinion, neither Nash v. Ontario nor Nash v. CIBC Trust Corp. involve circumstances so extraordinary or exceptional as to warrant the stays of these actions. The Nash appellants and CIBC Trust are not parties in the pending criminal proceedings and the issues involved in these two actions are quite distinct from those the criminal charges raise. Falloncrest Financial Corp. v. Ontario, on the other hand, is different. The Falloncrest appellants' allegations are such that their civil claims would have little merit if the Crown successfully convicts the Fallons and DoCouto. The civil action is the reciprocal of the criminal prosecution. Furthermore, the Falloncrest appellants' motivation for instituting their action against the Crown, shortly after their committal for trial, is suspect. The appearance is that their objective in maintaining the civil action is to interfere with the criminal process and to have pre-trial access to Crown witnesses beyond that afforded on the preliminary hearing. We would not interfere with the exercise of the trial judge's discretion in this instance where he stayed these civil proceedings until the conclusion of the prosecutions.

Conclusion

18 For the above reasons, we would dispose of the issues in this appeal as follows:

1. both of the Nash and Falloncrest appellants' appeals from the striking of their claims based on the Crown's breach of statutory duty, negligent performance of a statutory duty or power and negligent investigation are allowed;
2. the Nash appellants' appeal from the striking of their claim based on the Crown's role in Morgan Trust's motion for the appointment of a receiver is allowed;
3. the Nash appellants' appeals from the stays of their actions against the Crown and CIBC are allowed; and
4. the Falloncrest appellants' appeal from the stay of their action against the Crown is dismissed.

The various orders of Ground J. are varied in order to give effect to the above dispositions.

19 The Nash appellants shall receive their costs of appeals C22206 and C22998 in any event of the cause. No other party is entitled to costs.

Order accordingly.

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Nelles v. Ontario, [1989] 2 S.C.R. 170

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J. and Beetz *, Estey *, McIntyre, Lamer, Wilson, Le Dain *, La Forest and L'Heureux-Dubé JJ.

1988: February 29 / 1989: August 14.

File No.: 19598.

[1989] 2 S.C.R. 170 | [1989] 2 R.C.S. 170 | [1989] S.C.J. No. 86 | [1989] A.C.S. no 86

Susan Nelles, appellant; v. Her Majesty The Queen in right of Ontario, the Attorney General for Ontario, John W. Ackroyd, James Crawford, Jack Press and Anthony Warr, respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Beetz, Estey and Le Dain JJ. took no part in the judgment.

Case Summary

Crown — Immunity — Civil action — Malicious prosecution — Whether Crown, Attorney General and Crown Attorneys are immune from suit for malicious prosecution — Whether a ruling on the issue of prosecutorial immunity should be made on an appeal of a preliminary motion — Proceedings against the Crown Act, R.S.O. 1980, c. 393, s. 5(6) — Rules of Practice and Procedure, R.R.O. 1980, Reg. 540, Rule 126.

The appellant was charged with the murder of four infants and was discharged on all counts at the conclusion of the preliminary inquiry. She then brought an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting her and that the Attorney General and the Crown Attorneys were actuated by malice. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue it on the return of the motion. The Supreme Court of Ontario allowed the motion and struck out the statement of claim. The Court of Appeal upheld the judgment. Both the Supreme Court of Ontario and the Court of Appeal [page171] seemed to have acted under Rule 126. This appeal is to determine whether the Crown, the Attorney General and the Crown Attorneys enjoy an absolute immunity from a suit for malicious prosecution.

Held (L'Heureux-Dubé J. dissenting in part): The appeal should be dismissed as against the Crown. The appeal should be allowed as against the Attorney General and the matter returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The Crown enjoys absolute immunity from a suit for malicious prosecution. Section 5(6) of the Ontario Proceedings Against the Crown Act exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities that he has in connection with the execution of judicial process. The decision to prosecute is a judicial decision vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys. The Crown Attorneys and the Attorney General in deciding to prosecute the appellant came within s. 5(6) of the Act and the Crown is thus immune from liability to the appellant.

Per Dickson C.J. and Lamer and Wilson JJ.: There is no need for a trial to permit a conclusion on the question of prosecutorial immunity. This issue, disposed of in the courts below upon a pre-trial motion under Rule 124 or Rule

126 of the Ontario Rules of Practice, should be addressed by this Court. The issue has been given careful consideration in the Court of Appeal and in argument before this Court. To send the matter back for trial without resolving the issue would not be expeditious and would add both time and cost to an already lengthy case. The rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.

The Attorney General and Crown Attorneys are not immune from suits for malicious prosecution. A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. In the interests of public policy, an absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified. An absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Canadian Charter of Rights and Freedoms. As such, the existence of absolute immunity is a threat to the [page172] individual rights of citizens who have been wrongly and maliciously prosecuted. While the policy considerations in favour of absolute immunity have some merit, these considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. The tort of malicious prosecution requires not only proof of an absence of reasonable and probable cause for commencing the proceedings but also proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys. The inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Finally, attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful.

Per La Forest J.: The common law position as set out by Lamer J. is accepted. The Charter implications need not be considered.

Per McIntyre J.: The state of the law relating to the immunity of the Attorney General is far from clear and a ruling on a point of this importance should not be made on an appeal of a preliminary motion. Before laying down any proposition to the effect that the Attorney General and his agents enjoy absolute immunity from civil suit, there should be a trial to permit a conclusion on the question of prosecutorial immunity and to provide -- in the event that it is decided that the immunity is not absolute -- a factual basis for a determination of whether or not in this case the conduct of the prosecution was such that the appellant is entitled to a remedy.

Furthermore, the Attorney General's immunity from judicial review, which is based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys as agents of the Attorney General would fall into this category and, accordingly, the immunity may not extend [page173] to claims for damages as a result of a prosecution, however instituted, that is carried out with malice. A ruling on a preliminary motion to the effect that Attorneys General and their agents are absolutely immune from all liability for suits for malicious prosecution may be too expansive and even ill-founded.

This case, therefore, should not have been disposed of upon a pre-trial motion under Rule 126 of the Ontario Rules of Practice. Under that rule, it is only in the clearest of cases that an action should be struck out. This is not such a case.

Per L'Heureux-Dubé J. (dissenting in part): Appellant's action is completely dependent upon whether or not Attorneys General and Crown Attorneys are immune from civil suit and, as such, the matter can and should be decided by this Court in the present appeal. While, in general, important questions should not be disposed of in interlocutory fashion, this rule does not apply where the defence offered at the outset is one of law only -- namely, that the right of action is barred independently of the facts alleged. There is every advantage, in terms of saving the time and cost of a trial, to decide a question of law at the outset. This, in fact, is the very reason for the existence of Rule 126 of the Ontario Rules of Practice.

Adopting the reasons of the Ontario Court of Appeal, the Attorneys General and Crown Attorneys enjoy an absolute immunity from civil suit when they are acting within the bounds of their authority. The role of absolute immunity is not to protect the interests of the individual holding the office but rather to advance the greater public good. The Attorneys General and Crown Attorneys are often faced with difficult decisions as to whether to proceed in matters which come before them and their freedom of action is vital to the effective functioning of our criminal justice system.

Cases Cited

By Lamer J.

Considered: Imbler v. Pachtman, 424 U.S. 409 (1976); referred to: Owsley v. The Queen in Right of Ontario (1983), 34 C.P.C. 96; Richman v. McMurtry (1983), 41 O.R. (2d) 559; Levesque v. Picard (1985), 66 N.B.R. (2d) 87; Curry v. Dargie (1984), 28 C.C.L.T. 93; [page174]; German v. Major (1985), 39 Alta. L.R. (2d) 270; Wilkinson v. Ellis, 484 F. Supp. 1072 (1980); Marrero v. City of Hialeah, 625 F.2d 499 (1980), cert. denied, 450 U.S. 913 (1981); Taylor v. Kavanagh, 640 F.2d 450 (1981); Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935; Hester v. MacDonald, [1961] S.C. 370; Boucher v. The Queen, [1955] S.C.R. 16; Hicks v. Faulkner (1878), 8 Q.B.D. 167; Mitchell v. John Heine and Son Ltd. (1938), 38 S.R. (N.S.W.) 466; Bosada v. Pinos (1984), 44 O.R. (2d) 789; R. v. Groves (1977), 37 C.C.C. (2d) 429.

By McIntyre J.

Referred to: Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96; Richman v. McMurtry (1983), 41 O.R. (2d) 559; The Queen v. Comptroller-General of Patents, Designs, and Trade Marks, [1899] 1 Q.B. 909; Curry v. Dargie (1984), 28 C.C.L.T. 93; Roncarelli v. Duplessis, [1959] S.C.R. 121; Mostyn v. Fabrigas (1774), 1 Cowp. 161, 98 E.R. 1021; Henly v. Mayor of Lyme (1828), 5 Bing. 91, 130 E.R. 995; Asoka Kumar David v. Abdul Cader, [1963] 3 All E.R. 579; Imbler v. Pachtman, 424 U.S. 409 (1976); Unterreiner v. Wilson (1982), 40 O.R. (2d) 197 (H.C.), aff'd (1983), 41 O.R. (2d) 472 (C.A.); Bosada v. Pinos (1984), 44 O.R. (2d) 789; German v. Major (1985), 39 Alta. L.R. (2d) 270; Levesque v. Picard (1985), 66 N.B.R. (2d) 87; Gregoire v. Biddle, 177 F.2d 579 (1949); Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935; Warne v. Province of Nova Scotia (1969), 1 N.S.R. (2d) 27; Re Van Gelder's Patent (1888), 6 R.P.C. 22; Morier v. Rivard, [1985] 2 S.C.R. 716; Barrisove v. McDonald, B.C.C.A., No. 490/74, November 1, 1974.

By L'Heureux-Dubé J. (dissenting in part)

Roncarelli v. Duplessis, [1959] S.C.R. 121; Morier v. Rivard, [1985] 2 S.C.R. 716; Gregoire v. Biddle, 177 F.2d 579 (1949); Imbler v. Pachtman, 424 U.S. 409 (1976); Yaselli v. Goff, 12 F.2d 396 (1926).

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APPEAL from a judgment of the Ontario Court of Appeal (1985), 51 O.R. (2d) 513, 21 D.L.R. (4th) 103, 16 C.R.R. 320, 1 C.P.C. (2d) 113, affirming an order of Fitzpatrick J. granting respondents' application to strike out appellant's statement of claim and dismissing her action. Appeal dismissed as against the Crown and appeal allowed as against the Attorney General, L'Heureux-Dubé J. dissenting in part.
John Sopinka, Q.C., and David Brown, for the appellant. T.C. Marshall, Q.C., and L.A. Hunter, for the respondents.

Solicitors for the appellant: Stikeman, Elliott, Toronto. Solicitor for the respondents: R.F. Chaloner, Toronto.

The judgment of Dickson C.J. and Lamer and Wilson JJ. was delivered by

LAMER J.

1 I have read the reasons for judgment of my colleague McIntyre J. and I agree with his disposition of the appeal but I do so for somewhat different reasons. McIntyre J. in his reasons for judgment concludes that there must be a trial to permit a conclusion on the question of [page176] prosecutorial immunity. I am in respectful disagreement with him in this regard. I am of the opinion that the question of immunity should be addressed by this Court in this case, and that nothing prevents the Court from so doing. I set out the relevant rules of the Ontario Rules of Practice as they were at the time of the case for ease of reference:

> 124. Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> 126. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in the case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

2 As McIntyre J. points out the respondents moved to have the action dismissed under Rule 126 on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Both Fitzpatrick J. of the Supreme Court of Ontario and the Court of Appeal for Ontario (1985), 51 O.R. (2d) 513, in allowing the motion to strike out the statement of claim, seemed to have acted under Rule 126.

3 A review of the cases dealing with the application of Rule 124 and Rule 126 reveals the following. The difference between the two rules lies in the summary nature of Rule 126 as opposed to the more detailed consideration of issues under Rule 124. A court should strike a pleading under Rule 126 only in plain and obvious cases where the pleading is bad beyond argument. Rule 124 is designed to provide a means of determining, without deciding the issues of fact raised by the pleadings, a question of law that goes to the root of the action. I would like to point out that what is at issue here is not whether malicious [page177] prosecution is a reasonable cause of action. A suit for malicious prosecution has been recognized at common law for centuries dating back to the reign of Edward I. What is at issue is whether the Crown, Attorney General and Crown Attorneys are absolutely immune from suit for the well-established tort of malicious prosecution. This particular issue has been given careful consideration both by the Court of Appeal and in argument before this Court. The Court of Appeal for Ontario undertook a thorough review of authorities in the course of a lengthy discussion of arguments on both sides of the issue. As such it matters not in my view whether the matter was disposed of under Rule 124 or 126. To send this matter back for trial without resolving the issue of prosecutorial immunity would not be expeditious and would add both time and cost to an already lengthy case.

4 Furthermore I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case. Rule 1.04(1) of the Rules of Civil Procedure in Ontario confirms this principle in stating that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

5 In terms of whether the Crown enjoys absolute immunity from a suit for malicious prosecution, McIntyre J. concludes that s. 5(6) of the Proceedings Against the Crown Act, R.S.O. 1980, c. 393, exempts the Crown from any proceedings in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature or responsibilities that he has in connection with the execution of judicial process. I am of the opinion that McIntyre J. was correct in holding that the Crown is rendered immune from liability by the express terms of s. 5(6) of the Act, for the action by the Crown Attorney and the Attorney General in deciding to prosecute the appellant. I would like to point out, however, that for the reasons set out below, I am of the view that a functional approach to prosecutorial immunity at common law is inadequate. [page178] In this case the applicable legislation requires the Court to draw a distinction between prosecutorial functions in so far as Crown immunity under s. 5(6) is not available unless the function is "judicial" in nature. Therefore, although I agree with McIntyre J. that in this case the decision to prosecute is a "judicial" function for the purposes of s. 5(6), I hasten to add that in dealing with the policy considerations governing the availability of absolute immunity at common law for the Attorney General and Crown Attorneys the functional approach is not the proper test. In addition it should be noted that the constitutionality of the section was not an issue and was not addressed by counsel in this appeal. As such this issue is not before this Court, and therefore the constitutionality of s. 5(6) of the Act is still an open question.

6 Consequently, the remaining issue at hand is whether the Attorney General and his agents, the Crown Attorneys, are absolutely immune from civil liability in a suit for malicious prosecution. In resolving this question, a brief review of the situation prevailing in a few jurisdictions could be helpful and useful. While McIntyre J. in his reasons provides a detailed review of the authorities, I would like to add some further observations.

I. Different Approaches to Immunity

7 The situation in Canada is unclear and does not seem to be uniform throughout the country.

1. Absolute Immunity -- the Ontario Position

8 The Ontario Court of Appeal in the case at bar found that an absolute immunity exists, and in reaching this conclusion relied extensively on the decision by the Supreme Court of the United States in Imbler v. Pachtman, 424 U.S. 409 (1976). The Court of Appeal found the idea of an absolute immunity "troubling" but determined that it was justified by the following policy concerns. First, the rule encourages public trust in the fairness and impartiality of those who act and exercise discretion in the bringing and conducting [page179] of criminal prosecution; the rule is designed for the benefit of the public not the benefit of the individual prosecutor. Second, the threat of personal liability for tortious conduct would have a chilling effect on the prosecutor's exercise of discretion and third, to permit civil suits against prosecutors would invite a flood of litigation which would deflect a prosecutor's energies from the discharge of his public duties. In short, the absence of an absolute immunity would open the door to unmeritorious claims and would be a threat to prosecutorial independence. The Court also relied on two decisions of the Ontario High Court, Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96 and Richman v. McMurtry (1983), 41 O.R. (2d) 559. Both these decisions rely extensively on the American position as found in Imbler, supra. The case law in Ontario therefore, uniformly stands for the proposition that the Attorney General and Crown Attorneys enjoy absolute immunity from civil liability for malicious prosecution. Outside of Ontario, the issue is somewhat more ambiguous.

2. Elsewhere in Canada -- Absolute Immunity Questioned

9 In Levesque v. Picard (1985), 66 N.B.R. (2d) 87, the New Brunswick Court of Appeal held on the authority of the

Ontario cases, especially the case at bar, that an absolute immunity shielded a provincial Crown prosecutor from suit for malicious prosecution. By contrast the appellate courts of Nova Scotia and Alberta have cast some doubts on the existence of an absolute immunity. First, in Curry v. Dargie (1984), 28 C.C.L.T. 93 (N.S.C.A.), the Crown was sued as being vicariously liable for the action of a residential tenancy officer. Hart J.A. held that while the Proceedings Against the Crown Act, R.S.N.S. 1967, c. 239, might absolve the provincial Crown from civil liability, a Crown servant could still be personally liable for misconduct. In the course of his decision [page180] Hart J.A. considered the Ontario decisions especially that of Galligan J. in Richman, supra (at p. 110):

> I am not prepared to go as far as Galligan J. in holding that an officer of the Crown cannot be liable for a proceeding commenced maliciously, but it is not necessary to consider that issue at the moment. I do not believe that in the case at bar it can be said that the respondent in laying the information against the appellant was in fact carrying out a judicial function similar to those carried out by Attorneys General and prosecutors.

10 In German v. Major (1985), 39 Alta. L.R. (2d) 270, a Crown prosecutor was sued for alleged misconduct in the preferment of a charge of tax evasion, a charge on which the accused was acquitted. Kerans J.A. speaking for the Alberta Court of Appeal assumes throughout that a suit for malicious prosecution is possible and disposes of the case on the ground that there had been "reasonable and probable cause" to initiate the prosecution. The case was dismissed pursuant to Rule 129 of the Alberta Rules of Civil Procedure, a rule similar to the old Ontario Rule 126. In this context Kerans J.A. said the following (at p. 276):

> The rule upon which I rely has much to commend it. It falls short of the absolute immunity suggested by Major and accepted by the Supreme Court of the United States in Imbler v. Pachtman ... but offers some protection from the harassment which he says would otherwise afflict prosecuting counsel because suit would not be permitted to proceed if utterly without merit. It would indeed be a curious thing if we chose a stern immunity rule in preference to an effective striking-out rule.

11 Further support for the view that Kerans J.A. is not inclined to accept the existence of an absolute immunity for prosecutors can be found in the following statements (at pp. 277 and 286):

> I will assume, for the sake of argument, that, if counsel, with malice, continues a prosecution he once thought sound but now knows is unsound, he may be sued.

...

[page181]

> Counsel for the Attorney General who acts as his agent in the prosecution of a criminal case is not accountable in civil proceedings to the accused except possibly to the extent that it is alleged against him that he has not acted in good faith, and to that extent the allegation falls within the nominative tort of malicious prosecution ... [Emphasis added.]

12 Therefore the Canadian position ranges from a strong assertion of absolute immunity in Ontario to an acceptance of the possibility of suing the Attorney General and Crown Attorneys if bad faith or malice can be proven as evidenced by the cases from Nova Scotia and Alberta. The situation in Quebec differs in that since 1966 the Code of Civil Procedure, R.S.Q., c. C-25, specifically provides for claims against the Crown in the following terms:

> 94. Any person having a claim to exercise against the Crown, whether it be a revendication of moveable or immoveable property, or a claim for the payment of moneys on an alleged contract, or for damages, or otherwise, may exercise it in the same manner as if it were a claim against a person of full age and capacity, subject only to the provisions of this chapter.

13 No provisions in this chapter prevent a suit for malicious prosecution against the Crown. However, the substantive issue of immunity of Crown prosecutors has not been finally determined.

3. Immunity in the United States

14 A consideration of the position in respect of prosecutorial immunity in the United States is vital both because it is relied extensively upon by the Court of Appeal in the case at bar, and because it has been the source of a healthy debate in courts and among academics in that country. This position is furthermore interesting since a variety of approaches have been proposed and many critical comments have been made.

i) The Functional Approach -- Imbler v. Pachtman: "The Powell Judgment"

15 In 1972 Paul Imbler filed a claim under 42 U.S.C. s. 1983 alleging that the prosecutor and various members of the police force conspired to [page182] cause him loss of liberty by allowing a witness to give false testimony, suppressing evidence, prosecuting with knowledge of an exculpatory lie-detector test and introducing an altered police artist's sketch. Section 1983 of the Civil Rights Act creates a federal damage action against anyone who acts under colour of state law to deprive a person of his civil rights as protected by the U.S. Constitution. Powell J., speaking for five members of the Supreme Court, held that a prosecutor is absolutely immune from s. 1983 actions when the actions arise out of the prosecutor's initiation of prosecution and presentation of the State's case. In addition, the Court seemed to suggest that absolute immunity also attached to activities that "were intimately associated with the judicial phase of the criminal process" (p. 430). The Court then adopted what has become known as the "functional approach" of prosecutorial immunity.

16 The Imbler decision recognizes that prosecutors perform many functions in the course of fulfilling their duties, among them being the decision to initiate a prosecution, which witnesses to call, what other evidence to present, and obtaining, reviewing and evaluating evidence. The Court accepts that drawing a line between these functions is a difficult task but concludes that prosecutorial functions of a quasi-judicial or advocatory nature should be afforded absolute immunity. The Court refused to comment on whether a similar immunity attaches to what it called the "administrative" or "investigative" role of the prosecutor. In the course of justifying its position, the Court noted that the same policy considerations that afford absolute immunity to judges acting within the scope of their duties support a prosecutor's common law absolute immunity. The Court simply extended that line of reasoning to s. 1983 claims.

[page183]

17 The policy considerations canvassed by the Court are familiar ones and can be summarized as follows:

1. Public Confidence

"The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."

2. Diversion from Duties

" ... if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."

3. Balancing of Evils

" ... we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> "... it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Gregoire v. Biddle, 177 F. (2d) 579, 581 (CA2 1949) cert. denied, 339 U.S. 949 (1950)."

4. Other Available Remedies

"Even judges ... could be punished criminally for willful deprivations of constitutional rights ... The prosecutor would fare no better for his willful acts ... Moreover, a prosecutor stands perhaps unique, among

> officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."
>
> (Imbler, supra, at pp. 424-29)

18 Therefore, Powell J. affirmed the judgment of the Court of Appeal for the Ninth Circuit and held that a prosecutor is absolutely immune from suit in initiating a prosecution and in presenting the State's case.

[page184]

ii) The Functional Approach -- Imbler v. Pachtman: "The White Judgment"

19 While concurring with the judgment of Powell J. and much of his reasoning, White J. (Brennan and Marshall JJ. joining) would carve out an exception to the rule of absolute immunity for the unconstitutional suppression of evidence. In doing so White J. examined the rationale for granting absolute immunity to prosecutors at common law (at p. 442):

> The absolute immunity ... is designed to encourage [the prosecutors] to bring information to the court which will resolve the criminal case .... Lest they withhold valuable but questionable evidence or refrain from making valuable but questionable arguments, prosecutors are protected from liability for submitting before the court information later determined to have been false to their knowledge.

20 According to White J. immunity from suit based on the unconstitutional suppression of evidence would "stand this immunity rule on its head" (p. 442) by discouraging precisely the disclosure of evidence sought to be encouraged by the rule (at p. 443):

> A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But this will hardly injure the judicial process. Indeed, it will help it. Accordingly, lower courts have held that unconstitutional suppression of exculpatory evidence is beyond the scope of "duties constituting an integral part of the judicial process" and have refused to extend absolute immunity to suits based on such claims. Hilliard v. Williams, 465 F. 2d 1212, 1218 (CA6), cert. denied, 409 U.S. 1029 (1972) ....

21 White J.'s position then would limit the scope of absolute immunity but would not eliminate the theoretical underpinning of the Powell majority judgment, namely the functional approach to absolute immunity.

22 The functional approach has been criticized on a number of grounds. First, there is the ever present problem of line-drawing between functions that are quasi-judicial and those that are administrative [page185] or investigative. Drawing the line is made more difficult by multi-faceted functions, functions that simultaneously serve quasi-judicial, administrative and investigative functions. (See Anthony Luppino, "Supplementing the Functional Test of Prosecutorial Immunity" (1982), 34 Stan. L. Rev. 487, at pp. 493-94.) Aside from the problem of distinguishing between [page187] prosecutorial functions, there is the conceptual difficulty in justifying differential treatment of malicious acts based on the criterion of function. If a prosecutor acts maliciously in the course of the prosecution of an accused, does it really matter whether the function being carried out is characterized as "quasi-judicial" or "administrative"?

23 An example of the difficulty with the functional approach is the disagreement in the lower courts in the United States over whether quasi-judicial absolute immunity extends to investigative functions of a prosecutor. In addition, and in light of the White concurring judgment in Imbler, there is disagreement over whether leaks of information and destruction or alteration of evidence are acts that are protected by absolute immunity: see cases cited by J. C. Filosa, "Prosecutorial Immunity: No Place for Absolutes," [1983] U. Ill. L. Rev. 977, at pp. 985-86. In my view, these disagreements demonstrate the futility of attempting to differentiate between functions of a prosecutor in a principled way. The result is often arbitrary line-drawing which leads to seemingly unresolvable conflict and the diversion of attention from the central issue, namely whether or not a prosecutor has acted maliciously.

24 Second, it has been argued that the policy rationales supporting absolute immunity for prosecutors, derived as they are from judicial immunity, rely on an inaccurate reading of history. Filosa in his article challenges the derivation of the prosecutor's quasi-judicial immunity from s. 1983 [page186] claims from the absolute immunity of judges at common law (at pp. 980-81):

> In the sixteenth century, English judges were typically liable for their torts. Throughout the nineteenth century, judges remained liable for malicious conduct done without reasonable and probable cause. In America before Bradley v. Fisher [80 U.S. (13 Wall.) 335 (1872)], courts held many judicial officers liable for their wrongful acts .... Of the thirty-seven states in existence in 1871, thirteen had judicial immunity, six states held judges liable for malicious actions, nine had not taken a clear position, and nine had not faced the question.

25 Filosa goes on to argue that Congress could not have meant to incorporate a doctrine of absolute immunity into s. 1983 because Bradley, which firmly entrenched judicial immunity in the common law, was not decided until 1872, one year after the Civil Rights Act of 1871 that contained s. 1983.

4. Alternatives to Imbler

i) The Functional Approach Reapproached

26 The difficulties in applying the functional test have led American courts and academic commentators to suggest alternatives or reassessments of the test. One such attempt has been described by its proponent as the "functional approach reapproached". (See Note, "Delimiting the Scope of Prosecutorial Immunity from Section 1983 Damage Suits" (1977), 52 N.Y.U. L. Rev. 173, at pp. 190-91.) This approach seeks to avoid a judicial hearing to determine whether a prosecutor's action is quasi-judicial. As such the test states that "the only duties clearly not entitled to quasi-judicial immunity are those so divorced from the judicial process that they could readily be assigned to another official who could be completely independent of the prosecutor" (see Note, loc. cit., at p. 191). This approach seeks to grant to the prosecutor absolute immunity in a wider sphere of activities in the hopes of clarifying the distinction between quasi-judicial and investigative activities. In my view, this modification still has the drawback of requiring a line to be drawn between [page187] prosecutorial functions, a difficult task in itself. The modification, in seeking to make that task easier, errs on the side of including more activities within the realm of absolute prosecutorial immunity, a modification that, with respect, offers an immunity considerably wider than that given to judges from which prosecutorial immunity is allegedly derived.

ii) General Features Test: Wilkinson v. Ellis

27 In Wilkinson v. Ellis, 484 F. Supp. 1072 (E.D. Pa. 1980), the plaintiff alleged that a prosecutor destroyed a tape recorded interview with a man who admitted involvement in the alleged criminal activity, thereby exonerating the plaintiff. The prosecutor moved to dismiss the action, arguing that the destruction of evidence is a quasi-judicial act shielded by absolute immunity. The Wilkinson court refused to characterize the destruction as either investigative or quasi-judicial. Rather, it resolved the difficulty of classifying activities by asking whether the activity contained features "which generally characterize quasi-judicial activity" (p. 1083). In deciding that the destruction did not have the "general features" of quasi-judicial activity, the court identified three factors to be taken into account: (1) the activity's physical and temporal proximity to the judicial process; (2) the degree of dependence upon legal opinions and prosecutorial discretion involved in the conduct; and (3) whether the activity is primarily advocatory (p. 1080). This approach in my view, does little to get away from the inherent problems involved in categorizing prosecutorial actions.

iii) The Imbler "Umbrella"

28 This variation of the functional approach involves limiting the scope of the prosecutor's quasi-judicial function to conduct that falls within the [page188] narrowest confines of the Imbler test: in other words within the "umbrella" of coverage defined by the language of Imbler. Acts that are under the "umbrella" attract absolute immunity; all others receive at most qualified immunity. (See Marrero v. City of Hialeah, 625 F.2d 499 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981).) This approach merely re-states the categorization problem found in Imbler. The test requires a determination of what constitutes the coverage of the so-called "Imbler umbrella" and thereby takes us back to the original problem of line-drawing.

iv) The Harm Test

29 This variation of Imbler construes that decision broadly by granting absolute immunity to prosecutorial conduct that causes a defendant to "face prosecution, or to suffer imprisonment or pretrial detention". (See Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981), at p. 453.) The test denies absolute immunity to prosecutorial conduct that inflicts harm independent of the prosecution itself. This approach looks to the effects of prosecutorial conduct and as such purports to reduce the issue to a factual determination of harms. If the harm is unrelated to the judicial phase of the criminal justice process then the prosecutorial act causing the harm is not quasi-judicial.

v) The Supplemental Functional Approach

30 This approach involves a two-step process: first, determining what conduct normally merits absolute or qualified immunity and second, in the remaining cases, identifying the substantive values affected by conduct that is not susceptible to traditional categorization. (See Luppino, loc. cit., at p. 505.) This variation recognizes that there will be occasions when conduct does not clearly fall into one of the two traditional categories: quasi-judicial and non-quasi-judicial. When conduct does not fall into either category explicit balancing of competing interests becomes necessary. In this respect, [page189] courts should weigh the cost to the judicial system resulting from the unredressed civil wrong against the cost to the efficiency of the criminal justice system. This approach recognizes that the Imbler functional approach cannot account for all prosecutorial functions; there will be some conduct that is multi-faceted and uncategorizable. As a result the approach resorts to a consideration of first principles, namely a balancing of the policy considerations both in favour and opposed to prosecutorial immunity in the first place. In short, we have come full circle.

31 The American position, in any of its forms, demonstrates the impracticality of the functional approach to prosecutorial immunity. In my view, the functional approach leads to arbitrary line drawing between prosecutorial functions. This line drawing exercise is made nearly impossible by the reality that many prosecutorial functions are multi-faceted and cannot be neatly categorized. Further, it must be noted that however one categorizes a prosecutor's function it is still that of the prosecutor. If it can be demonstrated that a prosecutor has acted without reasonable cause and has acted with malice then does it really matter which functions he was carrying out? In my view to decide the scope of immunity on the basis of categorization of functions is an unprincipled approach that obscures the central issue, namely whether the prosecutor has acted maliciously. If immunity is to be qualified it should be done in a manner other than by the drawing of lines between quasi-judicial and other prosecutorial functions.

5. The English Position

32 The position in respect of prosecutorial immunity in England is somewhat unique in that jurisdiction owing in part to the tradition of private prosecution. Private prosecutors have always been liable to suit for malicious prosecution though few, if any, reported cases exist. The Director of Public Prosecutions, who performs the same or similar [page190] function as a Canadian provincial Attorney General, was not created until 1879. In Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935 (C.A.), the Court said the following in respect of suits against the D.P.P. (at p. 941):

> I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying, that the existence of the Attorney General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted.

33 The English position then, at the very least, leaves the door open for suits against the equivalent of our Attorneys General and Crown Attorneys when what is at issue is the suppression of evidence. It is apposite to note that this position is reflective of White J.'s concurring opinion in Imbler, supra, wherein he carved out an exception to the rule of absolute immunity for the unconstitutional suppression of evidence.

6. Scotland

34 It would appear that in Scotland the equivalent of our Attorney General and Crown Attorneys are absolutely immune from civil liability. In Hester v. MacDonald, [1961] S.C. 370, the court said at p. 377:

> It is, therefore, an essential element in the very structure of our criminal administration in Scotland that the Lord Advocate is protected by an absolute privilege in respect of matters in connexion with proceedings brought before a Scottish Criminal Court by way of indictment .... Never in our history has a Lord Advocate been sued for damages in connexion with such proceedings. On the contrary, our Courts have consistently affirmed the existence of such immunity on his part.

[page191]

35 The rationale underlying this comment has been disputed by Professor Edwards in The Attorney General, Politics and the Public Interest (1984) in which he argues that the Scottish rationale is based upon the idea that the Lord Advocate and his agents enjoy a constitutional trust which assumes good faith in commencing a prosecution, a rationale far removed from that invoked by the Ontario courts.

7. Australia and New Zealand

36 The position in respect of prosecutorial immunity in Australia and New Zealand is not clear. As far as I can determine, there does not seem to be any reported case on the issue.

37 Although the situation prevailing in European civil law jurisdictions is interesting, its application to the case at bar is of limited usefulness because of the wide differences between the civil law system and our common law tradition.

II. The Preferred Canadian Position

1. The Role of the Attorney General and Crown Attorney

38 Historically the Attorney General's role was that of legal adviser to the Crown and to the various departments of government. More specifically the principal function was and still is the prosecution of offenders. The appointment of Crown Attorneys as agents of the Attorney General, arose from the increasing difficulty of the Attorney General to attend effectively to all of his duties amid increases in population, and the expansion of settlement.

39 The office of the Crown Attorney has as its main function the prosecution of and supervision over indictable and summary conviction offences. The Crown Attorney is to administer justice at a local level and in so doing acts as agent for the Attorney General. Traditionally the Crown Attorney has been described as a "minister of justice" and "ought to regard himself as part of the Court rather than as an advocate". (Morris Manning, "Abuse of Power by Crown Attorneys," [1979] L.S.U.C. Lectures 571, at p. 580, quoting Henry Bull, Q.C.) As regards the proper role of the [page192] Crown Attorney, perhaps no more often quoted statement is that of Rand J. in Boucher v. The Queen, [1955] S.C.R. 16, at p. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

40 Among the many powers of a prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, the power of disclosure/non-disclosure of evidence before trial, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal. (For a fuller description of the genesis and operation of these powers see Manning, op. cit., at pp. 586-608, and P. Béliveau, J. Bellemare and J.-P. Lussier, On Criminal Procedure (1982), at pp. 69-83.)

41 With this background in mind, it is now necessary to turn to a consideration of the tort at issue, malicious prosecution, and the policy rationales in favour of an absolute immunity for the Attorney General and Crown Attorneys in respect of that tort.

2. The Tort of Malicious Prosecution

42 There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution: [page193] a) the proceedings must have been initiated by the defendant;

b) the proceedings must have terminated in favour of the plaintiff;

c) the absence of reasonable and probable cause;

d) malice, or a primary purpose other than that of carrying the law into effect.

(See J. G. Fleming, The Law of Torts (5th ed. 1977), at p. 598.)

43 The first two elements are straightforward and largely speak for themselves. The latter two elements require explicit discussion. Reasonable and probable cause has been defined as "an honest belief in the guilt of the accused based upon a full conviction, founded on reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed" (Hicks v. Faulkner (1878), 8 Q.B.D. 167, at p. 171, Hawkins J.)

44 This test contains both a subjective and objective element. There must be both actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances. The existence of reasonable and probable cause is a matter for the judge to decide as opposed to the jury.

45 The required element of malice is for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" (Fleming, op. cit., at p. 609). To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". [page194] In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice. In fact, in some cases this would seem to amount to criminal conduct. (See for example breach of trust, s. 122, conspiracy re: false prosecution s. 465(1)(b), obstructing justice s. 139(2) and (3) of the Criminal Code, R.S.C., 1985, c. C-46.)

46 Further, it should be noted that in many, if not all cases of malicious prosecution by an Attorney General or Crown Attorney, there will have been an infringement of an accused's rights as guaranteed by ss. 7 and 11 of the Canadian Charter of Rights and Freedoms.

47 By way of summary then, a plaintiff bringing a claim for malicious prosecution has no easy task. Not only does the plaintiff have the notoriously difficult task of establishing a negative, that is the absence of reasonable and probable cause, but he is held to a very high standard of proof to avoid a non-suit or directed verdict (see Fleming, op. cit., at p. 606, and Mitchell v. John Heine and Son Ltd. (1938), 38 S.R. (N.S.W.) 466, at pp. 469-71). Professor Fleming has gone so far as to conclude that there are built-in devices particular to the tort of malicious prosecution to dissuade civil suits (at p. 606):

> The disfavour with which the law has traditionally viewed the action for malicious prosecution is most clearly revealed by the hedging devices with which it has been surrounded in order to deter this kind of litigation

> and protect private citizens who discharge their public duty of prosecuting those reasonably suspected of crime.

3. Policy Considerations

48 In light of what I have said regarding the role of the prosecutor in Canada, and the tort of malicious [page195] prosecution, it now is necessary to assess the policy rationales. I would begin by noting that even those decisions that have come out firmly in favour of absolute immunity have described the rule as "troubling", a "startling proposition", "strained and difficult to sustain" (see Nelles v. The Queen in right of Ontario (1985), 51 O.R. (2d) 513 (Ont. C.A.), at p. 531, and Bosada v. Pinos (1984), 44 O.R. (2d) 789 (H.C.), at p. 794).

49 It is said by those in favour of absolute immunity that the rule encourages public trust and confidence in the impartiality of prosecutors. However, it seems to me that public confidence in the office of a public prosecutor suffers greatly when the person who is in a position of knowledge in respect of the constitutional and legal impact of his conduct is shielded from civil liability when he abuses the process through a malicious prosecution. The existence of an absolute immunity strikes at the very principle of equality under the law and is especially alarming when the wrong has been committed by a person who should be held to the highest standards of conduct in exercising a public trust. (See Filosa, op. cit., at p. 982, and Marilyn L. Pilkington, "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms" (1984), 62 Can. Bar. Rev. 517, at pp. 560-61.)

50 Regard must also be had for the victim of the malicious prosecution. The fundamental flaw with an absolute immunity for prosecutors is that the wrongdoer cannot be held accountable by the victim through the legal process. As I have stated earlier, the plaintiff in a malicious prosecution suit bears a formidable burden of proof and in those cases where a case can be made out, the plaintiff's Charter rights may have been infringed as well. Granting an absolute immunity to prosecutors is akin to granting a license to subvert individual rights. Not only does absolute immunity negate a private right of action, but in addition, it seems to me, it may be that it would effectively bar the seeking of a remedy pursuant to s. 24(1) of the Charter. It seems clear that in using his office to maliciously prosecute an accused, the prosecutor would be depriving an individual of the right to [page196] liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Such an individual would normally have the right under s. 24(1) of the Charter to apply to a court of competent jurisdiction to obtain a remedy that the court considers appropriate and just if he can establish that one of his Charter rights has been infringed. The question arises then, whether s. 24(1) of the Charter confers a right to an individual to seek a remedy from a competent court. In my view it does. When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong. To create a right without a remedy is antithetical to one of the purposes of the Charter which surely is to allow courts to fashion remedies when constitutional infringements occur. Whether or not a common law or statutory rule can constitutionally have the effect of excluding the courts from granting the just and appropriate remedy, their most meaningful function under the Charter, does not have to be decided in this appeal. It is, in any case, clear that such a result is undesirable and provides a compelling underlying reason for finding that the common law itself does not mandate absolute immunity.

51 It is also said in favour of absolute immunity that anything less would act as a "chilling effect" on the Crown Attorney's exercise of discretion. It should be noted that what is at issue here is not the exercise of a prosecutor's discretion within the proper sphere of prosecutorial activity as defined by his role as a "minister of justice". Rather, in cases of malicious prosecution we are dealing with allegations of misuse and abuse of the criminal process and of the office of the Crown Attorney. We are not dealing with merely second-guessing a Crown Attorney's judgment in the prosecution of a case but rather with the deliberate and malicious [page197] use of the office for ends that are improper and inconsistent with the traditional prosecutorial function.

52 Therefore it seems to me that the "chilling effect" argument is largely speculative and assumes that many suits for malicious prosecution will arise from disgruntled persons who have been prosecuted but not convicted of an offence. I am of the view that this "flood-gates" argument ignores the fact that one element of the tort of malicious prosecution requires a demonstration of improper motive or purpose; errors in the exercise of discretion and judgment are not actionable. Furthermore, there exist built-in deterrents on bringing a claim for malicious prosecution. As I have noted, the burden on the plaintiff is onerous and strict. The fact that the absence of reasonable cause is a matter of law to be decided by a judge means that an action for malicious prosecution can be struck before trial as a matter of substantive inadequacy (see Rule 21.01 of the Ontario Rules of Civil Procedure for example). In fact this was the approach adopted by Kerans J.A. in German v. Major, supra. I agree with Kerans J.A. that "[i]t would indeed be a curious thing if we chose a stern immunity rule in preference to an effective striking-out rule" (p. 276). In addition most jurisdictions, including Ontario, have provisions that allow a defendant to move for summary judgment before a full-fledged trial takes place (see for example Rule 20 in Ontario). Finally, the potential that costs will be awarded to the defendant if an unmeritorious claim is brought acts as financial deterrent to meritless claims. Therefore, ample mechanisms exist within the system to ensure that frivolous claims are not brought. In fact, the difficulty in proving a claim for malicious prosecution itself acts as a deterrent. This high threshold of liability is evidenced by the small number of malicious prosecution suits brought against police officers each year. In addition, since 1966, the province of Quebec permits suits against the Attorney General and Crown prosecutors without any evidence [page198] of a flood of claims. Therefore, I find unpersuasive the claim that absolute immunity is necessary to prevent a flood of litigation.

53 As for alternative remedies available to persons who have been maliciously prosecuted, none seem to adequately redress the wrong done to the plaintiff. The use of the criminal process against a prosecutor who in the course of a malicious prosecution has committed an offence under the Criminal Code, addresses itself mainly to the vindication of a public wrong not the affirmation of a private right of action. Of special interest in this regard is s. 737 of the Criminal Code which deals with the making of a probation order. Section 737(2) stipulates that certain conditions may be prescribed in a probation order, one of them being that the convicted person "make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof" (s. 737(2)(e)). This section would seem to be an indirect method of at least partially remedying a wrong done to an individual as a result of a malicious prosecution. However the section is only operative when an accused has been convicted of an offence and when a probation order is made. In addition, the Court's power to award compensation to a victim is limited to damages that are relatively concrete and ascertainable. (See R. v. Groves (1977), 37 C.C.C. (2d) 429 (Ont. H.C.)) As such it would seem a rather inadequate substitute for a private right of action. I do however pause to note that many cases of genuine malicious prosecution will also be offences under the Criminal Code, and it seems rather odd if not incongruous for reparation to be possible through a probation order but not through a private right of action.

54 Further, the use of professional disciplinary proceedings, while serving to some extent as punishment and deterrence, do not address the central issue of making the victim whole again. And as has already been noted, it is quite discomforting to realize that the existence of absolute immunity may bar a person whose Charter rights have been [page199] infringed from applying to a competent court for a just and appropriate remedy in the form of damages.

III. Conclusion

55 A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.

56 There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled as I have previously [page200] noted. As a result I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity in respect of suits for malicious prosecution. I would therefore dismiss the appeal as against the Crown, there being no order as to costs. I would allow the appeal as against the Attorney General with costs and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The following are the reasons delivered by

McINTYRE J.

57 This appeal concerns the question of the liability of the Crown and the Attorney General of the province in a suit for malicious prosecution arising out of the institution of criminal proceedings, charges of murder, brought against the appellant.

58 In March, 1981, the appellant, then a nurse at the Toronto Hospital for Sick Children, was charged with the murder of four infant patients. At the conclusion of her preliminary hearing, the Provincial Court Judge who conducted the proceedings discharged the appellant upon a finding of an absence of evidence: (1982), 16 C.C.C. (3d) 97. The appellant later commenced an action against the Crown in right of Ontario, the Attorney General for Ontario, and several police officers, alleging that the Attorney General and his agents, the Crown Attorneys, counselled, aided and abetted the police in charging and prosecuting the plaintiff, and that in so doing the Attorney General, the Crown Attorneys, and police were acting as agents for the Crown in right of Ontario. It was also alleged that in the prosecution the Attorney General and the Crown Attorneys were actuated by malice while acting as agents for the Crown. Proceedings were later discontinued against the police officers and the Crown Attorneys were not named as defendants. The Crown and the Attorney General remained the only defendants and are the respondents in this Court.

[page201]

59 Before trial, the respondents moved to have the action dismissed under Rule 126 of the Ontario Rules of Practice, on the ground that the pleadings disclosed no reasonable cause of action and, in the alternative, for leave under Rule 124 to set down a point of law raised in the pleadings and to argue the same on the return of the motion. Rule 124 and Rule 126 are set out hereunder:

> 124. Either party is entitled to raise by his pleadings any point of law, and by consent of the parties or by leave of a judge, the point of law may be set down for hearing at any time before the trial, otherwise it shall be disposed of at the trial.
>
> 126. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

The question of law for which leave was sought was in these terms:

> A defendant in a preliminary inquiry held under the provisions of the Criminal Code of Canada and discharged thereof has no cause of action based in malicious prosecution or negligence against the Crown Attorneys conducting such proceedings or as against those in law responsible for their conduct.

60 Fitzpatrick J., of the Supreme Court of Ontario, allowed the motion and struck out the statement of claim. In doing so, he seems to have acted under Rule 126. He concluded on the basis of two decisions of the Supreme Court of Ontario (Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96 (Ont. H.C.), and Richman v. McMurtry (1983), 41 O.R. (2d) 559 (Ont. H.C.)), that the Attorney General for Ontario has an absolute immunity from civil action while performing his duties as a public prosecutor, even if he acted maliciously. He concluded that the immunity had not been removed by the Canadian Charter of Rights and Freedoms and allowed the motion and struck out the statement of claim.

[page202]

61 An appeal was dismissed in the Ontario Court of Appeal: (1985), 51 O.R. (2d) 513. At the outset, Thorson J.A., speaking for the Court (Houlden, Thorson and Robins JJ.A.) said, at pp. 514-15:

> This Court reserved its judgment on the appeal following lengthy argument on whether, as a matter of law, any action can be asserted against the Crown or the Attorney-General, or both, in the circumstances which are found to be present in this case. My conclusion is that as a matter of law it cannot, and that the plaintiff's appeal must therefore be dismissed. The reasons for this conclusion follow.

From the foregoing, it may be somewhat doubtful whether the Court of Appeal acted under Rule 124 or 126. The record, however, does not disclose any consent by the parties or any grant of leave for the hearing of the point of law under Rule 124. Furthermore, in answer to arguments raised in the Court of Appeal in this form, at p. 518:

> At the outset of his submissions counsel for the appellant, Mr. Sopinka, contended that on an application to a judge under Rule 126 of the Rules of Practice, the judge hearing the application ought not to strike out a plaintiff's statement of claim unless he was persuaded that the claim could have no hope of succeeding, even if the facts alleged in the statement of claim were proved. In considering such an application, the facts must be taken to be as they are alleged in the statement of claim. Moreover, where the statement of claim raises a "substantial issue of law" it ought not to be struck out under Rule 126, and where an allegation is made that an executive of ministerial act has been performed in bad faith or for an improper purpose, that issue should not be dealt with on a summary application under Rule 126 but should be left to be determined by the judge at trial. Similarly, where an issue arises as to whether any conduct is unconstitutional, it is important to have the kind of factual underpinning which is needed to determine that issue and which can only be brought out at a trial in the ordinary course.

Thorson J.A. said, at pp. 518-19:

> With respect I cannot agree that Fitzpatrick J. erred in dealing with this application as one properly brought under Rule 126, albeit that the power conferred on a judge under that rule is one that ought to be used "sparingly", as noted by Dupont J. in Owsley v. The Queen in right of Ontario (1983), 34 C.P.C. 96 at p. [page203] 102. Nor can I agree with the assertion that merely because the statement of claim raises a "substantial issue of law" it ought not to be dealt with on an application under that rule. If the latter assertion were correct, it seems to me that the purpose of the rule would be largely defeated. That purpose, surely, is to make it possible for a person who has been named in an action to avoid having to go to the considerable trouble and expense of defending himself in court against a claim made in that action which has no reasonable expectation of succeeding against him, even if all the facts alleged are proved. If, in this case, the learned motions court judge had concluded that the Attorney-General, and thus by extension the Crown, did not enjoy an absolute immunity in law, it might well have been improper to decide the issue before him on an application under Rule 126 since in that event, and for the reasons explained by Linden J. in King v. Liquor Control Board of Ontario (1981), 33 O.R. (2d) 816 at p. 825, ... a "factual underpinning" for the claim would then have been necessary for its disposition, but where, as here, he concluded that the immunity was absolute, the same kind of factual underpinning was not needed, for even if the facts as alleged were proved the claim could not succeed. Accordingly, I find no error on the part of Fitzpatrick J. in acting on the application as one which could be properly considered and dealt with by him under Rule 126 ....

Therefore, I will proceed on the basis that the Court of Appeal reached its determination by the application of Rule 126. In so doing, the court concluded that there existed an absolute immunity for the Crown and the Attorney General and the Crown Attorneys against suit for all acts done in relation to criminal proceedings, even though malice be shown. If this Court should hold that the immunity asserted for the Crown and the Attorney General is clearly absolute, the action would be at an end. If, however, it should conclude that the immunity is in any way limited or qualified or that its existence is doubtful, the matter would have to go to trial in the usual way, so that evidence could be heard on the matters of fact and the issues raised in order to provide a factual underpinning for the determination of any possible liability. In approaching the matter at this stage, it must be borne in mind that in proceedings under Rule 126 the facts alleged must be taken as true and this [page204] motion must be disposed of on the basis that the Crown Attorneys and the Attorney General acted with malice in the initiation and conduct of these proceedings.

62 There are four necessary elements which must be proved for success in an action for malicious prosecution:

A. The proceedings must have been initiated by the defendant.

B. The proceedings must have terminated in favour of the plaintiff.

C. The plaintiff must show that the proceedings were instituted without reasonable cause, and

D. The defendant was actuated by malice.

This appeal must therefore be approached on the footing that all these elements are shown.

63 It was argued on behalf of the Crown that it enjoyed a complete immunity from liability for malicious prosecution, on the basis of a common law immunity of the Attorney General and the Crown Attorneys. Any liability on the part of the Crown arising from the conduct of its servants would be vicarious. Therefore, it was contended that because the common law accorded a full immunity to the Crown's servants, the Crown itself would not be liable. It was also contended that the Crown had an absolute immunity under the provisions of the Proceedings Against the Crown Act, R.S.O. 1980, c. 393 (the Act).

64 Any consideration of Crown liability must now be based upon the Act and I do not find it necessary for the purposes of this case to consider the common law position respecting Crown immunity. The purpose of the Act, clearly discernible from its form and structure, was to remove Crown immunities and place the Crown upon the same footing as any other person before the courts, save for the exceptions which are set out in the Act. The [page205] effective sections for this purpose are ss. 2 and 5. Section 2(2)(d) was relied upon by the Crown. It provides:

> 2. ...
>
> (2) Nothing in this Act
>
> . . .
>
> (d) subjects the Crown to proceedings under this Act in respect of anything done in the due enforcement of the criminal law or of the penal provisions of any Act of the Legislature;

It may be argued that commencing and conducting proceedings with malice against the object of the proceedings could not be considered as the "due" enforcement of the criminal law. But any opening in the wall of immunity found by the Court of Appeal would be, in my view, effectively closed by s. 5(6) of the Act, which provides:

> 5. ...
>
> (6) No proceedings lie against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in him or responsibilities that he has in connection with the execution of judicial process.

Section 5 expresses the general rule which subjects the Crown to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject. Subsections (2) to (5) provide interpretative guides while subs. (6), excepts from the general rule Crown liability in respect of anything done or omitted to be done by a person, while discharging or purporting to discharge responsibilities of a judicial nature vested in him or responsibilities that he has in connection with the execution of the judicial process.

65 The claim asserted here depends upon the actions of the Crown Attorneys and the Attorney General, specifically the decision to prosecute the appellant for murder. The decision to prosecute is a judicial decision and is obviously vested in the Attorney General and executed on his behalf by his agents, the Crown Attorneys: see The Queen v. Comptroller-General of Patents, Designs, and [page206] Trade Marks, [1899] 1 Q.B. 909 (C.A.). A.L. Smith L.J. said, at pp. 913-14:

> I wish to say a word or two about the position of the Attorney-General, because in my judgment it is of importance in this case, and his position appears likely to be lost sight of. Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide. For example, where a man who is tried for his life and convicted alleges that there is error on the record, he cannot take advantage of that error unless he obtains the fiat of the Attorney-General, and no Court in the kingdom has any controlling jurisdiction over him. That perhaps is the strongest case that can be put as to the position of the Attorney-General in exercising judicial functions. Another case in which the Attorney-General is pre-eminent is the power to enter a nolle prosequi in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is satisfied that there is no case; but the Attorney-General alone has power to enter a nolle prosequi, and that power is not subject to any control. Another case is that of a criminal information at the suit of the Attorney-General -- a practice which has, I am sorry to say, fallen into disuse. The issue of such an information is entirely in the discretion of the Attorney-General, and no one can set such an information aside. There are other cases to which I could refer to be found in old and in recent statutes, but I have said enough to shew the high judicial functions which the Attorney-General performs ....

The Crown Attorneys and the Attorney General in deciding to prosecute the appellant would therefore come within s. 5(6) of the Act, and the Crown would have its statutory immunity despite any uncertainty which might arise because of an argument under s. 2(2)(d) of the Act, based on the concept of "due" enforcement of the criminal law. The Attorney General and his agents, whatever the motives underlying their conduct, were surely, in the words of s. 5(6), "discharging or purporting" to discharge responsibilities of a judicial nature. In my view, the Crown is rendered immune by the express terms of s. 5(6) of the Act from liability to the appellant.

[page207]

66 The fact of Crown immunity in this case does not necessarily mean that a similar immunity for the Attorney General and his agents follows. Any immunity that they might enjoy must find its own independent footing and the fact that the Act extends an immunity to the Crown in this case, therefore, cannot be understood as conferring or evidencing an immunity for the Attorney General and the Crown Attorneys. This point was made by Hart J.A. in the case of Curry v. Dargie (1984), 28 C.C.L.T. 93 (N.S.C.A.), where he held that, while the Proceedings Against the Crown Act, R.S.N.S. 1967, c. 239, at p. 107, might absolve the provincial Crown from liability, a Crown servant, in that case a residential tenancy officer, could still be personally liable for misconduct:

> It seems to me that we are dealing here, once again, with the immunity of the Crown and not that of a tortfeasor.
>
> It has been pointed out that the Proceedings Against the Crown Act was passed to give citizens the right to sue the Crown for the tortious acts of its officers and servants. The Act also prevents suits against the Crown for acts of its officers or servants carried out in the due enforcement of valid legislation. The Act was not designed, however, to protect the officers and servants of the Crown personally from actions arising out of torts committed by them against members of the public, whether during the course of their employment or not, which were not done solely for the due enforcement of the criminal law or the provisions of any act of the Legislature ....

What then is the nature of the immunity, if any, enjoyed by the Attorney General at common law?

67 There is clear authority in the jurisprudence of most common law, and some civil law, jurisdictions for the proposition that public officers and officials discharging or purporting to discharge the duties and powers of their offices may be personally liable in damages for wrongful conduct. The leading case in Canada on this point is Roncarelli v. Duplessis, [1959] S.C.R. 121. The facts are well known. Roncarelli was a restaurant owner in [page208] Quebec. He was a member of a religious group, the Jehovah's Witnesses, and he supported their cause financially and in assisting members of the group who from time to time ran afoul of the law. Duplessis was the Premier of Quebec and, as well, Attorney General of the province. The policy of the Government was opposed to the Jehovah's Witnesses and Duplessis sought to eliminate Roncarelli as an opponent in his efforts to curb the Jehovah's Witnesses. He ordered the General Director of the Quebec Liquor Commission, which had the legislative authority to "grant, refuse or cancel permits for the sale of alcoholic liquors," to revoke Roncarelli's liquor licence and to forever bar him from obtaining another. This ruined his business and he brought action for damages against Duplessis for the wrongful revocation of his licence and the prohibition against his obtaining a further licence. A majority in this Court held that Duplessis was liable. The judgment of Rand J. (with whom Judson J. concurred) has been regarded as the leading judgment in the case. He saw the issue in these terms, at p. 137:

> In these circumstances, when the de facto power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting?

He concluded that there was legal redress in the form of damages. He expressed the view that there existed a general presumption in legislation and regulation that powers given by the legislation will be exercised in good faith and without improper motives. At page 140, he said:

> In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith [page209] in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.

In this context, it should be noted that in commencing and prosecuting criminal offences the Attorney General and his agents, the Crown Attorneys, are exercising statutory powers: see Ministry of the Attorney General Act, R.S.O. 1980, c. 271; Crown Attorneys Act, R.S.O. 1980, c. 107; and the Criminal Code, R.S.C. 1985, c. C-46, s. 504. Rand J. was also of the view that the acts shown to have been done by the respondent put him beyond the protection of any immunity which could attach to his office. He added, at pp. 141-42:

> The act of the respondent [Duplessis] through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: Mostyn v. Fabrigas, and under art. 1053 of the Civil Code. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure.

[page210]

68 It will be observed that Duplessis in the Roncarelli case purported to act not only as the Premier of Quebec but also as the Attorney General. It would appear to be clear from the majority judgments in Roncarelli that the principle that public officers of the highest rank in Canada who exercise the powers of their office in excess or in abuse of those powers will be liable in damages for injuries resulting. This principle has been well founded in English authority: see Mostyn v. Fabrigas (1774), 1 Cowp. 161, 98 E.R. 1021, where the Governor of Minorca was held to be liable in damages in a civil action for false imprisonment of a native Minorcan. Lord Mansfield rejected the Governor's claim for immunity at p. 175 Cowp., p. 1029 E.R.:

> Therefore to lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

See, as well, Henly v. Mayor of Lyme (1828), 5 Bing. 91, 130 E.R. 995.

69 Another case expressing the same or a similar proposition is Asoka Kumar David v. Abdul Cader, [1963] 3 All E.R. 579 (P.C.). In that case, a licensing authority had refused a licence for the operation of a cinema and the appellant brought action alleging a malicious refusal of licence. The action was struck out in a pre-trial motion and the Court of Appeal of Ceylon supported the respondent. In the judicial committee, Viscount Radcliffe expressed the view that the case was not one which should have been the subject of a pre-trial disposition, and said, at p. 582:

> Since then [1907] the English courts have had to give much consideration to the general question of the rights of the individual dependent on the exercise of statutory powers by a public authority .... In their lordships' opinion it would not be correct today to treat it as establishing any wide general principle in this field: certainly it would not be correct to treat it as sufficient to found the proposition, as asserted here, that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse [page211] of the statutory power to grant the licence. Much must turn in such cases on what may prove to be the facts of the alleged misuse and in what the malice is found to consist. The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive. But a "malicious" misuse of authority, such as is pleaded by the appellant in his plaint, may cover a set of circumstances which go beyond the mere presence of ill-will, and in their lordships' view it is only after the facts of malice relied on by a plaintiff have been properly ascertained that it is possible to say in a case of this sort whether or not there has been any actionable breach of duty.

70 It would appear on the basis of the authorities cited that in general terms public officers are entitled to no special immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities. It would follow, then, that where a public officer, a servant of the Crown, exceeds the powers of his office or acts improperly in fraud of his duties and powers, or acts with malice in the discharge of his duties, he does not have immunity from civil suit and where, by reason of such excess of power or improper motive, he causes damage he may be civilly liable in damages. This, indeed, seems clear as far at least at it may concern public servants who act in administrative capacities. However, the question before us involves a consideration of the position of the Attorney General, acting in his capacity as the chief law officer of the Crown concerned with the commencement and prosecution of criminal proceedings against accused persons.

71 The Court of Appeal, as has been said, found an absolute immunity from civil liability on the part of the Attorney General and the Crown Attorneys, and in reaching this conclusion they placed special emphasis on Owsley v. The Queen in right of Ontario and Richman v. McMurtry, supra, in the Ontario High Court and, as well, on Imbler v. Pachtman, 424 U.S. 409 (1976). They formed the view that the absolute immunity was a clearly established feature of the common law. This issue has been considered in many Canadian cases in recent years: see Unterreiner v. Wilson (1982), 40 O.R. (2d) 197 (H.C.), per Gray J., affirmed [page212] (1983), 41 O.R. (2d) 472 (C.A.); Owsley v. The Queen in right of Ontario, supra; Richman v. McMurtry, supra; Bosada v. Pinos (1984), 44 O.R. (2d) 789 (H.C.), per Pennell J.; Curry v. Dargie, supra; German v. Major (1985), 39 Alta. L.R. (2d) 270 (C.A.); and Levesque v. Picard (1985), 66 N.B.R. (2d) 87 (C.A.), leave to appeal to the Supreme Court of Canada granted May 22, 1986, [1986] 1 S.C.R. x, notice of discontinuance filed January 7, 1987, [1987] 1 S.C.R. x.

72 These cases do not offer complete support for the position taken in the Court of Appeal. The cases decided in the Ontario courts, which are noted above, reach the conclusion that the prosecutorial immunity is absolute. In reaching a similar conclusion in the case at bar, Thorson J.A. relied extensively on American authority with particular emphasis on the judgments of Learned Hand J. in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), and of Powell and White JJ., of the U.S. Supreme Court, in Imbler v. Pachtman, supra. These cases adopt the view that the social need to have prosecutors who are charged with the prosecution of criminal cases freed from the threat of civil action, so that they may fearlessly and objectively conduct the prosecutions justifies the adoption of the absolute rule. Powell J. in Pachtman, supra, at p. 428, expressed agreement with the words of Learned Hand J. in Gregoire, supra, at p. 581, where he said:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation ....

73 But the position respecting prosecutorial immunity is not unanimous. Other courts in other jurisdictions have indicated that they would not necessarily extend absolute immunity to those executing prosecutorial functions. In Riches v. Director of Public Prosecutions, [1973] 2 All E.R. 935 (C.A.), the plaintiff had been acquitted of a criminal charge and sought damages for malicious [page213] prosecution against the Director of Public Prosecutions. I observe, that in respect of the institution of prosecutions against individuals, the Director of Public Prosecutions is effectively performing the same function as a Canadian provincial Attorney General. In that case, although Stephenson L.J. held that the material before the Court disclosed that there had been a basis in evidence for the plaintiff's prosecution and that there was no cause of action disclosed by the statement of claim, he rejected the proposition that the Director of Public Prosecutions could never be found liable for malicious prosecution. He said, at p. 941:

> I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted. But that case is, as it seems to me, many miles from this one. There is nothing in the judgment of the Court of Criminal Appeal in this particular case which lends any support to the view that there was no case for the plaintiff to answer; and I cannot find in anything that he has said to us or in any document that has been put before us anything to suggest that there was in existence material showing that there was no basis in evidence for a prosecution of him on the conspiracy charge or on any of the three substantive charges which he had to meet at the Suffolk Assizes. In those circumstances, as it seems to me, he has failed to show that the defendant put the facts unfairly before prosecuting counsel, that there was anything like a lack of reasonable or probable cause, or malice, on the defendant's part or that there is any possibility of such material being produced.

74 In Canada, decisions in the Alberta and Nova Scotia courts cast doubt on the existence of the complete immunity. In German v. Major, supra, the plaintiff had been prosecuted under the Income Tax Act. The trial judge acquitted on the basis of [page214] a doubt as to guilt and the defendant taxpayer then sued the prosecutor for malicious prosecution. Though Kerans, J.A. considered that the material before the court disclosed that the plaintiff's case was "doomed beyond doubt to fail", for absence of proof of malice, and because there were reasonable grounds for the prosecution he also considered that the prosecutor's immunity to prosecution was not absolute. In the closing paragraph of his judgment, at p. 286, he said:

> Counsel for the Attorney General who acts as his agent in the prosecution of a criminal case is not accountable in civil proceedings to the accused except possibly to the extent that it is alleged against him that he has not acted in good faith, and to that extent the allegation falls within the nominative tort of malicious prosecution, and that cause of action has been dealt with [see p. 282]. I would therefore strike those portions of the statement of claim which deal with the remaining claims by German against Major. [Emphasis added.]

It would follow that had the prosecutor proceeded solely or principally on an improper motive: for example, malice, then coming within Kerans J.A.'s conception there would be no immunity against malicious prosecution. In Curry v.

Dargie, supra, it was held that a residential tenancy officer who had instituted proceedings against a tenant could not claim an absolute prosecutorial immunity. Relying in part on the earlier case of Warne v. Province of Nova Scotia (1969), 1 N.S.R. (2d) 27 (S.C.T.D.), where Gillis J. refused to strike out a personal claim against the provincial Minister of Agriculture, Hart J.A. explained that he was not willing to go as far as the Ontario cases had gone in extending prosecutorial immunity. Although he distinguished the case before him from a case where the Attorney General or a Crown Attorney had instituted a prosecution, he made it clear that he was not deciding the issue as to the immunity of Attorneys General and Crown Attorneys. He said, at p. 110:

> I am not prepared to go as far as Galligan J. [in Richman, supra] in holding that an officer of the Crown cannot be liable for a proceeding commenced maliciously, [page215] but it is not necessary to consider that issue at the moment. I do not believe that in the case at Bar it can be said that the respondent in laying the information against the appellant was in fact carrying out a judicial function similar to those carried out by Attorneys General and prosecutors. An information can be laid by any person and there is no obligation under the Residential Tenancies Act requiring that it be laid by the respondent. Surely a person who undertakes to swear that she has reasonable and probable cause to believe that an offence has been committed must take personal responsibility for the results of that act and cannot simply say that she was merely following instructions of her superiors. Nor can it be said that she was by her act enforcing the criminal law or the provisions of any statute. She was simply setting in motion the forces of the justice system which would enable the persons charged with its administration to perform their duties. She was in no different position from the police informant or other person who lays an information in a criminal case without reasonable and probable cause for believing that the offence had been committed and with some malicious intent. Such a person is always liable to an action for malicious prosecution. [Emphasis added.]

75 The basis upon which Hart J.A. draws the distinction between the residential tenancy officer and the Attorney General, and which erases any doubt as to the non-existence of an immunity for the residential tenancy officer, is the fact that the Attorney General exercises a "judicial function" in commencing a prosecution, whereas the residential tenancy officer does not. I have already referred to the "judicial" nature of the Attorney General's decision to prosecute: see the discussion of The Queen v. Comptroller-General of Patents, Designs, and Trade Marks, supra. But can it be said that the mere fact of the Attorney General's decision being "judicial" confers an absolute immunity? I do not think the law is decided on this point.

76 The "judicial" nature of the Attorney General's decision to prosecute does not in any way render him a "court", that is, an adjudicative entity. See on this point, Re Van Gelder's Patent (1888), 6 R.P.C. 22 (C.A.), where Lord Esher, M.R., said, at p. 27:

[page216]

> If what I have said is true, after all the Attorney-General is not a Court. He may have a judicial function to perform, but he is not a Court, and prohibition does not lie to him .... [Emphasis added.]

What is meant by the words "prohibition does not lie to him" is that the Attorney General's decision to prosecute is not reviewable by any court. As A.L. Smith L.J. noted in Comptroller-General of Patents, supra, at p. 914:

> The issue of such an [a criminal] information is entirely in the discretion of the Attorney-General, and no one can set such an information aside .... [Emphasis added.]

Hence, the law is settled that the Attorney General's exercise of his "judicial" functions, such as the commencement of criminal proceedings, the entering of a nolle prosequi, the entering of a stay under s. 579(1) of the Criminal Code, or the preferring of direct indictments in the absence of a committal for trial after a preliminary hearing, are all incapable of judicial review and to that extent, the Attorney General enjoys an absolute and total immunity on the basis that he is performing a judicial function.

77 Immunity from judicial review, however, does not equate to immunity from civil suit for damages incurred as a result of a maliciously instituted and executed prosecution. This Court has held that, in respect of adjudicative judicial decisions, there is a complete immunity from civil suit: Morier v. Rivard, [1985] 2 S.C.R. 716. In light of the reservations expressed by learned justices of the Alberta, Nova Scotia and English Courts of Appeal, however, I am loath to make a ruling on an appeal of a preliminary motion that a similar absolute immunity exists for the benefit of the Attorney General and his agents in respect of suits for malicious prosecution. If the Court were to make such a ruling on a point of this importance in a total absence of evidence, it would, in my view, be adopting a dangerous course. Let us not forget that, when Lord Mansfield was faced with the bleak reality of a colonial governor gone awry, imprisoning innocent people without proper trials and in contravention of the law, "absolutely despotic" [page217] and "accountable only to God, and his own conscience", he felt compelled to reject any notion of immunity by virtue of the Governor's office: see Mostyn v. Fabrigas, supra. The state of the law relating to the immunity of the Attorney General is, as has been shown, far from clear. Before laying down any proposition to the effect that the Attorney General and his agents enjoy absolute immunity from civil suit, there must be a trial to permit a conclusion on the question of prosecutorial immunity and to furnish -- in the event that it is decided that the immunity is not absolute -- a factual basis for a determination of whether or not in this case the conduct of the prosecution was such that the appellant is entitled to a remedy.

78 Furthermore, the Attorney General's immunity from judicial review, based on the exercise of a judicial function, does not equate with immunity from civil suit for damages for wrongful conduct in the performance of prosecutorial functions which do not involve the exercise of a judicial function. Indeed, most of the functions and acts performed by Crown Attorneys, as agents of the Attorney General, would fall into this category and, accordingly, the immunity may not extend to claims for damages as a result of a prosecution, however instituted but carried out with malice. A ruling on a preliminary motion to the effect that Attorneys General and their agents are absolutely immune from all liability for suits for malicious prosecution may therefore be too expansive and even ill-founded.

79 Therefore, my view is that this case is not one which should have been disposed of upon a pre-trial motion under Rule 126. The law has long been settled that it is only in the clearest of cases that actions will be struck out, and this is not such a clear case. Of interest in this connection are the comments made in an unreported case in the British Columbia Court of Appeal (Barrisove v. McDonald, B.C.C.A., No. 490/74, November 1, 1974 (McFarlane, Robertson and Carrothers JJ.A.)) where an action was commenced against a county court judge for alleged misconduct in the [page218] course of the plaintiff's trial. The pleadings were struck out in the Supreme Court of British Columbia as alleging no reasonable cause of action, but an appeal was allowed, holding, in effect, that the allegations against the judge were cognizable in a civil action for damages. This case cannot now be considered as authoritative in view of the judgment in this Court in Morier v. Rivard, supra, but the comments made by Robertson J.A. in agreeing with the disposition made of the appeal are significant. He said (at p. 10):

> I agree with the disposition proposed by my brother [McFarlane] and agree substantially with what he has said. I wish, however, to guard myself against being said to have made a pronouncement on the law which will be binding on the trial judge or upon this Court if following a trial, there should be an appeal to the Court. Rather than saying categorically that the endorsement on the writ and the Statement of Claim discloses a cause of action to which there can be no defence, I prefer to put my reasons on the ground that the question is not one which should have been decided in a proceeding of the sort that was taken here. It is so far from clear that no cause of action is disclosed that, as I have indicated, that stage of the proceedings was not one at which the question should have been decided.

In view of the uncertainty of the law upon this question, it is not possible, in my view, to conclude that the appellant has not alleged a reasonable cause of action in her pleadings and, therefore, the move to strike out the pleadings and dismiss the action as against the Attorney General must fail.

80 I would therefore dismiss the appeal as against the Crown. There is no order as to costs. I would allow the appeal as against the Attorney General with costs, and direct that the matter be returned to the Supreme Court of Ontario for trial of the claim against the Attorney General.

The following are the reasons delivered by

LA FOREST J.

81 I agree with my colleague Lamer J. except that I prefer to rely solely on the common law position as set forth by him, leaving [page219] consideration of Charter implications to another day when it becomes necessary to deal with them.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting in part)

82 While I agree with my colleague, Justice McIntyre, that the Crown enjoys absolute immunity from suit even for malicious prosecution, I respectfully disagree with his conclusion that the Attorney General and, by extension, Crown Attorneys, may not. Consequently, I would dismiss the appeal.

83 My colleague McIntyre J. is of the view that the lower courts erred in striking out the appellant's statement of claim under Rule 126 of the Ontario Rules of Practice under circumstances where there was sufficient doubt as to the actual state of the law on the question. He finds that the law in Canada is somewhat ambiguous as to the question of the degree of immunity of Attorneys General and Crown Attorneys. For that reason, he orders the matter to proceed to trial. My point of divergence from the reasons of McIntyre J. concerns the appropriate response of this Court under the circumstances. Since, in my view, strong policy reasons exist for granting Attorneys General and Crown Attorneys absolute immunity from prosecution for actions taken in the proper exercise of their powers, I see no reason to prolong this matter any further by remitting it to trial to decide this very same issue.

84 I would like to make it clear at the outset that I am proceeding from the premise that any decisions taken or acts performed by the respondents in this case were done within the scope of their authority. I perceive the claim of the appellant to be founded on the idea that her prosecution by the respondents, though carried out within the bounds of their authority, was malicious. In this respect, I would distinguish the situation from that which arose in Roncarelli v. Duplessis, [1959] S.C.R. 121. In that case, the claim was brought on the basis that the respondent had acted outside the scope of his legitimate authority. The civil action was brought [page220] against Maurice Duplessis in his capacity as an individual, and not against Duplessis in either of his official roles as Premier of the province or as Attorney General. As Rand J. stated, at pp. 142-43:

> The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act. [Emphasis added.]

And at p. 144:

> Was the act here, then, done by the respondent in the course of that exercise [of his functions]? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it.

85 It may well be that a governmental authority who acts with malice acts outside of the scope of his authority. However, this is not the issue which was put before us. It is to be noted that the appellant chose to proceed against the Attorney General in his official, rather than personal, capacity. In her factum, the appellant also maintains that all of the respondents were acting, "at all material times" as agents of the Attorney General for Ontario, who "acted as an agent" of Her Majesty the Queen in right of Ontario.

86 For the purposes of Rule 126, as McIntyre J. has indicated, we must assume that all the facts alleged by the appellant in her submissions are true. The question then, to be decided before the matter is allowed to go to trial, is simply: does the appellant's claim disclose a reasonable cause of [page221] action? This is a pure question of law, and no evidence is required for its determination. In fact, there is every advantage, in terms of saving the time and cost of a trial, to decide a question of law at the outset. This, in fact, is the very reason for the existence of Rule 126.

87 In the present case, a determination that the Attorney General and Crown Attorneys enjoy absolute immunity would settle the question definitively. Both the judge at first instance and the Court of Appeal of Ontario proceeded on this basis. I intend to do so as well. This is also the course followed in Morier v. Rivard, [1985] 2 S.C.R. 716, which came to this Court on an interlocutory question similar to the one in this case.

88 This, of course, does not mean that I disagree with McIntyre J. when he proposes that, in general, important questions should not be disposed of in interlocutory fashion. However, this, in my view, does not apply in cases such as the one before us, where the defense offered at the outset is one of law only, namely that the right of action is barred independently of the facts alleged.

89 The action brought by Nelles is completely dependent upon the answer to the question of whether Attorneys General and Crown Attorneys are immune from civil suit. As such, the matter can and should be decided by this Court in the present appeal. My answer to the question is that the immunity from civil suit enjoyed by Attorneys General and Crown Attorneys is absolute when they are acting within the bounds of their authority. I rest my reasons on the very carefully considered judgment of the unanimous Ontario Court of Appeal: Nelles v. The Queen in right of Ontario (1985), 51 O.R. (2d) 513. The Court of Appeal (Houlden, Thorson and Robins JJ.A.) undertook a thorough review of the authorities in the course of a lengthy and well reasoned discussion of the arguments on either side of the issue.

90 As Thorson J.A. put it, at p. 531:

> ... the concept that the Attorney-General and Crown Attorneys should enjoy an absolute immunity from civil suit for their conduct in initiating and conducting criminal prosecutions is a troubling one. That it confronts thoughtful and fair-minded persons with the need to make what cannot be other than a difficult choice, is obvious.

91 Ultimately, however, "[a]s is so often the case, the answer must be found in a balance between the evils inevitable in either alternative" (Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), at p. 581).

92 While there are significant differences between the role of prosecutors in the American legal system, and the role of Crown Attorneys in Canada, it is my view that the basic principles underlying the grant of immunity to these agents are the same. These principles have been clearly elucidated in American case law. For example, in Gregoire, supra, Learned Hand J. expanded on the underlying rationale for the immunity of officials, at p. 581:

> The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

93 Similarly, Powell J. in Imbler v. Pachtman, 424 U.S. 409 (1976), observed, at pp. 422-23:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection [page223] of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

94 The role of absolute immunity is not to protect the interests of the individual holding the office, rather it is to advance the greater public good. Absolute immunity is based upon principles of public policy. In Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), Rogers J. wrote, at p. 406:

> The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.

95 Attorneys General and Crown Attorneys are often faced with difficult decisions as to whether to proceed in matters which come before them. It is unfortunate that, like all human beings, they cannot be immune from error. However, the holders of such offices can and should be immune from prosecution for any such errors which occur in the course of the exercise of their functions. The freedom of action of Attorneys General and Crown Attorneys is vital to the effective functioning of our criminal justice system. In my view, the greater public interest is best served by giving absolute immunity to these agents.

96 I would dismiss the appeal.

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

Heard: February 17, 2003;

Judgment: December 5, 2003.

[page264]

File No.: 28425.

[2003] 3 S.C.R. 263 | [2003] 3 R.C.S. 263 | [2003] S.C.J. No. 74 | [2003] A.C.S. no 74 | 2003 SCC 69

Estate of Manish Odhavji, deceased, Pramod Odhavji, Bharti Odhavji and Rahul Odhavji, appellants (plaintiffs); v. Detective Martin Woodhouse, Detective Constable Philip Gerrits, Officer John Doe, Officer Jane Doe, Metropolitan Toronto Chief of Police David Boothby, Metropolitan Toronto Police Services Board and Her Majesty The Queen in Right of Ontario, respondents (defendants). And between Metropolitan Toronto Chief of Police David Boothby, appellant on cross-appeal; v. Estate of Manish Odhavji, deceased, Pramod Odhavji, Bharti Odhavji and Rahul Odhavji, respondents on cross-appeal, and Attorney General of Canada, Attorney General of British Columbia, Canadian Civil Liberties Association, Urban Alliance on Race Relations, African Canadian Legal Clinic, Mental Health Legal Committee, Association in Defence of the Wrongfully Convicted and Innocence Project of Osgoode Hall Law School, interveners.

(78 paras.)

Case Summary

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Practice — Motion to strike — Police officers involved in fatal shooting — Actions brought by estate and family of victim — Statement of claim alleging misfeasance in public office against police officers and chief of police and negligence against chief of police, police services board and province — Actions based on failure of police officers to cooperate in SIU investigation — Whether portions of statement of claim should be struck out as disclosing no reasonable cause of action — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 21.01(1)(b).

Catchwords:

Torts — Tort of misfeasance in public office — Chief of police and police officers — Victim killed by police — Police officers involved in shooting not complying with statutory duty to cooperate with SIU investigation — Plaintiffs bringing actions in misfeasance in public office against police officers and chief of police — Whether tort of misfeasance in public office can arise from misconduct involving breaches of statutory duty — Whether tort limited to unlawful exercises of statutory or prerogative powers.

Catchwords:

Torts — Negligence — Duty of care — Victim killed by police — Police officers involved in shooting not complying with statutory duty to cooperate with SIU investigation — Plaintiffs bringing actions in negligence against chief of police, police services board and province — Whether they owed plaintiffs duty to take reasonable care to ensure that police officers cooperated with investigation.

Catchwords:

Costs — Court of Appeal's costs award — Plaintiffs submitting that they are public interest litigants and should not have been required to pay costs — Actions involving public authorities and raising issues of public interest insufficient to alter essential nature of litigation — Plaintiffs not falling within definition of public interest litigants — No clear and compelling reasons to interfere with Court of Appeal's decision to award costs in [page265] accordance with usual rule that successful party is entitled to costs.

Summary:

O was fatally shot by police officers. The Special Investigation Unit ("SIU") began an investigation. The police officers involved in the incident did not comply with SIU requests that they remain segregated, that they attend interviews on the same day as the shooting, and that they provide shift notes, on-duty clothing, and blood samples in a timely manner. Under s. 113(9) of the Ontario *Police Services Act*, members of the force are under a statutory obligation to cooperate with SIU investigations and, under s. 41(1), a chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act. The SIU cleared the officers of any wrongdoing. O's estate and family commenced a variety of actions. The statement of claim alleged that the lack of a thorough investigation into the shooting incident had caused them to suffer mental distress, anger, depression and anxiety. They claimed that the officers' failure to cooperate with the SIU gave rise to actions for misfeasance in a public office against the officers and the Chief of Police, and to actions for negligence against the Chief, the Metropolitan Toronto Police Services Board, and the Province. The defendants brought motions under rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure* to strike out the claims on the ground that they disclose no reasonable cause of action. The motions judge and the Court of Appeal struck out portions of the statement of claim. In this Court, the plaintiffs appeal against the Court of Appeal's decision to strike the claims for misfeasance in a public office against the officers and the Chief, and the claims for negligence against the Board and the Province. The Chief cross-appeals against the Court of Appeal's decision to allow an action for negligence against him to proceed.

Held: The appeal should be allowed in part and the cross-appeal dismissed. The actions in misfeasance in a public office against the police officers and the Chief and the action in negligence against the Chief should be allowed to proceed. The actions in negligence against the Board and the Province should be struck from the statement of claim.

Under rule 21.01(1)(b), a court may strike out a statement of claim for disclosing no reasonable cause of action when it is plain and obvious that the action is [page266] certain to fail because the statement of claim contains a radical defect. In this case, if the facts of the motion to strike are taken as pleaded, it is not plain and obvious that the actions for misfeasance in a public office against the police officers and the Chief must fail.

The failure of a public officer to perform a statutory duty can constitute misfeasance in a public office. Misfeasance is not limited to unlawful exercises of statutory or prerogative powers. It is an intentional tort distinguished by (1) deliberate, unlawful conduct in the exercise of public functions; and (2) awareness that the conduct is unlawful and likely to injure the plaintiff. The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff establishes the required nexus between the parties. A plaintiff must also prove the requirements common to all torts, specifically, that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

Here, the statement of claim pleads each of the constituent elements of the tort. The officers' alleged failure to cooperate with the SIU investigation and the Chief's alleged failure to ensure that they did cooperate both constitute unlawful breaches of statutory duties under the *Police Services Act*. The allegation that the officers' acts and omissions "represented intentional breaches of their legal duties as police officers" satisfies the requirement that the officers were aware that their conduct was unlawful and that it was intentional and deliberate. The allegation that the Chief deliberately failed to segregate the officers satisfies the requirement that he intentionally breached his legal obligation to ensure compliance with the *Police Services Act*. However, the same cannot be said of his alleged failures to ensure that the officers produced timely and complete notes, attended interviews, and provided accurate and complete accounts. A mere failure to discharge obligations of an office cannot constitute misfeasance in a public office and the plaintiffs must prove the failures were deliberate. The allegation that the officers and the Chief "ought to have known" that their misconduct would cause the plaintiffs to suffer must be struck from the statement of claim because misfeasance in a public office is an intentional tort requiring subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. Lastly, at the pleadings stage, it is sufficient with respect to damages that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the alleged misconduct, but the plaintiffs [page267] will have to prove at trial that the alleged misconduct caused anxiety or depression of sufficient magnitude to warrant compensation.

To succeed with their actions in negligence against the Chief, the Board, and the Province, the plaintiffs must first establish that these defendants owed the plaintiffs a duty to take reasonable care to ensure that the police officers cooperated with the SIU investigation. To do so, the plaintiffs must demonstrate that: (1) the harm complained of is a reasonably foreseeable consequence of the alleged breach; (2) there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (3) there exist no policy reasons to negative or otherwise restrict that duty.

The circumstances of this case raise a *prima facie* duty of care owed by the Chief to the plaintiffs. First, it is reasonably foreseeable that the officers' failure to cooperate with the SIU investigation would harm the plaintiffs. As the Chief was responsible for ensuring that cooperation, it is reasonably foreseeable that his failure to do so would harm the plaintiffs. Second, a finding of proximity is supported by the relatively direct causal link between the alleged misconduct -- negligent supervision -- and the complained of harm, and by the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. The public expectation is consistent with the statutory obligations the *Police Services Act* imposes on the Chief. No broad policy considerations exist that ought to negative the *prima facie* obligation of the Chief to prevent the misconduct. With respect to damages, the same principles set out in the context of the actions in misfeasance in a public office are applicable.

The relationship between the plaintiffs and the Board and the Province, however, are not such that a duty of care may rightly be imposed. The Board is not under a private law duty to ensure that police officers, as a matter of general practice, cooperate with the SIU. There is no close causal connection between the misconduct alleged against the Board and the alleged harm. The [page268] Board does not supervise officers and is not involved in their day-to-day conduct. This weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct. Further, the Board has no statutory obligation to ensure that police officers cooperate with the SIU. Courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue or what policies to enact, and a decision not to enact additional policies or training procedures for the purpose of ensuring cooperation under s. 113(9) does not constitute a breach of its obligation to provide adequate and effective police services.

Similarly, the Province does not have a private law obligation to institute policies and training procedures for the purpose of ensuring that police officers, as a matter of general policy, cooperate with the SIU. There is insufficient proximity between the parties to conclude that the Province is under a private law obligation to ensure that members of the force comply with an SIU investigation. The Province is too far removed from the day-to-day conduct of members of the force and the Solicitor General is not under a statutory obligation to ensure that police officers cooperate with the SIU. The Solicitor General's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of his duty to ensure that the Board provides adequate and effective police services.

Cases Cited

Applied: Anns v. Merton London Borough Council, [1978] A.C. 728; explained: R. v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205; referred to: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Ashby v. White (1703), 2 Ld. Raym. 938, 92 E.R. 126; Roncarelli v. Duplessis, [1959] S.C.R. 121; Powder Mountain Resorts Ltd. v. British Columbia (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; Alberta (Minister of Public Works, Supply and Services) v. Nilsson (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283, aff'g (1999), 70 Alta. L.R. (3d) 267, 1999 ABQB 440; Northern Territory of Australia v. Mengel (1995), 129 A.L.R. 1; Henly v. Mayor of Lyme (1828), 5 Bing. 91, 130 E.R. 995; Garrett v. Attorney-General, [1997] 2 N.Z.L.R. 332; Three Rivers District Council v. Bank of England (No. 3), [2000] 2 W.L.R. 1220; Granite Power Corp. v. Ontario, [2002] O.J. No. 2188 (QL); R. v. Dytham, [1979] Q.B. 722; [page269] Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General) (2001), 156 Man. R. (2d) 14, 2001 MBCA 40; Guay v. Sun Publishing Co., [1953] 2 S.C.R. 216; Frame v. Smith, [1987] 2 S.C.R. 99; Le Lievre v. Gould, [1893] 1 Q.B. 491; Kamloops (City of) v. Nielsen, [1984] 2 S.C.R. 2; B.D.C. Ltd. v. Hofstrand Farms Ltd., [1986] 1 S.C.R. 228; Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021; London Drugs Ltd. v. Kuehne & Nagel International Ltd., [1992] 3 S.C.R. 299; Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., [1995] 1 S.C.R. 85; Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 SCC 79; Donoghue v. Stevenson, [1932] A.C. 562; Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165; Martel Building Ltd. v. Canada, [2000] 2 S.C.R. 860, 2000 SCC 60; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315.

Statutes and Regulations Cited

Police Services Act, R.S.O. 1990, c. P.15, ss. 3(2), 31(1), 41(1), 113(1), (9).

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 21.01(1)(b), 57.01(1).

Rules of Court, B.C. Reg. 221/90, r. 19(24)(a).

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History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (2000), 52 O.R. (3d) 181, 194 D.L.R. (4th) 577 (sub nom. Odhavji Estate v. Toronto Metropolitan Police Force), 142 O.A.C. 149, 3 C.C.L.T. (3d) 226, [2000] O.J. No. 4733 (QL), varying a judgment of the Ontario Court (General Division), [1998] O.J. No. 5426 (QL). Appeal allowed in part and cross-appeal dismissed.

Counsel

Julian N. Falconer and Richard Macklin, for the appellants/respondents on cross-appeal.

Kevin McGivney, Cheryl Woodin and Robert W. Traves, for the respondents Woodhouse and Gerrits.

Ansuya Pachai and Kerri Kitchura, for the respondent/appellant on cross-appeal the Metropolitan Toronto Chief of Police David Boothby [page270] and the respondent the Metropolitan Toronto Police Services Board.

John P. Zarudny, Troy Harrison and James Kendik, for the respondent Her Majesty the Queen in Right of Ontario.

David Sgayias, Q.C., and Anne M. Turley, for the intervener the Attorney General of Canada.

D. Clifton Prowse and J. Gareth Morley, for the intervener the Attorney General of British Columbia.

Written submissions only by John B. Laskin and Kristine M. Di Bacco, for the intervener the Canadian Civil Liberties Association.

Written submissions only by Peter J. Pliszka and Anne C. McConville, for the intervener the Urban Alliance on Race Relations.

Written submissions only by Marie Chen and Sheena Scott, for the intervener the African Canadian Legal Clinic.

Written submissions only by Suzan E. Fraser and Najma Jamaldin, for the intervener the Mental Health Legal Committee.

Written submissions only by Sean Dewart and Louis Sokolov, for the intervener the Association in Defence of the Wrongfully Convicted.

Written submissions only by Marlys A. Edwardh and Breese Davies for the intervener the Innocence Project of Osgoode Hall Law School.

The judgment of the Court was delivered by

IACOBUCCI J.

1 This appeal concerns actions for misfeasance in a public office and negligence within the context of motions to strike the actions as disclosing no reasonable cause of action. Unlike the Court of Appeal, I would permit the actions for misfeasance in a public office to proceed. Like the Court of Appeal, I would permit the action against Metropolitan Toronto Chief of Police David Boothby to proceed, but would strike the actions for negligence against the Metropolitan Toronto Police [page271] Services Board and Her Majesty the Queen in Right of Ontario.

I. Facts

2 On September 26, 1997, Manish Odhavji was fatally shot by officers of the Metropolitan Toronto Police Service while running from his vehicle subsequent to a bank robbery. Within 25 minutes of the shooting, an assistant to Metropolitan Toronto Chief of Police David Boothby (the "Chief") notified the Special Investigations Unit of the Ministry of the Solicitor General (the "SIU") of the incident.

3 The SIU is a civilian agency statutorily mandated to conduct independent investigations of police conduct in cases of death or serious injury caused by the police. The SIU began its investigation immediately. It requested that the defendant officers remain segregated, that they make themselves available for same-day interviews, and that they provide their shift notes, on-duty clothing, and blood samples. Under s. 113(9) of the *Police Services Act*, R.S.O. 1990, c. P.15, members of the force are under a statutory obligation to cooperate with members of the SIU in the conduct of the investigation. Under s. 41(1) of the *Police Services Act*, a chief of police is required to ensure that members of the force carry out their duties in accordance with the provisions of the Act.

4 The estate of Mr. Odhavji and the members of his immediate family (the "plaintiffs") allege that the defendant officers intentionally breached their statutory obligation to cooperate fully with the SIU investigation. In particular, the plaintiffs allege that the defendant officers did not attend for interviews with the SIU until September 30, that they did not comply with the request to remain segregated, and that they failed to comply with the request for shift notes, on-duty clothing, and blood samples in a timely manner -- and that when statements were eventually given to the SIU, they were both inaccurate and misleading. In the plaintiffs' statement of claim, the lack of a thorough investigation into the [page272] shooting incident has caused the plaintiffs to suffer mental distress, anger, depression and anxiety. The plaintiffs further allege that these damages are consequences that the defendant officers and the Chief knew or ought to have known would result from an inadequate investigation into the shooting incident.

5 The actions at issue in this appeal are not related to the allegedly wrongful death of Mr. Odhavji, but, rather, to the defendant officers' alleged failure to cooperate with the SIU. It is the plaintiffs' submission that the foregoing facts give rise to an action for misfeasance in a public office against the defendant officers and the Chief, and actions for negligence against the Chief, the Metropolitan Toronto Police Services Board (the "Board") and Her Majesty the Queen in Right of Ontario (the "Province"). More specifically, this appeal concerns: (i) the plaintiffs' appeal against the Court of Appeal's decision to strike the actions for misfeasance in a public office, and the actions for negligence against the Board and the Province, on the basis that they disclose no reasonable cause of action; and (ii) the Chief's cross-appeal against the Court of Appeal's decision to allow the action for negligence against the Chief to proceed.

II. Relevant Statutory Provisions

6 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 21

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

21.01 (1) A party may move before a judge,

...

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

[page273]

Police Services Act, R.S.O. 1990, c. P.15

3. -- ...

(2) The Solicitor General shall,

(a) monitor police forces to ensure that adequate and effective police services are provided at the municipal and provincial levels;

(b) monitor boards and police forces to ensure that they comply with prescribed standards of service;

...

(d) develop and promote programs to enhance professional police practices, standards and training;

31. -- (1) A board is responsible for the provision of police services and for law enforcement and crime prevention in the municipality and shall, [since amended]

...

(b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;

(c) establish policies for the effective management of the police force;

...

(e) direct the chief of police and monitor his or her performance;

...

(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

41. -- (1) The duties of a chief of police include,

...

(b) ensuring that members of the police force carry out their duties in accordance with this Act and [page274] the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force;

113. -- (1) There shall be a special investigations unit of the Ministry of the Solicitor General.

...

(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

III. Judicial History

A. *Ontario Court (General Division)*, [1998] O.J. No. 5426 (QL)

7 According to Day J., misfeasance in a public office can be established in one of two ways: either by proof of malice with intent to injure, or by proof that the public officer intentionally engaged in acts that were *ultra vires* the scope of his or her office and that she or he could foresee with a degree of certainty that harm would be caused to the plaintiff. As applied to the facts of this case, Day J. concluded that the action against the defendant officers could proceed, but only if the cause of action for misfeasance was framed in malice. He held that it was plain and obvious that the action for misfeasance in a public office against the Chief would fail, owing to the fact that he was not directly and consciously involved in the breach of the obligation to cooperate with the SIU investigation.

8 Day J. allowed the action for negligent supervision against the Chief to proceed on the basis that he made no submissions in respect of this issue. In respect of the actions for negligent supervision against the Board and the Province, Day J. found that there was sufficient proximity between the parties to conclude that the defendants owed a duty of care to the appellants. Nonetheless, Day J. struck the action against the Board, on the basis that a duty of care is negatived in situations in which the agency's involvement was limited to establishing policy. He found that the action for negligent supervision against the Province could succeed, on the basis that a cause of action for negligence lies where the [page275] responsible Minister fails to take sufficient steps to implement a particular policy decision, in this instance the decision to establish the SIU.

B. *Ontario Court of Appeal* (2000), 52 O.R. (3d) 181

9 Borins J.A., for the majority of the court, held that the defining element of misfeasance in a public office is the unlawful exercise of a statutory or prerogative power that adheres to the defendant's office. On this view, the failure of a public officer to perform a statutory duty cannot constitute misfeasance in a public office. Consequently, Borins J.A. found it plain and obvious that neither action for misfeasance in a public office could succeed, owing to the fact that the defendants had not been engaged in the exercise of a statutory or prerogative power that adhered to their respective offices. The most that could be said was that the defendants failed to comply with the obligations imposed upon them by the *Police Services Act*.

10 In respect of the actions for negligent supervision, Borins J.A. held that the action against the Chief was based on s. 41(1)(b) of the *Police Services Act*, which imposes a duty on a chief of police to ensure that members of the police force carry out their duties in accordance with the Act and its regulations. Borins J.A. concluded that it was not plain and obvious that the action for negligent supervision against the Chief must fail. It was, however, plain and obvious that the actions against the Board and the Province must fail. With respect to the Board, Borins J.A. agreed with Day J. that the Board's involvement was limited to establishing policy. With respect to the Province, Borins J.A. held that the *Police Services Act* does not impose a duty on the Province to control the operational conduct of the municipal police officers or to ensure that police officers comply with [page276] their obligation to cooperate with an SIU investigation.

11 Feldman J.A., dissenting, did not agree that it was plain and obvious that the actions for misfeasance in a public office must fail. In her view, the essence of the tort is the misfeasance in or misuse of the office itself; its purpose is to prevent the deliberate injuring of members of the public by the intentional disregard of official duty. Feldman J.A. thus held that there is no principled reason to distinguish between a public officer who improperly exercises a power and a public officer who deliberately fails to carry out a duty where they know or are recklessly indifferent to the fact that injury to the plaintiff is the likely result. Applied to the facts of this case, Feldman J.A. would have found that the actions for misfeasance in a public office should have been allowed to proceed.

12 Feldman J.A. also was of the view that each of the actions for negligent supervision should have been allowed to proceed. She agreed with Borins J.A. that the Province is not under an obligation to ensure that individual officers comply with their statutory obligation to cooperate with the SIU, but noted that the nature of the claim was that the Province failed to implement training procedures or other policies in order to ensure that officers, as a matter of general practice, cooperated with the SIU. Feldman J.A. was uncertain whether the *Police Services Act* imposes a statutory duty on the Province in respect of these operational matters, and thus felt it inappropriate to strike the claim at this stage of the action. In respect of the Board, Feldman J.A. found that it was not immediately clear whether the Board is under an obligation to establish policies and monitor their implementation for the purpose of ensuring that police officers comply with their statutory obligations. Thus, Feldman J.A. would have found that it was not plain and obvious that the actions for negligent supervision could not succeed.

[page277]

IV. Analysis

13 In discussing the issues in this appeal, I will begin by stating the test for striking a statement of claim on the basis that it discloses no reasonable cause of action. I will then consider that test within the context of the actions for misfeasance in a public office, and then within the context of the actions for negligence.

A. *Striking Out a Statement of Claim*

14 The defendants' motions to have the actions dismissed were made pursuant to rule 21.01(1)(b) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 21.01(1)(b) stipulates that a court may strike out a statement of claim that discloses no reasonable cause of action. The rules with respect to striking out a statement of claim are much the same in other provinces. In British Columbia, for example, rule 19(24)(a) of the *Rules of Court*, B.C. Reg. 221/90, states that a court may strike out a pleading on the ground that it discloses no reasonable claim.

15 An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:

> ... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ... .

The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should [page278] be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

B. *The Actions for Misfeasance in a Public Office*

16 The essence of the Court of Appeal's decision is that the "radical defect" from which the actions for misfeasance in a public office suffer is their failure to plead the constituent elements of the tort. In particular, the Court of Appeal held that the defining element of the tort is the unlawful exercise of the statutory or prerogative powers that adhere to the defendant's office. Because the alleged misconduct involved the breach of a statutory duty rather than the improper or unlawful exercise of a statutory or prerogative power, it is "plain and obvious", on this view, that the actions for misfeasance in a public office cannot succeed.

17 Consequently, I begin by considering the Court of Appeal's conclusion that the unlawful exercise of a statutory or prerogative power is a constituent element of the tort. With respect, a review of the leading cases clearly reveals that the tort is not limited to circumstances in which the defendant officer is engaged in the unlawful exercise of a particular statutory or prerogative power. As I will discuss, the class of conduct at which the tort is targeted is not as narrow as the unlawful exercise of a particular statutory or prerogative power, but more broadly based on unlawful conduct in the exercise of public functions generally.

(1) The Defining Elements of the Tort

18 The origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. Although the original judgment suggests that he was [page279] simply applying the principle *ubi jus ibi remedium*, Holt C.J. produced a revised form of the judgment in which he stated that it was because fraud and malice were proven that the action lay: J. W. Smith, *A Selection of Leading Cases on Various Branches of the Law* (13th ed. 1929), at p. 282. Thus, in its earliest form it is arguable that misfeasance in a public office was limited to circumstances in which a public officer abused a power actually possessed.

19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See for example *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; and *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283. In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission". Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all". From this, it is clear that the tort is not restricted to the abuse of a statutory or prerogative power actually held. If that were the case, there would have been no grounds on which to find Mr. Duplessis liable.

[page280]

20 This understanding of the tort is consistent with the widespread consensus in other common law jurisdictions that there is a broad range of misconduct that can found an action for misfeasance in a public office. For example, in *Northern Territory of Australia v. Mengel* (1995), 129 A.L.R. 1 (H.C.), Brennan J. wrote as follows, at p. 25:

> The tort is not limited to an abuse of office by exercise of a statutory power. *Henly v. Mayor of Lyme* [(1828), 5 Bing. 91, 130 E.R. 995] was not a case arising from an impugned exercise of a statutory power. It arose from an alleged failure to maintain a sea wall or bank, the maintenance of which was a condition of the grant to the corporation of Lyme of the sea wall or bank and the appurtenant right to tolls. Any act or

> omission done or made by a public official in the purported performance of the functions of the office can found an action for misfeasance in public office. [Emphasis added.]

In *Garrett v. Attorney-General*, [1997] 2 N.Z.L.R. 332, the Court of Appeal for New Zealand considered an allegation that a sergeant failed to investigate properly the plaintiff's claim that she had been sexually assaulted by a police constable. Blanchard J. concluded, at p. 344, that the tort can be committed "by an official who acts or omits to act in breach of duty knowing about the breach and also knowing harm or loss is thereby likely to be occasioned to the plaintiff".

21 The House of Lords reached the same conclusion in *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220. In *Three Rivers*, the plaintiffs alleged that officers with the Bank of England improperly issued a licence to the Bank of Credit and Commerce International and then failed to close the bank once it became evident that such action was necessary. Forced to consider whether the tort could apply in the case of omissions, the House of Lords concluded that "the tort can be constituted by an omission by a public officer as well as by acts on his part" (*per* Lord Hutton, at p. 1267). In Australia, New Zealand and the United Kingdom, it is equally clear that the tort of misfeasance is not limited to the unlawful [page281] exercise of a statutory or prerogative power actually held.

22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts, supra*; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.

23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such [page282] as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

24 Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers, supra*, at p. 1269:

> The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.

Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: "If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office]." See also *R. v. Dytham*, [1979] Q.B. 722 (C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.

25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999), 70 Alta. L.R. (3d) 267, 1999 ABQB 440, at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of: (i) an intentional illegal act; and (ii) an intent to harm an individual or class [page283] of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 156 Man. R. (2d) 14, 2001 MBCA 40, in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts, supra*, Newbury J.A. described the tort in similar terms, at para. 7:

> ... it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231].) Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power -- i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff. [Emphasis in original.]

Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

26 As is often the case, there are a number of phrases that might be used to describe the essence of the tort. In *Garrett, supra*, Blanchard J. stated, at p. 350, that "[t]he purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty." In *Three Rivers, supra*, Lord Steyn stated, at p. 1230, that "[t]he rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." As each passage makes clear, misfeasance in a public office is not directed at a public officer who inadvertently or negligently fails adequately to discharge the obligations of his or her office: see *Three Rivers*, at p. 1273, *per* Lord [page284] Millett. Nor is the tort directed at a public officer who fails adequately to discharge the obligations of the office as a consequence of budgetary constraints or other factors beyond his or her control. A public officer who cannot adequately discharge his or her duties because of budgetary constraints has not deliberately disregarded his or her official duties. The tort is not directed at a public officer who is unable to discharge his or her obligations because of factors beyond his or her control but, rather, at a public officer who could have discharged his or her public obligations, yet wilfully chose to do otherwise.

27 Another factor that may remove an official's conduct from the scope of the tort of misfeasance in a public office is a conflict with the officer's statutory obligations and his or her constitutionally protected rights, such as the right against self-incrimination. Should such circumstances arise, a public officer's decision not to comply with his or her statutory obligation may not amount to misfeasance in a public office. I need not decide that question here except that it could be argued. A public officer who properly insists on asserting his or her constitutional rights cannot accurately be said to have deliberately disregarded the legal obligations of his or her office. Under this argument, an obligation inconsistent with the officer's constitutional rights is not itself lawful.

28 As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A [page285] public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

29 The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

30 In sum, I believe that the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions. Once these requirements have been satisfied, it is unclear why the tort would be restricted to a public officer who engaged in the unlawful exercise of a statutory power that she or he actually possesses. If the tort were restricted in this manner, the tort would not extend to a public officer, such as Mr. Duplessis, who intentionally exceeded his powers for the express purpose of interfering with a citizen's economic interests. Nor would it extend to a public officer who breached a statutory obligation for the same purpose. But there is no principled reason, in my view, why a public officer who wilfully injures a member of the public [page286] through intentional abuse of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty. In each instance, the alleged misconduct is equally inconsistent with the obligation of a public officer not to intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions.

31 I wish to stress that this conclusion is not inconsistent with *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, in which the Court established that the nominate tort of statutory breach does not exist. *Saskatchewan Wheat Pool* states only that it is insufficient that the defendant has breached the statute. It does not, however, establish that the breach of a statute cannot give rise to liability if the constituent elements of tortious responsibility have been satisfied. Put a different way, the mere fact that the alleged misconduct also constitutes a breach of statute is insufficient to exempt the officer from civil liability. Just as a public officer who breaches a statute might be liable for negligence, so too might a public officer who breaches a statute be liable for misfeasance in a public office. *Saskatchewan Wheat Pool* would only be relevant to this motion if the appellants had pleaded no more than a failure to discharge a statutory obligation. This, however, is not the case. The principle established in *Saskatchewan Wheat Pool* has no bearing on the outcome of the motion on this appeal.

32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, [page287] the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

(2) Application to the Case at Hand

33 As outlined earlier, on a motion to strike on the basis that the statement of claim discloses no reasonable cause of action, the facts are taken as pleaded. Consequently, the primary question that arises on this appeal is whether the statement of claim pleads each of the constituent elements of the tort.

34 In respect of the first constituent element, namely, unlawful conduct in the exercise of public functions, the statement of claim alleges that the defendant officers did not cooperate with the SIU investigation, but, rather, took positive steps to frustrate the investigation. As described above, police officers are under a statutory obligation to cooperate fully with members of the SIU in the conduct of investigations, pursuant to s. 113(9) of the *Police Services Act*. On the face of it, the decision not to cooperate with an investigation constitutes an unlawful breach of statutory duty. Similarly, the alleged failure of the Chief to ensure that the defendant officers cooperated with the investigation also would seem to constitute an unlawful breach of duty. Under s. 41(1)(b) of the *Police Services Act*, the duties of a chief of police include ensuring that members of the police force carry out their duties in accordance with the Act. A decision not to ensure that police officers cooperate with the SIU is inconsistent with the statutory obligations of the office.

35 As discussed above, an obligation inconsistent with a public officer's constitutional rights cannot give rise to misfeasance in a public office. It is arguable that the statutory obligation to cooperate fully with the members of the SIU cannot trump a police officer's constitutional right against self-incrimination. I do not need to answer this question because it has not been argued that the SIU's requests were inconsistent with the officers' [page288] constitutional rights. Nor has it been argued that the alleged misconduct, which includes submitting inaccurate and misleading shift notes and disobeying an order to remain segregated, is privileged by the right against self-incrimination. As a consequence, it is not "plain and obvious" that the officers were faced with a stark choice between complying with the SIU's requests and abandoning their right against self-incrimination, either as a matter of fact or law. The potential conflict between the duty to cooperate with the SIU and the right against self-incrimination cannot be relied on to dismiss the action at this stage of the proceedings.

36 Insofar as the second requirement is concerned, the statement of claim alleges that the acts and omissions of the defendant officers "represented intentional breaches of their legal duties as police officers". This plainly satisfies the requirement that the officers were aware that the alleged failure to cooperate with the investigation was unlawful. The allegation is not simply that the officers failed to comply with s. 113(9) of the *Police Services Act*, but that the failure to comply was intentional and deliberate. Insofar as the Chief is concerned, the statement of claim alleges as follows:

> (i) Chief Boothby, through his legal counsel, was directed by S.I.U. officers to segregate the defendant officers and he deliberately failed to do so;
>
> (ii) Chief Boothby failed to ensure that defendant police officers produced timely and complete notes;
>
> (iii) Chief Boothby failed to ensure that the defendant police officers attended for requested interviews by S.I.U. in a timely manner; and
>
> (iv) Chief Boothby failed to ensure that the defendant police officers gave accurate and complete accounts of the specifics of the shooting incident.

37 Although the allegation that the Chief deliberately failed to segregate the officers satisfies the requirement that the Chief intentionally breached [page289] his legal obligation to ensure compliance with the *Police Services Act*, the same cannot be said of his alleged failure to ensure that the defendant officers produced timely and complete notes, attended for interviews in a timely manner, and provided accurate and complete accounts of the incident. As above, inadvertence or negligence will not suffice; a mere failure to discharge the obligations of the office cannot constitute misfeasance in a public office. In light of the allegation that the Chief's failure to segregate the officers was deliberate, this is not a sufficient basis on which to strike the pleading. Suffice it to say, the failure to issue orders for the purpose of ensuring that the defendant officers cooperated with the investigation will only constitute misfeasance in a public office if the plaintiffs prove that the Chief deliberately failed to comply with the standard established by s. 41(1)(b) of the *Police Services Act*.

38 The statement of claim also alleges that the defendant officers and the Chief "knew or ought to have known" that the alleged misconduct would cause the plaintiffs to suffer physically, psychologically and emotionally. Although the allegation that the defendants knew that a failure to cooperate with the investigation would injure the plaintiffs satisfies the requirement that the alleged misconduct was likely to injure the plaintiffs, misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, according to a number of cases, the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct: see for example *Three Rivers, supra*; *Powder Mountain Resorts, supra*; and *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*. This, again, is not a sufficient basis on which to strike the pleading. It is clear, however, that the phrase "or ought to have known" must be struck from the statement of claim.

[page290]

39 The final factor to be considered is whether the damages that the plaintiffs claim to have suffered as a consequence of the aforementioned misconduct are compensable. In the defendant officers' submission, the alleged damages are non-compensable. Consequently, it is their submission that even if the plaintiffs could prove the other elements of the tort, it still would be plain and obvious that the actions for misfeasance in a public office must fail.

40 In the defendant officers' submission, the essence of the plaintiffs' claim is that they were deprived of a thorough, competent and credible investigation. And owing to the fact that no individual has a private right to a thorough, competent and credible criminal investigation, the plaintiffs have suffered no compensable damages. If this were an accurate assessment of the plaintiffs' claim, I would agree. Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize. This, however, is not an accurate assessment of the plaintiffs' submission. In their statement of claim, the plaintiffs also allege that they have suffered physically, psychologically and emotionally, in the form of mental distress, anger, depression and anxiety as a direct result of the defendant officers' failure to cooperate with the SIU.

41 Although courts have been cautious in protecting an individual's right to psychiatric well-being, compensation for damages of this kind is not foreign to tort law. As the law c urrently stands, that the appellant has suffered grief or emotional distress is insufficient. Nevertheless, it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm": see for example *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216, and *Frame v. Smith*, [1987] 2 S.C.R. 99. Consequently, even if the plaintiffs could prove that they had suffered psychiatric damage, in the form of anxiety or [page291] depression, they still would have to prove both that it was caused by the alleged misconduct and that it was of sufficient magnitude to warrant compensation. But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct.

42 In the final analysis, I would allow the appeal in respect of the actions for misfeasance in a public office. If the facts are taken as pleaded, it is not plain and obvious that the actions for misfeasance in a public office against the defendant officers and the Chief must fail. The plaintiffs may well face an uphill battle, but they should not be deprived of the opportunity to prove each of the constituent elements of the tort.

C. *The Actions for Negligence*

43 In addition to the actions for misfeasance in a public office, the statement of claim includes actions for negligence against the Chief, the Board and the Province. The essence of these claims is that the Chief, the Board and the Province are liable as a consequence of their failure to ensure that the defendant officers complied with s. 113(9) of the *Police Services Act*.

44 In order for an action in negligence to succeed, a plaintiff must be able to establish three things: (i) that the defendant owed the plaintiff a duty of care; (ii) that the defendant breached that duty of care; and (iii) that damages resulted from that breach. The primary question that arises on this appeal is in respect of the first element, namely, whether the defendants owed to the appellants a duty to take reasonable care to ensure that the defendant officers cooperated with the SIU investigation. If the defendants are under no such obligation, the actions for negligence cannot [page292] succeed. After discussing the general principles applicable to the duty of care analysis, I will go on to discuss this approach in the context of the negligence actions against the Chief, the Board and the Province. I will also address the defendants' submission that complained of harm is non-compensable.

(1) The Duty of Care

45 It is a well-established principle that a defendant is not liable in negligence unless the law exacts an obligation in the circumstances to take reasonable care. As Lord Esher concluded in *Le Lievre v. Gould*, [1893] 1 Q.B. 491 (C.A.), at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Duty may therefore be defined as an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others.

46 It is now well established in Canada that the existence of such a duty is to be determined in accordance with the two-step analysis first enunciated by the House of Lords in *Anns v. Merton London Borough Council*, [1978] A.C. 728, at pp. 751-52:

> First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter -- in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

See for example *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *B.D.C. Ltd. v. Hofstrand Farms Ltd.*, [1986] 1 S.C.R. 228; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021; *London Drugs Ltd. v. Kuehne & [page293] Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85; and *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79.

47 The first stage of analysis, then, demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and defendant that the defendant owes to the plaintiff a *prima facie* duty of care. The question of when such a duty arises is one with which this Court and others have repeatedly grappled since Lord Atkin enunciated the neighbour principle in *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.), at p. 580 :

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be -- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

As eloquently observed by Professor J. G. Fleming, this passage is a sacrosanct preamble to judicial disquisitions on duty, yet contains a fateful ambiguity: *The Law of Torts* (9th ed. 1998), at p. 151. More specifically, does the reference to persons so closely and directly affected by the conduct in question that the defendant ought reasonably to have had them in contemplation conflate foreseeability of harm and duty? Or does it require something in addition to foreseeability of harm?

48 In *Cooper, supra*, the Court clearly stated that the latter approach is the correct one. At para. 29 of their joint reasons, McLachlin C.J. and Major J. stated that there must be reasonable foreseeability of harm "plus something more". At para. 31, they concluded that this "something more" is proximity: in order to establish that the defendant owed the plaintiff a duty of care, the reasonable foreseeability of harm must be supplemented by proximity. It is only if harm is a [page294] reasonably foreseeable consequence of the conduct in question and there is a sufficient degree of proximity between the parties that a *prima facie* duty of care is established. The question that thus arises is what precisely is meant by the term proximity.

49 McLachlin C.J. and Major J. concluded, at para. 32, that the term "proximity" , in the context of negligence law, is used to describe the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed. As this Court stated in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, at para. 24:

> The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a

> nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

50 Consequently, the essential purpose of the inquiry is to evaluate the nature of that relationship in order to determine whether it is just and fair to impose a duty of care on the defendant. The factors that are relevant to this inquiry depend on the circumstances of the case. As stated by McLachlin J. (as she then was) in *Norsk, supra*, at p. 1151, "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in *Hercules Managements, supra*, at para. 23, and *Cooper, supra*, at para. 35). Examples of factors that might be relevant to the inquiry include the expectations of the parties, representations, reliance and the nature of the property or interest involved.

51 The second stage of the *Anns* test requires the trial judge to consider whether there exist any residual policy considerations that ought to negative or reduce the scope of the duty or the class of persons to whom it is owed. In *Cooper*, McLachlin C.J. [page295] and Major J. wrote, at para. 37, that this stage of the analysis is not concerned with the relationship between the parties but, rather, with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair.

(2) Application of the *Anns* Test

52 The essence of the appellants' claim is that the Chief, the Board and the Province breached a duty to take reasonable care to ensure that the defendant officers complied with their legal obligation to cooperate with the SIU investigation. In order for this to give rise to an action in negligence, it must first be true that the defendants owed the appellants a duty to take such care. On the analysis above, this requires the Odhavji family to establish each of the following: (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach; (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (iii) that there exist no policy reasons to negative or otherwise restrict that duty. If the defendants did not owe such a duty to the appellants, it is plain and obvious that the actions for negligence cannot succeed.

(i) *Police Chief Boothby*

53 The conclusion that the harm complained of is a reasonably foreseeable consequence of the Chief's conduct is dependent on the prior conclusion that it is a reasonably foreseeable consequence of an inadequate investigation into the shooting incident. [page296] If it is not reasonably foreseeable that the plaintiffs would suffer psychiatric harm as a consequence of an inadequate investigation into the incident, it is not reasonably foreseeable that the Chief's failure to ensure that the defendant officers' failure to cooperate with the SIU would injure the plaintiffs.

54 It is not immediately clear, in my view, that this initial threshold has been satisfied. Although it is to be expected that an inadequate investigation would distress or anger the close relatives of Mr. Odhavji, it is less obvious that this distress or anger would rise to the level of compensable psychiatric harm. Nevertheless, I do not think it "plain and obvious" that such harm is an unforeseeable consequence of the defendant officers' failure to cooperate with the investigation. The task might be a difficult one, but the appellants should not be deprived of the opportunity to prove that the complained of harm is a reasonably foreseeable consequence of a truncated or otherwise inadequate investigation into the shooting incident. It is reasonably foreseeable that the officers' failure to cooperate with the SIU investigation would harm the appellants. As the Chief was responsible for ensuring that the officers cooperated with the SIU investigation, it is reasonably foreseeable that the Chief's failure to do so would also harm the appellants.

55 The next question that arises is whether there is sufficient proximity between the parties that a duty of care may rightly be imposed on the Chief. It may be that the appellants can show that it was reasonably foreseeable that the alleged misconduct would result in psychiatric harm, but foreseeability alone is an insufficient basis on which to establish a *prima facie* duty of care. In addition to showing foreseeability, the appellants must establish that it is just and fair to impose on the Chief a private law obligation to ensure that the defendant officers cooperated with the SIU. A broad range of factors may be relevant to this inquiry, including a close causal connection, the parties' expectations and any assumed or imposed obligations. See for example *Norsk, supra*, at p. 1153; *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, [page297] 2000 SCC 60, at paras. 51-52; and *Cooper, supra*, at para. 35.

56 In the present case, one factor that supports a finding of proximity is the relatively direct causal link between the alleged misconduct and the complained of harm. As discussed above, the duties of a chief of police include ensuring that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act*. In those instances in which a member of the public is injured as a consequence of police misconduct, there is an extremely close causal connection between the negligent supervision and the resultant injury: the failure of the chief of police to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* leads directly to the police misconduct, which, in turn, leads directly to the complained of harm. The failure of the Chief to ensure the defendant officers cooperated with the SIU is thus but one step removed from the complained of harm. Although a close causal connection is not a condition precedent of liability, it strengthens the nexus between the parties.

57 A second factor that strengthens the nexus between the Chief and the Odhavjis is the fact that members of the public reasonably expect a chief of police to be mindful of the injuries that might arise as a consequence of police misconduct. Although the vast majority of police officers in our country exercise their powers responsibly, members of the force have a significant capacity to affect members of the public adversely through improper conduct in the exercise of police functions. It is only reasonable that members of the public vulnerable to the consequences of police misconduct would expect that a chief of police would take reasonable care to prevent, or at least to discourage, members of the force from injuring members of the public through improper conduct in the exercise of police functions.

58 Finally, I also believe it noteworthy that this expectation is consistent with the statutory obligations [page298] that s. 41(1)(b) of the *Police Services Act* imposes on the Chief. Under s. 41(1)(b), the Chief is under a freestanding statutory obligation to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* and the needs of the community. This includes an obligation to ensure that members of the police force do not injure members of the public through misconduct in the exercise of police functions. The fact that the Chief already is under a duty to ensure compliance with an SIU investigation adds substantial weight to the position that it is neither unjust nor unfair to conclude that the Chief owed to the plaintiffs a duty of care to ensure that the defendant officers did, in fact, cooperate with the SIU investigation.

59 In light of the above factors, I conclude that the circumstances of the case satisfy the first stage of the *Anns* test and raise a *prima facie* duty of care. If it is reasonably foreseeable that the defendant officers' decision not to cooperate with the SIU would injure the plaintiffs, a private law obligation to ensure that the officers cooperate with the SIU is rightly imposed on the Chief. Consequently, the only issue that is left to consider is whether there exist any broad policy considerations that ought to negative the *prima facie* obligation of the Chief to prevent the misconduct.

60 Counsel for the Chief submits that imposing a private law duty on the Chief to ensure that the officers cooperate with the investigation would compromise the independence of the SIU. It is difficult to see how this is the case, particularly as the Chief already is under a statutory obligation to ensure such cooperation. Imposing a duty of care on the Chief to ensure that members of the force cooperate with the SIU would have no bearing on the capacity of the SIU to determine how or in what circumstances to conduct such an investigation. Counsel for the Chief also submits that another factor to consider is the availability of alternative remedies, namely, the public complaints process that allows members of the public to complain in respect of the conduct of [page299] a police officer. What the appellants seek, though, is not the opportunity to file a complaint that might result in the imposition of disciplinary sanctions but, rather, compensation for the psychological harm that they have suffered as a consequence of the Chief's inadequate supervision. The public complaints process is no alternative to liability in negligence.

61 In short, I believe that it would be inappropriate to strike the action for negligent supervision against the Chief on the basis that he did not owe the plaintiffs a duty of care. If the plaintiffs can establish that the complained of harm is a reasonably foreseeable consequence of the Chief's failure to ensure that the defendant officers cooperated with the SIU, the Chief was under a private law duty of care to take reasonable care to prevent such misconduct. The cross-appeal against the Court of Appeal's decision to allow the action in negligence against Police Chief Boothby to proceed is therefore dismissed.

(ii) *Metropolitan Toronto Police Services Board*

62 The plaintiffs do not allege that the Board was under a private law obligation to ensure that the defendant officers in this appeal cooperated with the SIU investigation into the allegedly wrongful death of Mr. Odhavji. Rather, the basis of the action is that the Board breached a duty of care to ensure that police officers, as a matter of general practice, cooperate with SIU investigations. The duty of care is owed not to the Odhavjis in particular, but to the family of a person harmed by the police.

63 The first question to answer is whether it is reasonably foreseeable that the family of a person harmed by the police would suffer acute anxiety or depression as a consequence of the Board's failure to enact additional policies or training procedures for the purpose of ensuring that police officers cooperate with the SIU. But, once again, foreseeability [page300] alone is insufficient. Even if it is reasonably foreseeable that the Board's decision not to enact additional procedures would exacerbate the allegedly systematic failure of the police officers to cooperate with the SIU, and that this, in turn, would cause the families of persons harmed by the police to suffer psychiatric harm, it still must be determined whether the Board is under a private law duty to ensure that members of the force, as a matter of general practice, cooperate with the SIU. For the reasons that follow, I am of the view that the Board is under no such duty.

64 The first factor that I consider is the lack of a close causal connection between the alleged misconduct and the complained of harm. As discussed earlier, the fact that a chief of police is in a direct supervisory relationship with members of the force gives rise to a certain propinquity between the Chief and the Odhavjis; the close connection between the Chief's inadequate supervision and the officers' subsequent failure to cooperate with the SIU establishes a nexus between the Chief and the individuals who are injured as a consequence of the officers' misconduct. The Board, however, is much further in the background than the Chief. Unlike the Chief, the Board does not directly involve itself in the day-to-day conduct of police officers, but, rather, implements general policy and monitors the performance of the various chiefs of police. The Board does not supervise members of the force, but, rather, supervises the Chief (who, in turn, supervises members of the force). This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct.

65 A second factor that distinguishes the Board from the Chief is the absence of a statutory obligation to ensure that members of the police force cooperate with the SIU. As discussed earlier, the express duties of the Chief include ensuring that members of the force comply with s. 113(9) of the *Police Services Act*. Under s. 31(1), the Board is responsible for the provision of adequate and effective police services, but is not under an express [page301] obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act*. The absence of such an obligation is consistent with the general tenor of s. 31(1), which provides the Board with a broad degree of discretion to determine the policies and procedures that are necessary to provide adequate and effective police services. A few enumerated exceptions aside, the Board is free to determine what objectives to pursue, and what policies to enact in pursuit of those objectives.

66 It is possible, I concede, that circumstances might arise in which the Board is required to address a particular problem in order to discharge its statutory obligation to provide adequate and effective police services. If there was evidence, for example, of a widespread problem in respect of the excessive use of force in the detention of visible minorities, the Board arguably is under a positive obligation to combat racism and the resultant use of excessive force. But as a general matter, courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue, or what policies to enact in pursuit of those objectives. Suffice it to say, the Board's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of its obligation to provide "adequate and effective" police services.

67 Considered against this backdrop, I conclude that the circumstances of the relationship inhering between the plaintiff and the defendant are not such that a duty of care to ensure that members of the police force cooperate with the SIU may rightly be imposed. The appeal against the Court of Appeal's decision to strike the action against the Board is dismissed.

(iii) *The Province*

68 As with the Board, the plaintiffs do not allege that the Province, through the Solicitor General, was under a private law obligation to ensure that [page302] the defendant officers in this appeal cooperated with the investigation into the allegedly wrongful death of Mr. Odhavji. Rather, the basis of the action is that the Province breached a private law obligation to institute policies and training procedures for the purpose of ensuring that members of the force, as a matter of general practice, cooperate with the SIU. Owing to the fact that my conclusions in respect of the action against the Province mirror my conclusions in respect of the action against the Board, the following analysis is fairly brief.

69 As above, I am not certain that it is reasonably foreseeable that the Solicitor General's decision not to institute further policies and training procedures in respect of s. 113(9) would cause the families of persons harmed by the police to suffer compensable psychiatric harm. This, however, is a matter that is properly addressed at trial. But even if it is reasonably foreseeable that the failure of the Solicitor General to institute further policies and training procedures in respect of s. 113(9) would cause the families of persons harmed by the police to suffer compensable psychiatric harm, there is insufficient proximity between the parties to conclude that the Province is under a private law obligation to ensure that members of the force comply with s. 113(9) of the *Police Services Act*.

70 Like the Board, the Province is not directly involved in the day-to-day conduct of members of the police force. Whereas the Police Chief is in a direct supervisory relationship with members of the force, the Solicitor General's involvement in the conduct of police officers is limited to a general obligation to monitor boards and police forces to ensure that adequate and effective police services are provided and to develop and promote programs to enhance professional police practices, standards and training. Like the Board, the Province is very much in the background, perhaps even more so. The lack of any direct involvement in the day-to-day conduct of members of the force substantially weakens the nexus between the Province and the [page303] plaintiffs. The Province simply is too far removed from the day-to-day conduct of members of the force to be under a private law obligation to ensure that members of the force cooperate with the SIU.

71 This lack of any direct involvement in the day-to-day conduct of police officers is compounded by the fact that the responsible minister is not under a statutory obligation to ensure that police officers cooperate with the SIU . Under s. 3(2) of the *Police Services Act*, the Solicitor General is under a general duty to monitor police forces to ensure that adequate and effective police services are provided. It is not, however, under an obligation to ensure that members of the force carry out their duties in accordance with the *Police Services Act* and the needs of the community. Although I do not foreclose the possibility that s. 3(2) might give rise to a statutory obligation to address widespread or systemic misconduct of a particularly serious nature, the circumstances of this case do not give rise to such an obligation. The Solicitor General's decision not to enact additional policies or training procedures in respect of s. 113(9) does not constitute a breach of his duty to ensure that the Board provides "adequate and effective" police services in the municipality.

72 For the above reasons, it is my conclusion that the Province does not owe to the plaintiffs a duty of care. Absent a more direct involvement in the day-to-day conduct of police officers or a statutory obligation to ensure that members of the force comply with s. 113(9), it would be improper to impose on the Province a private law obligation to ensure that members of the police force cooperate with the SIU. The appeal against the Court of Appeal's decision to strike the action against the Province is dismissed.

(3) Damages

73 The final factor to consider is the defendants' submission that the alleged injuries are non-compensable. Consequently, it is their submission [page304] that even if it is established that the defendants owed the plaintiffs a duty of care, it is still plain and obvious that the actions for negligence must fail.

74 As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm". At the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. Causation and the magnitude of psychiatric damage are matters to be determined at trial.

D. *The Court of Appeal's Costs Award*

75 A final issue to consider is the Court of Appeal's decision to follow the usual rule that the successful party is entitled to costs. In the plaintiffs' submission, it was improper for the Court of Appeal to award costs to the defendant officers and the Province. By the consent of the parties, a "no-costs" order was made in respect of the actions against the Chief and the Board. The plaintiffs submit that they are public interest litigants and should not have been required to pay costs.

76 Although circumstances might arise in which there are cogent arguments for departing from the normal cost rules, I have difficulty conceptualizing the plaintiffs in the present appeal as public interest litigants. In the plaintiffs' own submissions, there are typically two types of public interest litigants: (i) litigants who have no direct pecuniary or other material interest in the proceedings (e.g., a non-profit organization); and (ii) litigants who do have a pecuniary interest, but whose interest is modest in comparison to the cost of the proceedings. The plaintiffs in the present case do not fit into either [page305] category -- and thus do not fit their own definition of a public interest litigant. Indeed, it is difficult to regard a plaintiff who is seeking several millions of dollars in damages as a public interest litigant. The fact that the actions involve public authorities and raise issues of public interest is insufficient to alter the essential nature of the litigation.

77 Moreover, under rule 57.01(1) of the *Rules of Civil Procedure*, costs awarded in a proceeding are a matter of discretion for the court. Consequently, this Court should not interfere with a lower court's exercise of that discretion unless there is a clear and compelling reason for doing so. See for example *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315. In the present case, there is no such basis on which to interfere with the Court of Appeal's decision to award costs in accordance with the usual rule that the successful party is entitled to costs.

V. Disposition

78 In the result, the appeal against the Court of Appeal's decision to strike the actions for misfeasance in a public office is allowed. The judgment of the Court of Appeal is set aside, and an order will issue striking the phrase "or ought to have known" from the amended statement of claim. The cross-appeal against the Court of Appeal's decision to allow the action in negligence in respect of the SIU investigation against the Chief to proceed is dismissed, as is the appeal against the Court of Appeal's decision to strike the actions in negligence in respect of the SIU investigation against the Board and the Province. Although success has been divided, the plaintiffs have achieved a significant success in respect of the actions against the defendant officers and the Chief. Accordingly, I would award costs to the plaintiffs in this Court.

[page306]

Solicitors

Solicitors for the appellants/respondents on cross-appeal: Falconer Charney Macklin, Toronto.

Solicitors for the respondents Woodhouse and Gerrits: Borden Ladner Gervais, Toronto.

Solicitors for the respondent/appellant on cross-appeal the Metropolitan Toronto Chief of Police David Boothby and the respondent the Metropolitan Toronto Police Services Board: City of Toronto, Toronto.

Solicitor for the respondent Her Majesty the Queen in Right of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

Solicitors for the intervener the Urban Alliance on Race Relations: Fasken Martineau DuMoulin, Toronto.

Solicitors for the intervener the African Canadian Legal Clinic: African Canadian Legal Clinic, Toronto.

Solicitor for the intervener the Mental Health Legal Committee: Suzan E. Fraser, Toronto.

Solicitors for the intervener the Association in Defence of the Wrongfully Convicted: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Innocence Project of Osgoode Hall Law School: Ruby & Edwardh, Toronto.

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Operation Dismantle Inc. v. Canada, [1985] 1 S.C.R. 441

Supreme Court Reports

Supreme Court of Canada

Present: Ritchie *, Dickson, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

1984: February 14, 15 / 1985: May 9.

File No.: 18154.

[1985] 1 S.C.R. 441 | [1985] 1 R.C.S. 441 | [1985] S.C.J. No. 22 | [1985] A.C.S. no 22 | 1985 CanLII 74

Operation Dismantle Inc., Canadian Union of Public Employees, Canadian Union of Postal Workers, National Union of Provincial Government Employees, Ontario Federation of Labour, Arts for Peace, Canadian Peace Research and Education Association, World Federalists of Canada, Alberni Valley Coalition for Nuclear Disarmament, Comox Valley Nuclear Responsibility Society, Cranbrook Citizens for Nuclear Disarmament, Peace Education Network, Windsor Coalition for Disarmament, Union of Spiritual Communities of Christ Committee for World Disarmament and Peace, Against Cruise Testing Coalition, B.C. Voice of Women, National Action Committee on the Status of Women, Carman Nuclear Disarmament Committee, Project Survival, Denman Island Peace and Nuclear Disarmament, Muskoka Peace Group, Global Citizens' Association, Physicians for Social Responsibility (Montreal Branch), appellants; and Her Majesty The Queen, The Right Honourable Prime Minister, The Attorney General of Canada, The Secretary of State for External Affairs, The Minister of Defence, respondents.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

* Ritchie J. took no part in the judgment.

Case Summary

Constitutional law — Canadian Charter of Rights and Freedoms — Right to life, liberty and security of person — U.S. cruise missile testing in Canada — Testing alleged to increase risk of nuclear war in violation of that right — Motion to strike out — Whether or not facts as alleged in violation of Charter — Canadian [page442] Charter of Rights and Freedoms, ss. 1, 7, 24(1), 32(1)(a) — Constitution Act, 1982, s. 52(1).

Jurisdiction — Judicial review — Cabinet decision relating to national defence and external affairs — Whether or not decision reviewable by courts.

Practice — Motion to strike — U.S. cruise missile tests alleged to increase risk of nuclear war in violation of s. 7 of Charter — Whether or not statement of claim should he struck out — Whether or not statement of claim can he amended before statement of defence filed — Federal Court Rules, Rules 419(1), 421, 1104, 1723.

This appeal is from a judgment of the Federal Court of Appeal which allowed respondents' appeal from a judgment dismissing their motion to strike out the appellants' statement of claim.

Appellants alleged that a decision made by the Government of Canada to allow the United States to test cruise missiles in Canada violated s. 7 of the Charter. The development of the cruise missile, it was argued, heightened the risk of nuclear war and the increased American military presence and interest in Canada as a result of the testing allegedly made Canada more likely to be a target for nuclear attack. Declaratory relief, an injunction and damages were sought.

Held: The appeal should be dismissed.

Per Dickson C.J., Estey, McIntyre, Chouinard and Lamer JJ.: The appellants' statement of claim should be struck out and their cause of action dismissed. The statement of claim does not disclose facts which, if taken as true, would prove that the Canadian government's decision to permit the testing of the cruise missile in Canada could cause a violation or a threat of violation of their rights under s. 7 of the Charter.

The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict and thereby violates the right to life, liberty and security of the person. This alleged violation of s. 7 turns upon an actual increase in the risk of nuclear war resulting from the federal cabinet's decision to permit the testing. This allegation is premised upon assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of uncertainty and change, will react to the Canadian government's decision to permit the testing of the cruise. Since the foreign policy decisions of independent nations are not capable of prediction on the [page443] basis of evidence to any degree of certainty approaching probability, the nature of the reaction to the federal cabinet's decision to permit the testing can only he a matter of speculation. The appellants could never prove the causal link between the decision to permit the testing and the increase in the threat of nuclear conflict.

Cabinet decisions are reviewable by the Courts under s. 32(1)(a) of the Charter and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the Charter. The decision to permit the testing of the cruise missile cannot be considered contrary to the duties of the executive since the possible effects of this government action are matters of mere speculation. Section 7 could only give rise to a duty on the part of the executive to refrain from permitting the testing if it could be said that a deprivation of life or security of the person could be proven to result from the impugned government act.

Per Wilson J.: The government's decision to allow the testing of the U.S. cruise missile in Canada, even although an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(a) of the Charter. It was not insulated from review because it was a "political question" since the Court had a constitutional obligation under s. 24 of the Charter to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.

On a motion to strike out a statement of claim as disclosing no reasonable cause of action, the court must take the allegations of fact therein as proved. If such allegations raise a justiciable issue the court cannot abdicate its responsibility for review on the basis of anticipated problems of proof.

This statement of claim was struck, notwithstanding the general hesitancy of the courts to strike, because the facts disclosed no reasonable cause of action (1) under s. 24(1) of the Charter, (2) under s. 52(1) of the Constitution Act, 1982 or (3) under the common law power to grant declaratory relief. To succeed in their claim for relief under s. 24 of the Charter the plaintiffs would have to establish a violation or threat of violation of their right under s. 7 of the Charter. To obtain a declaration of unconstitutionality under s. 52(1) of the Constitution Act, 1982, the plaintiffs would have to show that the government's decision to test the cruise missile in Canada was inconsistent with their right [page444] under s. 7. To obtain declaratory relief at common law, they would have to establish a violation or threatened violation of their right under s. 7.

The government's decision to test the cruise missile in Canada does not give rise to a violation or threatened violation of the plaintiffs' right under s. 7. Even an independent, substantive right to life, liberty and security of the person cannot be absolute. It must take account of the corresponding rights of others and of the right of the state to protect the collectivity as well as the individual against external threats. The central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. It does not extend to incidental effects of governmental action in the field of inter-state relations.

There is at the very least a strong presumption that governmental action concerning the relation of the state with other states, and not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may incidentally increase the risk of death or injury that individuals generally have to face.

Section 1 of the Charter was not called into operation here given the finding that the facts as alleged could not constitute a violation of s. 7.

Since the application to amend the statement of claim was filed after the Crown instituted its appeal, the application was made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal applied. Appellants' right under Rule 421 had therefore expired and their only recourse was to proceed under Rule 1104.

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APPEAL from a judgment of the Federal Court of Appeal, [1983] 1 F.C. 745, 49 N.R. 363, allowing an appeal from a judgment of Cattanach J., [1983] 1 F.C. 429, dismissing a motion to strike out. Appeal dismissed.
Gordon F. Henderson, Q.C., Lawrence Greenspon and Emilio Binavince, for the appellants. W.I.C. Binnie, Q.C., and Graham R. Garton, for the respondents.

Solicitors for the appellants: Karam, Tannis, Greenspon, Vanier. Solicitor for the respondents: R. Tassé, Ottawa.

[page447]

[Quicklaw note: An erratum was published at [1986] 1 S.C.R., page iv. The change indicated therein has been made to the text below and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of Dickson C.J., Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

DICKSON J.

1 This case arises out of the appellants' challenge under s. 7 of the Canadian Charter of Rights and Freedoms to the decision of the federal cabinet to permit the testing of the cruise missile by the United States of America in Canadian territory. The issue that must be addressed is whether the appellants' statement of claim should be struck out, before trial, as disclosing no reasonable cause of action. In their statement of claim, the appellants seek: (i) a declaration that the decision to permit the testing of the cruise missile is unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages. Cattanach J. of the Federal Court, Trial Division, refused the respondents' motion to strike. The Federal Court of Appeal unanimously allowed the respondents' appeal, struck out the statement of claim and dismissed the appellants' action.

2 The facts and procedural history of this case are fully set out and discussed in the reasons for judgment of Madame Justice Wilson. I agree with Madame Justice Wilson that the appellants' statement of claim should be struck out and this appeal dismissed. I have reached this conclusion, however, on the basis of reasons which differ somewhat from those of Madame Justice Wilson.

3 In my opinion, if the appellants are to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights under s. 7 of the Charter. I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the Charter is simply too uncertain, speculative and hypothetical to sustain a cause of action. Thus, although decisions of the federal cabinet are reviewable by the courts under the Charter, and the government bears a general [page448] duty to act in accordance with the Charter's dictates, no duty is imposed on the Canadian government by s. 7 of the Charter to refrain from permitting the testing of the cruise missile.

I

The Appellants' Statement of Claim

4 The relevant portion of the appellants' statement of claim is found in paragraph 7 thereof. The deprivation of s. 7 Charter rights alleged by the appellants and the facts they advance to support this deprivation are described as follows:

> 7. The plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:
>
> (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
>
> (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
>
> (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;
>
> (d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;
>
> (e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

Section 7 of the Charter provides in English:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof [page449] except in accordance with the principles of fundamental justice.

and in French:

> 7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

5 Before turning to an examination of the appellants' allegations concerning the results of the decision to permit testing and its consequences on their rights under s. 7, I think it would be useful to examine the principles governing the striking out of a statement of claim and dismissal of a cause of action.

(a) Striking Out a Statement of Claim

6 The respondents, by a motion pursuant to Rule 419(1)(a) of the Federal Court Rules, moved for an order to strike out the appellants' statement of claim as disclosing no reasonable cause of action. Rule 419(1)(a) reads as follows:

> Rule 419.(1) The Court may at any stage of an action order any pleading to be struck out, with or without leave to amend, on the ground that
>
> (a) it discloses no reasonable cause of action or defence, as the case may be, ...

7 The most recent and authoritative statement of the principle applicable to determine when a statement of claim may be struck out is that of Estey J. in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308 (App. Div.)

8 Madame Justice Wilson in her reasons in the present case summarized the relevant principles as follows:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the [page450] question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed".

9 I agree with Madame Justice Wilson that, regardless of the basis upon which the appellants advance their claim for declaratory relief -- whether it be s. 24(1) of the Charter, s. 52 of the Constitution Act, 1982, or the common law -- they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the Charter.

10 In short then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian government has caused a violation or a threat of violation of their rights under the Charter.

(b) The Allegations of the Statement of Claim

11 The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict, and thus violates the right to life, liberty and security of the person guaranteed by s. 7 of the Charter.

12 As a preliminary matter, it should be noted that the exact nature of the deprivation of life and security of the person that the appellants rely upon as the legal foundation for the violation of s. 7 they allege is not clear. There seem to be two possibilities. The violation could be the result of actual deprivation of life and security of the person that would occur in the event of a nuclear attack on Canada, or it could be the result of general insecurity experienced by all people in Canada as a result of living under the increased threat of nuclear war.

13 The first possibility is apparent on a literal reading of the statement of claim. The second possibility, however, appears to be more consistent with the appellants' submission at p. 31 of their factum, that:

[page451]

> ... at the minimum, the above allegations show [in paragraph 7 of the statement of claim] that there is a "threat" to the life and security of the Appellants which "threat", depending upon the construction of the concept "infringe" or "deny" in Section 7 [sic], could arguably constitute an infringement of the person. The amendment to the Statement of Claim, rejected by the Court of Appeal, would have made the infringement or denial more explicit when it states: "The very testing of the cruise missile per se in Canada endangers the Charter of Rights and Freedoms Section 7:(sic) Rights".

14 I believe that we are obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.

15 Thus, I am prepared to accept that the appellants intended both of these possible deprivations as a basis for the violation of s. 7. It is apparent, however, that the violation of s. 7 alleged turns upon an actual increase in the risk of nuclear war, resulting from the federal cabinet's decision to permit the testing of the cruise missile. Thus, to succeed at trial, the appellants would have to demonstrate, inter alia, that the testing of the cruise missile would cause an increase in the risk of nuclear war. It is precisely this link between the Cabinet decision to permit the testing of the cruise and the increased risk of nuclear war which, in my opinion, they cannot establish. It will not be necessary therefore to address the issue of whether the deprivations of life and security of the person advanced by the appellants could constitute violations of s. 7.

16 As I have noted, both interpretations of the nature of the infringement of the appellants' rights are founded on the premise that if the Canadian government allows the United States government to test the cruise missile system in Canada, then there will be an increased risk of nuclear war. Such a claim can only be based on the assumption that the net result of all of the various foreign powers' reactions to the testing of the cruise missile in Canada will be an increased risk of nuclear war.

[page452]

17 The statement of claim speaks of weapons control agreements being "practically unenforceable", Canada being "more likely to be the target of a nuclear attack", "increasing the likelihood of either a pre-emptive strike or an accidental firing, or both", and "escalation of the nuclear arms race". All of these eventualities, culminating in the increased risk of nuclear war, are alleged to flow from the Canadian Government's single act of allowing the United States to test the cruise missile in Canada.

18 Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven.

19 An analysis of the specific allegations of the statement of claim reveals that they are all contingent upon the possible reactions of the nuclear powers to the testing of the cruise missile in Canada. The gist of paragraphs (a) and (b) of the statement of claim is that verification of the cruise missile system is impossible because the missile cannot be detected by surveillance satellites, and that, therefore, arms control agreements will be unenforceable. This is based on two major assumptions as to how foreign powers will react to the development of the cruise missile: first, that they will not develop new types of surveillance satellites or new methods of verification, and second, that foreign powers will not establish new modes of co-operation for dealing with the problem of enforcement. With respect to the latter of these points, it is just as plausible that lack of verification would have the effect of enhancing enforceability than of undermining it, since an inability on the part of nuclear powers to verify systems like the cruise could precipitate a system of enforcement [page453] based on co-operation rather than surveillance.

20 As for paragraph (c), even if it were the case that the testing of the air-launched cruise missile would result in an increased American military presence and interest in Canada, to say that this would make Canada more likely to be the target of a nuclear attack is to assume certain reactions of hostile foreign powers to such an increased American presence. It also makes an assumption about the degree to which Canada is already a possible target of nuclear attack. Given the impossibility of determining how an independent sovereign nation might react, it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other.

21 Paragraph (d) assumes that foreign states will not develop their technology in such a way as to meet the requirements of effective detection of the cruise and that there will therefore be an increased likelihood of pre-emptive strike or an accidental firing, or both. Again, this assumption concerns how foreign powers are likely to act in response to the development of the cruise. It would be just as plausible to argue that foreign states would improve their technology with respect to detection of missiles, thereby decreasing the likelihood of accidental firing or pre-emptive strike.

22 Finally, paragraph (e) asserts that the development of the cruise will lead to an escalation of the nuclear arms race. This again involves speculation based on assumptions as to how foreign powers will react. One could equally argue that the cruise would be the precipitating factor in compelling the nuclear powers to negotiate agreements that would lead to a de-escalation of the nuclear arms race.

23 One final assumption, common to all the paragraphs except (c), is that the result of testing of the cruise missile in Canada will be its development [page454] by the United States. In all of these paragraphs, the alleged harm flows from the production and eventual deployment of the cruise missile. The effect that the testing will have on the development and deployment of the cruise can only be a matter of speculation. It is possible that as a result of the tests, the Americans would decide not to develop and deploy the cruise since the very reason for the testing is to establish whether the missile is a viable weapons system. Similarly, it is possible that the Americans would develop the cruise missile even if testing were not permitted by the Canadians.

24 In the final analysis, exactly what the Americans will decide to do about development and deployment of the cruise missile, whether tested in Canada or not, is a decision that they, as an independent and sovereign nation, will make for themselves. Even with the assistance of qualified experts, a court could only speculate on how the American government may make this decision, and how important a factor the results of the testing of the cruise in Canada will be in that decision.

25 What can be concluded from this analysis of the statement of claim is that all of its allegations, including the ultimate assertion of an increased likelihood of nuclear war, are premised on assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of radical uncertainty, and continually changing circumstances, will react to the Canadian government's decision to permit the testing of the cruise missile.

26 The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact. In brief, it is simply not possible for a court, even with the best available evidence, to do more than speculate upon the likelihood of the federal cabinet's decision to test the cruise missile resulting in an increased threat of nuclear war.

[page455]

(c) The Rule that Facts in a Statement of Claim Must be Taken as Proven

27 We are not, in my opinion, required by the principle enunciated in Inuit Tapirisat, supra, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

II

The Cabinet's Decision to Permit the Testing of the Cruise Missile and the Application of the Charter of Rights and Freedoms

(a) Application of the Charter to Cabinet Decisions

28 I agree with Madame Justice Wilson that cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the Charter. Specifically, the cabinet has a duty to act in a manner consistent with the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

(b) The Absence of a Duty on the Government to Refrain from Allowing Testing

29 I do not believe the action impugned in the present case can be characterized as contrary to the duties of the executive under the Charter. Section 7 of the Charter cannot reasonably be read as imposing a duty on the government to refrain [page456] from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act.

30 The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.

31 The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, The Declaratory Judgment Action (1971), at p. 5:

> 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
>
> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings [page457] with the sole purpose of remedying only possible conflicts": (The Law of Declaratory Judgments (1978), at p. 179).

32 None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, Declaratory Judgments (2nd ed. 1941), at p. 27, states that,

> ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty...

33 Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in Solosky v. The Queen, [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In Solosky, supra, one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This Court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The Court made it clear, however, at p. 832:

> ... that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise.
>
> (Emphasis added)

34 A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, Injunctions and Specific [page458] Performance (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective, at pp. 30-31:

> All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered....
>
> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues quia timet -- because he fears -- and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The

court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

35 The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": (Sharpe, supra, at p. 31). In Redland Bricks Ltd. v. Morris, [1970] A.C. 652, at p. 665, per Lord Upjohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:

> 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

36 It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

37 In the present case, the speculative nature of the allegation that the decision to test the cruise missile will lead to an increased threat of nuclear war makes it manifest that no duty is imposed on the [page459] Canadian government to refrain from permitting the testing. The government's action simply could not be proven to cause the alleged violation of s. 7 of the Charter and, thus, no duty can arise.

III

Justiciability

38 The approach which I have taken is not based on the concept of justiciability. I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes. I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts. My concerns in the present case focus on the impossibility of the Court finding, on the basis of evidence, the connection, alleged by the appellants, between the duty of the government to act in accordance with the Charter of Rights and Freedoms and the violation of their rights under s. 7. As stated above, I do not believe the alleged violation -- namely, the increased threat of nuclear war -- could ever be sufficiently linked as a factual matter to the acknowledged duty of the government to respect s. 7 of the Charter.

IV

Section 52 of the Constitution Act, 1982 and Section 1 of the Charter

39 I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the Constitution Act, 1982 is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52. Equally, it is not necessary for the resolution of this case to express any [page460] opinion on the application of s. 1 of the Charter or the appropriate principles for its interpretation.

V

Conclusion

40 I would accordingly dismiss the appeal with costs.

The following are the reasons delivered by

WILSON J.

41 This litigation was sparked by the decision of the Canadian government to permit the United States to test the cruise missile in Canada. It raises issues of great difficulty and considerable importance to all of us.

1. The Facts

42 The appellants are a group of organizations and unions claiming to have a collective membership of more than 1.5 million Canadians. They allege that a decision made by the Canadian government on July 15, 1983 to allow the United States to test cruise missiles within Canada violates their constitutional rights as guaranteed by the Canadian Charter of Rights and Freedoms. More specifically, quoting from their statement of claim:

> 7. The Plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:
>
> (a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;
>
> (b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;
>
> (c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;
>
> [page461]
>
> (d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;
>
> (e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

43 The plaintiffs, in addition to declaratory relief, seek consequential relief in the nature of an injunction and damages. The defendants, by a motion pursuant to Rule 419(1) of the Federal Court Rules moved to strike out the plaintiffs' statement of claim and to dismiss it as disclosing no reasonable cause of action. Cattanach J. dismissed the defendants' motion to strike on the grounds that the Charter applied to the Government of Canada, including executive acts of the cabinet, and that the statement of claim contained "the germ of a cause of action" and raised a "justiciable issue". The Federal Court of Appeal unanimously allowed the defendants' appeal.

2. The Judgment Appealed From

44 Each of the five judges who sat on the appeal to the Federal Court of Appeal delivered separate reasons for allowing the appeal. Four of the five (Pratte, Le Dain, Marceau and Hugessen JJ.) held that a breach of s. 7 of the Charter must involve a failure to comply with the principles of fundamental justice and the appellants had not alleged any such failure.

45 Three of the justices (Pratte, Marceau and Hugessen JJ.) were of the opinion that the facts as alleged did not constitute a violation of the right to life, liberty and security of the person as guaranteed by s. 7. Pratte and Hugessen JJ. thought that any breach of s. 7 would only occur as the result of actions by foreign powers who were not bound by the Charter. Pratte J. went further and stated that the only "liberty and security of the person" that was protected by s. 7 was security against arbitrary [page462] arrest or detention. Marceau J. felt that s. 7 could never have "any higher mission than that of protecting the life and the freedom of movement of the citizens against arbitrary action and despotism by people in power".

46 Two of the justices (Ryan and Le Dain JJ.) would have allowed the appeal on the fundamental ground that the issue was inherently non-justiciable and therefore incapable of adjudication by a court. Ryan J. thought that the question whether national security was impaired, and hence whether the plaintiffs' own personal security had been affected, was not triable because it was not susceptible of proof. Le Dain J. took the central issue to be the effect of testing cruise missiles on the risk of nuclear conflict, a matter which he asserted to be non-justiciable as involving factors either inaccessible to a court or incapable of being evaluated by it. The other three judges did not directly address this point.

47 Marceau J. would have allowed the appeal on the additional ground that the Charter did not give the courts a power to interfere with an exercise of the royal prerogative, especially when issues of defence and national security were involved. However, a majority of the Court (Pratte, Le Dain and Ryan JJ.) was of the opinion that the Charter did apply to decisions taken in the exercise of the royal prerogative. Hugessen J. did not deal with this question.

48 None of the five judges was prepared to say that the cabinet's decision to test the cruise missile was unreviewable because it involved a "political question". Pratte and Marceau JJ. expressly rejected this argument, Le Dain and Hugessen JJ. did not consider it necessary to deal with it, and Ryan J. did not mention it.

3. The Issues

49 The issues to be addressed on the appeal to this Court may be conveniently summarized as follows:

[page463]

(1) Is a decision made by the government of Canada in relation to a matter of national defence and foreign affairs unreviewable on any of the following grounds:

  (a) it is an exercise of the royal prerogative;

  (b) it is, because of the nature of the factual questions involved, inherently non-justiciable;

  (c) it involves a "political question" of a kind that a court should not decide?

(2) Under what circumstances can a Statement of Claim seeking declaratory relief concerning the constitutionality of a law or governmental decision be struck out as disclosing no cause of action?

(3) Do the facts as alleged in the statement of claim,

which must be taken as proven, constitute a violation of

s. 7 of the Canadian Charter of Rights and Freedoms? and

(4) Do the plaintiffs have a right to amend the statement of claim before the filing of a statement of defence?

(1) Is the Government's Decision Reviewable?

(a) The Royal Prerogative

50 The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the Constitution Act, 1867 the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(a) the Charter applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", the Charter's application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercise of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued, the limiting phrase "within the authority of Parliament" would be deprived of any effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words "within the authority of the legislature [page464] of each province" in s. 32(1) (b), are merely a reference to the division of powers in ss. 91 and 92 of the Constitution Act, 1867. They describe the subject matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action. As Le Dain J. points out, the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also.

(b) Non-Justiciability

51 Le Dain and Ryan JJ. in the Federal Court of Appeal were of the opinion that the issues involved in this case are inherently non-justiciable, either because the question whether testing the cruise missile increases the risk of nuclear war is not susceptible of proof and hence is not triable (per Ryan J.) or because answering that question involves factors which are either inaccessible to a court or are of a nature which a court is incapable of evaluating (per Le Dain J.). To the extent that this objection to the appellants' case rests on the inherent evidentiary difficulties which would obviously confront any attempt to prove the appellants' allegations of fact, I do not think it can be sustained. It might well be that, if the issue were allowed to go to trial, the appellants would lose simply by reason of their not having been able to establish the factual basis of their claim but that does not seem to me to be a reason for striking the case out at this preliminary stage. It is trite law that on a motion to strike out a statement of claim the plaintiff's allegations of fact are to be taken as having been proved. Accordingly, it is arguable that by dealing with the case as they have done Le Dain and Ryan JJ. have, in effect, made a presumption against the appellants which they are not entitled, on a preliminary motion of this kind, to make.

[page465]

52 I am not convinced, however, that Le Dain and Ryan JJ. were restricting the concept of non-justiciability to difficulties of evidence and proof. Both rely on Lord Radcliffe's judgment in Chandler v. Director of Public Prosecutions, [1962] 3 All E.R. 142 (H.L.), and especially on the following passage at p. 151:

> The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interests. I may add that I can think of few issues which present themselves in less triable form. It would be ingenuous to suppose that the kind of evidence that the appellants wanted to call could make more than a small contribution to its final solution. The facts which they wished to establish might well be admitted: even so, throughout history men have had to run great risk for themselves and others in the hope of attaining objectives which they prize for all. The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends on an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.
>
> (Emphasis added.)

In my opinion, this passage makes clear that in Lord Radcliffe's view these kinds of issues are to be treated as non-justiciable not simply because of evidentiary difficulties but because they involve moral and political considerations which it is not within the province of the courts to assess. Le Dain J. maintains that the difficulty is one of judicial competence rather than anything resembling the American "political questions" doctrine. However, in response to that contention it can be pointed out that, however unsuited courts may be for the task, they are called upon all the time to decide questions [page466] of principle and policy. As Melville Weston points out in "Political Questions" 38 Harv. L. Rev. 296 (1925), at p. 299:

> The word "justiciable"... is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to a tribunal having an established procedure, with an orderly presentation of such evidence as is available, for the purpose of an adjudication

> from which practical consequences in human conduct are to follow. For example, when nations decline to submit to arbitration or to the compulsory jurisdiction of a proposed international tribunal those questions of honor or interest which they call "non-justiciable", they are really avoiding that broad sense of the word, but what they mean is a little less clear. Probably they mean only that they will not, or deem they ought not, endure the presentation of evidence on such questions, nor bind their conduct to conform to the proposed adjudications. So far as "non-justiciable" is for them more than an epithet, it expresses a sense of a lack of fitness, and not of any inherent impossibility, of submitting these questions to judicial or quasi-judicial determination.

53 In the 1950's and early 1960's there was considerable debate in Britain over the question whether restrictive trade practices legislation gave rise to questions which were subject to judicial determination: see Marshall, "Justiciability," in Oxford Essays in Jurisprudence (1961), ed. A.G. Guest; Summers, "Justiciability" (1963), 26 M.L.R. 530; Stevens "Justiciability: The Restrictive Practices Court Re-Examined", (1964) Public Law 221. I think it is fairly clear that the British restrictive trade practices legislation did not involve the courts in the resolution of issues more imponderable than those facing American courts administering the Sherman Act. Indeed, there is significantly less "policy" content in the decisions of the courts in those cases than there is in the decisions of administrative tribunals such as the Canadian Transport Commission or the CRTC. The real issue there, and perhaps also in the case at bar, is not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness [page467] of the use of judicial techniques for such purposes.

54 I cannot accept the proposition that difficulties of evidence or proof absolve the Court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must rather than on whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us. I will return to this question later.

(c) The Political Questions Doctrine

55 It is a well established principle of American constitutional law that there are certain kinds of "political questions" that a court ought to refuse to decide. In Baker v. Carr, 369 U.S. 186 (1962), at pp. 210-11, Brennan J. discussed the nature of the doctrine in the following terms:

> We have said that "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Coleman v. Miller, 307 U.S. 433, 454-455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

At p. 217 he said:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is [page468] found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

While one or two of the categories of political question referred to by Brennan J. raise the issue of judicial or institutional competence already referred to, the underlying theme is the separation of powers in the sense of the proper role of the courts vis-a-vis the other branches of government. In this regard it is perhaps noteworthy that a distinction is drawn in the American case law between matters internal to the United States on the one hand and foreign affairs on the other. In the area of foreign affairs the courts are especially deferential to the executive branch of government: see e.g. Atlee v. Laird, 347 F. Supp. 689 (1972) (U.S. Dist. Ct.), at pp. 701 ff.

56 While Brennan J.'s statement, in my view, accurately sums up the reasoning American courts have used in deciding that specific cases did not present questions which were judicially cognizable, I do not think it is particularly helpful in determining when American courts will find that those factors come into play. In cases from Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), to United States v. Nixon, 418 U.S. 683 (1974), the Court has not allowed the "respect due coordinate branches of government" to prevent it from rendering decisions highly embarrassing to those holding executive or legislative office. In Baker v. Carr itself, supra, Frankfurter J., in dissent, expressed concern that the judiciary could not find manageable standards for the problems presented by the reapportionment of political districts. Indeed, some would say that the enforcement of the desegregation decision in Brown v. Board of Education of [page469] Topeka, 347 U.S. 483 (1954), gave rise to similar problems of judicial unmanageability. Yet American courts have ventured into these areas undeterred.

57 Academic commentators have expended considerable effort trying to identify when the political questions doctrine should apply. Although there are many theories (perhaps best summarized by Professor Scharpf in his article "Judicial Review and the Political Question: A Functional Analysis," 75 Yale L.J. 517 (1966)), I think it is fair to say that they break down along two broad lines. The first, championed by scholars such as Weston "Political Questions", supra, and Wechsler, Principles, Politics, and Fundamental Law (1961); Wechsler, Book Review, 75 Yale L.J. 672 (1966), define political questions principally in terms of the separation of powers as set out in the Constitution and turn to the Constitution itself for the answer to the question when the Courts should stay their hand. The second school, represented by Finkelstein "Judicial Self-Limitation", 37 Harv. L.R. 338 (1924), and Bickel, The Least Dangerous Branch (1962), especially chapter 4, "The Passive Virtues," roots the political questions doctrine in what seems to me to be a rather vague concept of judicial "prudence" whereby the courts enter into a calculation concerning the political wisdom of intervention in sensitive areas. More recently, commentators such as Tigar, "Judicial Power, the Political Question Doctrine, and Foreign Relations", 17 U.C.L.A. L.R. 1135 (1970), and Henkin, "Is There a Political Question Doctrine?", 85 Yale L.J. 597 (1976), have doubted the need for a political questions doctrine at all, arguing that all the cases which were correctly decided can be accounted for in terms of orthodox separation of powers doctrine.

58 Professor Tigar in his article suggests that the political questions doctrine is not really a doctrine at all but simply "a group of quite different legal rules and principles, each resting in part upon deference to the political branches of government" (p. 1163). He sees Justice Brennan's formulation [page470] of the doctrine in Baker v. Carr, supra, as an "unsatisfactory effort to rationalize a collection of disparate precedent" (p. 1163).

59 In the House of Lords in Chandler, supra, Lord Devlin expressed a similar reluctance to retreat from traditional techniques in the interpretation of the phrase "purpose prejudicial to the safety or interests of the state..." in the Official Secrets Act, 1911. His colleagues, in particular Lord Radcliffe and Lord Reid, seem to have been of the view that in matters of defence the Crown's opinion as to what was prejudicial to the safety or interests of the State was conclusive upon the courts. Lord Devlin agreed with the result reached by his colleagues on the facts before him, and with the observation of Lord Parker on the Court of Criminal Appeal ([1962] 2 All E.R. 314, at pp. 319-20) that "the manner of the exercise of... [the Crown's] prerogative powers [over the disposition and armament of the military] cannot be inquired into by the courts, whether in a civil or a criminal case..." ([1962] 3 All E.R. 142 at p. 157) but went on to make three observations in clarification of his position.

60 Lord Devlin's first observation was that the principle that the substance of discretionary decisions is not reviewable in the courts is one basic to administrative law and is not confined to matters of defence or the exercise of the prerogative. The second point was that even though review on the merits of a discretionary decision was excluded, that did not mean that judicial review was excluded entirely. The third comment was that the nature and effect of the principle of judicial review is "[to limit] the issue which the court has to determine..." ([1962] 3 All E.R. 142, at p. 158).

61 Lord Devlin then proceeded to apply these propositions to the case before him and asked what it was that the jury was required to determine. In his view "the fact to be proved is the existence of a purpose prejudicial to the state -- not a purpose which "appears to the Crown" to be prejudicial to [page471] the state" ([1962] 3 All E.R. 142, at p. 158). He accordingly went on to conclude at p. 159:

> Consequently, the Crown's opinion as to what is or is not prejudicial in this case is just as inadmissible as the appellants'. The Crown's evidence about what its interests are is an entirely different matter. They can be proved by an officer of the Crown wherever it may be necessary to do so. In a case like the present, it may be presumed that it is contrary to the interests of the Crown to have one of its airfields immobilised just as it may be presumed that it is contrary to the interests of an industrialist to have his factory immobilised. The thing speaks for itself, as the Attorney-General submitted. But the presumption is not irrebuttable. Men can exaggerate the extent of their interests and so can the Crown. The servants of the Crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative. But in the present case there is nothing at all to suggest that the Crown's interest in the proper operation of its airfields is not what it may naturally be presumed to be or that it was exaggerating the perils of interference with their effectiveness.
>
> (Emphasis added.)

62 It seems to me that the point being made by Lord Devlin, as well as by Tigar and Henkin in their writings, is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.

63 It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the Constitution [page472] Act, 1867 and that the federal executive has the powers conferred upon it in ss. 9 - 15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the Charter, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question": see Martin H. Redish "Abstention, Separation of Powers, and the Limits of the Judicial Function," 94 Yale L.J. 71 (1984).

64 I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so.

65 One or two hypothetical situations will, I believe, illustrate the point. Let us take the case of [page473] a person who is being conscripted for service during wartime and has been ordered into battle overseas, all of this pursuant to appropriate legislative and executive authorization. He wishes to challenge his being conscripted and sent overseas as an infringement of his rights under s. 7. It is apparent that his liberty has been constrained and, if he is sent into battle, his security of the person and, indeed, his life are put in jeopardy. It seems to me that it would afford the conscriptee a somewhat illusory protection if the validity of his challenge is to be determined by the executive. On the other hand, it does not follow from these facts that the individual's rights under the Charter have been violated. Even if an individual's rights to life and liberty under s. 7 are interpreted at their broadest, it is clear from s. 1 that they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If the Court were of the opinion that conscription during wartime was a "reasonable limit" within the meaning of s. 1, a conscriptee's challenge on the facts as presented would necessarily fail.

66 By way of contrast, one can envisage a situation in which the government decided to force a particular group to participate in experimental testing of a deadly nerve gas. Although the government might argue that such experiments were an important part of our defence effort, I find it hard to believe that they would survive judicial review under the Charter. Equally we could imagine a situation during wartime in which the army began to seize people for military service without appropriate enabling legislation having been passed by Parliament. Such "press gang" tactics would, one might expect, be subject to judicial review even if the executive thought they were justified for the prosecution of the war.

67 Returning then to the present case, it seems to me that the legislature has assigned to the courts as a constitutional responsibility the task of determining whether or not a decision to permit the testing of cruise missiles violates the appellants' rights under the Charter. The preceding illustrations indicate why the legislature has done so. It is [page474] therefore, in my view, not only appropriate that we decide the matter; it is our constitutional obligation to do so.

(2) In What Circumstances May a Statement of Claim Seeking Declaratory Relief Be Struck Out?

68 In order to put this issue in context it is necessary to review the procedural history of the case.

69 On July 20, 1983 the appellants filed a statement of claim seeking a declaration that their constitutional rights had been violated and consequential relief in the form of an injunction, damages and costs. The respondents moved on August 11, 1983 under Rule 419(1) of the Federal Court Rules to strike out the statement of claim primarily on the ground that it disclosed no reasonable cause of action. The statement was also alleged to be frivolous and vexatious and an abuse of the process of the Court. Cattanach J. denied the motion on September 15, 1983. He noted the requirement under Rule 408 that a statement of claim contain a precise statement of the material facts upon which the plaintiff relies and must stand or fall on the allegations of fact. He said that a statement of claim would not be struck out if the facts alleged were capable of constituting "the scintilla of a cause of action". He noted that by virtue of s. 32(1)(a) the Charter applies to the Parliament and government of Canada and by virtue of s. 24(1) the Court has jurisdiction to administer and provide appropriate remedies. He concluded that the statement of claim contained sufficient allegations to raise a justiciable issue and analogised the alleged liability of the respondents to liability for extra-hazardous activities contemplated by the rule in Rylands v. Fletcher, [1861-73] All E.R. 1 (H.L.). He concluded that there was a "germ of a cause of action" disclosed in the statement of claim.

70 On September 19, 1983 the respondents appealed to the Federal Court of Appeal. On October 7, 1983 the appellants sought leave from the Court of Appeal to amend their statement of [page475] claim under Rule 1104 to include an allegation that the testing of the cruise missile in Canada per se violated the appellants' rights under s. 7 of the Charter. Pratte J. dismissed the application without reasons on October 11, 1983. The Federal Court of Appeal heard the case on November 28, 1983 and allowed the respondents' appeal for the reasons outlined earlier.

71 The appeal to this Court was heard on February 14 and 15, 1984. On March 6, 1984 the appellants applied to

Muldoon J. for an injunction under Rule 469 of the Federal Court Rules to prevent testing until the case was decided. Muldoon J. concluded that until this Court decreed differently the law applicable to the matter was that the appellants' claim was non-justiciable. He held that in order to get an interlocutory injunction "cogent" evidence of a violation of a right had to be presented. The evidence presented was speculative only and could not establish a "real and proximate jeopardy" to the appellants' rights. There was nothing therefore to support the issue of an injunction.

72 The procedural issue before the Court then is: did the appellants' statement of claim disclose a reasonable cause of action within the meaning of Rule 419 of the Federal Court Rules?

(a) The Applicable Principle

73 Estey J. stated the applicable principle in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308 (App. Div.)

74 In Shawn v. Robertson (1964), 46 D.L.R. (2d) 363, a declaration was sought against a ministerial exercise of discretion. An application for striking out on the basis of no reasonable cause of action [page476] was made under the Ontario Rules. Grant J. stated, at p. 365:

> The principles to be applied by the Court in determining whether to exercise jurisdiction conferred by Rule 126 or not are set out in the following cases; in Ross v. Scottish Union & National Insurance Co. (1920), 53 D.L.R. 415 at pp. 421-2, 47 O.L.R. 308 at p. 316, Magee, J.A., states:
>
> > That inherent jurisdiction is partly embodied in our Rule 124 (now R. 126).... The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.
>
> And at p. 423 D.L.R., p. 317 O.L.R.: "To justify the use of Rule 124... it is not sufficient that the plaintiff is not likely to succeed at the trial."
>
> In Gilbert Surgical Supply Co. and Gilbert v. Frank W. Horner Ltd., 34 C.P.R. 17, [1960] O.W.N. 289, 19 Fox Pat. C. 209, Aylesworth, J.A., speaking for himself, Porter C.J.O., and LeBel, J.A., states as follows at p. 289 O.W.N.:
>
> > He said that the action was novel and he could not agree that the defendant had shown the case to be one within the Rule. At this stage of litigation the Court could not conclude that the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown.

75 A case analogous to the present case, not in the nature of the issues involved but in the novelty of the alleged cause of action and the absence of precedent, is McKay v. Essex Area Health Authority, [1982] 2 All E.R. 771. In that case a pregnant mother contracted German measles in the early months of her pregnancy. Her doctor took blood samples from her which were tested by the defendant Health Authority but the infection was not diagnosed and the child was born severely disabled. The mother and child sued the doctor and the Health Authority for negligence, the child claiming damages for her "entry into a life in which her injuries are highly debilitating". The Master struck out the child's claim on the basis it disclosed no reasonable cause of action. His order [page477] was set aside on appeal, the judge holding that the defendants owed a duty of care to the child and her real claim was not that she had suffered damage by reason of "wrongful entry into life" but by reason of having been born deformed. This gave rise to a reasonable cause of action. An appeal to the Court of Appeal was allowed and the order of the Master striking out the claim restored.

76 Stephenson L.J. had to struggle with the question whether a child had a right not to be born deformed which in the case of a child deformed or disabled before birth by disease meant a right to be aborted. Counsel for the child submitted that this could not be viewed as a plain and obvious case susceptible of only one result, nor could it be viewed as frivolous or vexatious; although it might be novel, it raised issues of real substance which ought to go to trial. His Lordship disagreed. He said at p. 778:

> Here the court is considering not "ancient law" but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at a trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendants' application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding.
>
> (Emphasis added.)

77 It would seem then that as a general principle the courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs.

78 It has been suggested, however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence: see McGhee v. National Coal Board, [1972] 3 All E.R. 1008 (H.L.). Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. For example, in Fleming v. Hislop (1886), 11 A.C. 686, it was necessary to determine whether or not the finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' land would cause material discomfort and annoyance to the pursuers," was a finding of fact or a finding of law. It was argued that it could not be a finding of fact because it related to something that was "prospective, future, not actually in existence". The Earl of Selborne agreed that, since the thing had not actually happened, a finding of fact as a thing past was impossible. But it was nevertheless a finding of fact and "there is a fallacy in saying that, because the word "would" is a word of futurity, the words "would cause" do not mean something which is properly a fact" (p. 690). See also on causation as an issue of fact: Alphacell Ltd [page479] v. Woodward, [1972] 2 All E.R. 475 per Lord Salmon, at pp. 489-90:

> The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

79 In my view, several of the allegations contained in the statement of claim are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts or by expert testimony or "through the application of common sense principles": see Leyland Shipping Co. v. Norwich Union Fire Insurance Society, [1918] A.C. 350, at p. 363, per Lord Dunedin. We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage to prejudge that question. I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

(b) Declaratory Relief

80 This may be an appropriate point at which to consider the appellants' submission that in order to establish a reasonable cause of action in relation to their claim for declaratory relief as opposed to their claim for an injunction and damages, they do not have to allege in their statement of claim the violation of a right or the threat of a violation of a right. It is sufficient, they submit, that the plaintiff have standing, that a "serious constitutional issue" is raised, and that the declaration sought serves a useful purpose. In support of this contention the appellants rely on Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575, and Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138. Thorson involved an alleged excess of legislative [page480] power by the Parliament of Canada as did the later case of Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265. Given the nature of such questions it is undoubtedly true that no violation of a right need necessarily be involved.

81 Borchard, Declaratory Judgments (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

> ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant....

Borchard then goes to expand upon the concept of a "legal interest" at pp. 48-49:

> It is an essential condition of the right to invoke judicial relief that the plaintiff have a protectible interest. The fact that under declaratory procedure so many types of legal issues are presentable for determination which are incapable of any other form of relief, has imposed upon the courts at the outset the function of determining whether the facts justify the grant of judicial relief, and more particularly, whether the plaintiff has a "legal interest" in the relief he seeks. In the more familiar executory action, the legal interest is sought in the "cause of action," but, as already observed, the narrow scope often given to this ambiguous term has served to conceal from view the many occasions and situations in which a plaintiff not yet physically injured or one seeking escape from dilemma and uncertainty by a clarification of his legal position has need for judicial relief not of the traditional kind. The wider opportunity and necessity for judicial usefulness disclosed by the declaratory judgment make necessary either a more flexible and comprehensive connotation of the term "cause of action" or the employment of a less chameleonic term to indicate when the petitioner may be accorded judicial protection. Without losing sight of the necessity for jurisdictional facts, it is suggested that the term "legal interest" meets the need.

[page481]

82 Where, however, the unconstitutionality of a law or an act is founded upon its conflict with a right, then the right must be alleged to have been violated. Such was the case in Borowski where a declaration was being sought to the effect that the abortion provisions in the Criminal Code contravened the right to life guaranteed by s. 1(a) of the Canadian Bill of Rights R.S.C. 1970, Appendix III. It was alleged in Borowski that rights were being violated even although they were the rights of human foetuses and not the rights of the plaintiff. It seems to me that whenever a litigant raises a "serious constitutional issue" involving a violation of the Charter or the Canadian Bill of Rights then, since what is being complained of is an alleged violation of a right, it follows almost by definition that the nature of the alleged violation must be asserted. Moreover, as the respondents point out, s. 24(1) of the Charter makes the infringement or denial of a right a pre-condition to obtaining relief in the courts under that section. That being so, it seems to follow that the infringement or denial complained of must be specifically pleaded.

83 The appellants submit, however, that while their consequential relief in the form of an injunction and damages is made pursuant to s. 24(1) of the Charter, their claim for declaratory relief is at large. It is not sought pursuant to that section in paragraph 9(c) of their statement of claim which merely seeks a declaration of unconstitutionality. It is, they submit, a separate cause of action at common law and also under s. 52 of the Constitution Act, 1982 and can stand alone even if they fail in their claim for consequential relief under s. 24(1). They cite Rule 1723 of the Federal Court Rules which provides:

> Rule 1723. No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

84 The appellants acknowledge that a declaration of unconstitutionality is a discretionary remedy (Solosky v. The Queen, [1980] 1 S.C.R. 821) but [page482] say that the discretion lies with the trial court and is exercisable only after a trial on the merits. Accordingly, their claim for this relief should not have been struck out at the preliminary stage regardless of the fate of their other claims. However, as the respondents point out, declaratory relief is only discretionary in the sense that a court may refuse it even if the case for it has been made out: see Zamir, The Declaratory Judgment (1962), at p. 193. The court, therefore, on a motion to strike on the basis that no reasonable cause of action has been disclosed in the statement of claim is not in any sense usurping the discretionary power of the trial court.

(i) Inconsistency with the Constitution Act, 1982, s. 52(1)

85 Section 52(1) of the Constitution Act, 1982 provides:

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

86 Section 52 would appear to have the same role in terms of imposing a constitutional limitation on law-making power in Canada as its predecessors, s. 2 of the Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 and s. 7 of the Statute of Westminster, 1931, 22 Geo. 5, c. 4 (R.S.C. 1970, Appendix II, no. 26): see La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 Can. Bar Rev., 19, at p. 28. Section 2 of the Colonial Laws Validity Act 1865 provides:

> 2. Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Section 7 of the Statute of Westminster, 1931 provides:

[page483]

> 7.(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
>
> (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.
>
> (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

Accordingly, Dickson C.J.C. is unquestionably correct when he states in The Queen v. Big M Drug Mart Ltd. [1985], 1 S.C.R. 295 at p. 313:

> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme.

The Chief Justice then goes on to note that where a declaration is sought under s. 52 to the effect that legislation is unconstitutional the standing requirements for constitutional litigation must of course be met.

87 If the appellants are relying on s. 52(1) of the Constitution Act, 1982 as the source of their right to a declaration of unconstitutionality, which it would appear from their factum that they are, it is noted that that provision is directed to "laws" which are inconsistent with the provisions of the Constitution.

88 Counsel for the appellants submitted in oral argument that they should not be prejudiced in the relief sought by the absence of any law authorizing, ratifying or implementing the agreement between Canada and the United States since legislation, they submitted, should have been passed. The government should not therefore be allowed to immunize itself against judicial review under s. 52 of the Constitution Act, 1982 by its own omission to do that which it ought to have done.

89 This argument assumes, of course, that legislation was required and this does not appear to be so. [page484] The law in relation to treaty-making power was definitively established for Canada and the rest of the Commonwealth in Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions), [1937] A.C. 326 where Lord Atkin stated at pp. 347-48:

> It will be essential to keep in mind the distinction between (1) the formation, and (2) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.
>
> (Emphasis added.)

90 A treaty, therefore, may be in full force and effect internationally without any legislative implementation and, absent such legislative implementation, it does not form part of the domestic law of Canada. Legislation is only required if some alteration in the domestic law is needed for its implementation: see R. St J. Macdonald: "The Relationship between International Law and Domestic Law in Canada," in Canadian Perspectives on International Law and Organization (1974), eds. Macdonald, Morris and Johnston, p. 88.

[page485]

91 The agreement in this case took the form of an "exchange of notes" between Allan Gotlieb, Canadian Ambassador to the United States and Kenneth W. Dam, Acting Secretary of State, The United States State Department. As Mr. Gotlieb points out in an article entitled "Canadian Treaty-Making: Informal Agreements and Interdepartmental Arrangements," in Canadian Perspectives on International Law and Organization, supra, at p. 230, Canadian treaty-making practice has been characterized by a movement away from formal, full-fledged governmental "treaties" and towards informal "exchange of notes" arrangements. There is nothing unusual, therefore, in the procedure adopted in relation to the cruise testing agreement.

92 Although little, if any, argument has been addressed in this case to the question whether the government's decision to permit testing of the cruise missile in Canada falls within the meaning of the word "law" as used in s. 52 of the Constitution Act, 1982, I am prepared to assume, without deciding, that it does. I am also prepared to assume that the appellants could establish their standing to bring an action under s. 52. The question remains, however, whether the appellants' claim raises a serious question of constitutional inconsistency. This in turn depends on the answer to the question whether the government's decision violates the appellants' rights under s. 7. If it does not, there is no inconsistency with the provisions of the Constitution.

(ii) At common law

93 If the appellants' claim for declaratory relief is a claim at common law of the type upheld in Dyson v. Attorney-

General, [1911] 1 K.B. 410, no issue arises as to whether or not there is a "law" implementing the cruise testing agreement. The common law action affords a means of attack on the acts of public officials who have allegedly exceeded their powers. However, in order to have standing to bring such an action a plaintiff must, as noted from Borchard, supra, be able to show that he or she will suffer injury to a right or legally protected interest from the conduct of such officials. [page486] The same point is made in de Smith, Constitutional and Administrative Law (4th ed.), at p. 604:

> The declaratory judgment is basically a twentieth-century judicial remedy and has come to be used for a great variety of purposes in public and private law. Declarations can be awarded in almost every situation where an injunction will lie -- the most important exception is that interim relief cannot be granted by way of a declaration -- and they extend to a number of situations where an injunction would be inappropriate (for example, because there is nothing to prohibit) or could not be obtained for other reasons (for example, because the prospective defendant was the Crown). The rules governing locus standi are in a state of confusion. In Gouriet v. Union of Post Office Workers [[1977] 3 All E.R. 70 (H.L.)] Mr. Gouriet eventually amended his claim to an application for a declaration that the Union of Post Office Workers was acting unlawfully in blocking mail from this country to South Africa. He was refused such a declaration. Lord Wilberforce said: "... there is no support for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and defendant concerning their legal respective rights and liabilities, either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him, or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff."
>
> (Emphasis added.)

I believe, therefore, that the appellants, even on the common law action for a declaration, must establish at least a threat of violation, if not an actual violation, of their rights under s. 7 of the Charter in order to bring a viable claim for declaratory relief against governmental action.

94 The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (Drummond-Jackson v. British Medical Association, [1970] All E.R. 1094) or, [page487] as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.) at p. 138, is it "plain and obvious that the action cannot succeed?" Is it plain and obvious that the plaintiffs' claim for declaratory or consequential relief cannot succeed?

(3) Could the Facts as Alleged Constitute a Violation of Section 7 of the Charter?

95 Section 7 of the Canadian Charter of Rights and Freedoms provides as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

96 Whether or not the facts that are alleged in the appellants' statement of claim could constitute a violation of s. 7 is, of course, the question that lies at the heart of this case. If they could not, then the appellants' statement of claim discloses no reasonable cause of action and the appeal must be dismissed. The appellants submit that on its proper construction s. 7 gives rise to two separate and presumably independent rights, namely the right to life, liberty and security of the person, and the right not to be deprived of such life, liberty and security of the person except in accordance with the principles of fundamental justice. In their submission, therefore, a violation of the principles of fundamental justice would only have to be alleged in relation to a claim based on a violation of the second right. As Marceau J. points out in his reasons, the French text of s. 7 does not seem to admit of this two-rights interpretation since only one right is specifically mentioned. Moreover, as the respondents point out, the appellants' suggestion does not accord with the interpretation that the courts have placed on the similarly structured provision in s. 1(a) of the Canadian Bill of Rights: see e.g. Miller v. The Queen, [1977] 2 S.C.R. 680, per Ritchie J., at pp. 703-04.

97 The appellants' submission, however, touches upon a number of important issues regarding the proper interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be [page488] deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of interpretation arising under the Charter but I do not think it is necessary to deal with them in this case. It can, in my opinion, be disposed of without reaching these issues.

98 In my view, even an independent, substantive right to life, liberty and security of the person cannot be absolute. For example, the right to liberty, which I take to be the right to pursue one's goals free of governmental constraint, must accommodate the corresponding rights of others. The concept of "right" as used in the Charter postulates the inter-relation of individuals in society all of whom have the same right. The aphorism that "A hermit has no need of rights" makes the point. The concept of "right" also premises the existence of someone or some group against whom the right may be asserted. As Mortimer J. Adler expressed it in Six Great Ideas (1981), at p. 144:

> Living in organized societies under effective government and enforceable laws, as they must in order to survive and prosper, human beings neither have autonomy nor are they entitled to unlimited liberty of action. Autonomy is incompatible with organized society. Unlimited liberty is destructive of it.

99 The concept of "right" as used in the Charter must also, I believe, recognize and take account of the political reality of the modern state. Action by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens. It may be argued, for example, that the failure of government to limit significantly the speed of traffic [page489] on the highways threatens our right to life and security in that it increases the risk of highway accidents. Such conduct, however, would not, in my view, fall within the scope of the right protected by s. 7 of the Charter.

100 In the same way, the concept of "right" as used in the Charter must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state's citizens. Such steps, it seems to me, cannot have been contemplated by the draftsman of the Charter as giving rise to violations of s. 7. As John Rawls states in A Theory of Justice (1971), at p. 213:

> The government's right to maintain public order and security is... a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them.

101 The rights under the Charter not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s. 1. As was pointed out by the Ontario Court of Appeal in Re Federal Republic of Germany and Rauca (1983), 41 O.R. (2d) 225, at p. 294:

> ... the Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws....

There is no liberty without law and there is no law without some restriction of liberty: see Dworkin, Taking Rights Seriously (1977), p. 267. This paradox caused Roscoe Pound to conclude:

> There is no more ambiguous word in legal and juristic literature than the word right. In its most general sense [page490] it means a reasonable expectation involved in civilized life. [See Jurisprudence, vol. 4, (1959), p. 56.]

102 It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.

103 I agree with Le Dain J. that the essence of the appellants' case is the claim that permitting the cruise missile to be tested in Canada will increase the risk of nuclear war. But even accepting this allegation of fact as true, which as I have already said I think we must do on a motion to strike, it is my opinion for the reasons given above that this state of affairs could not constitute a breach of s. 7. Moreover, I do not see how one can distinguish in a principled way between this particular risk and any other danger to which the government's action vis-à-vis other states might incidentally subject its citizens. A declaration of war, for example, almost certainly increases the risk to most citizens of death or injury. Acceptance of the appellants' submissions, it seems to me, would mean that any such declaration would also have to be regarded as a violation of s. 7. I cannot think that that could be a proper interpretation of the Charter.

104 This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s. 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace -- as, for example, if it were being tested with live warheads -- I think that might well raise different [page491] considerations. A court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under s. 1 of the Charter. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.

(4) Can the Statement of Claim be Amended?

105 The appellants were denied leave by Pratte J. to amend their statement of claim by adding the following:

> The very testing of the cruise missiles per se in Canada endangers the Charter of Rights and Freedoms Section 7: Rights.

106 Since this is a conclusion of law, not fact, it cannot in my view affect the factual allegations which the Court must accept as proved in order to decide whether the statement of claim should be struck out. We do not know the basis on which Pratte J. refused the amendment. He gave no reasons, nor was he obliged to. The matter was purely discretionary under Rule 1104. Certainly conclusions of law may be pleaded: see Famous Players Canadian Corporation Ltd. v. J.J. Turner and Sons Ltd. [1948] O.W.N. 221, per Gale J. at pp. 221-22 but they do not form part of the factual allegations which must be taken as proved for [page492] purposes of a motion to strike. No appeal was taken from the order of Pratte J.

107 Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421 and that they should not be prejudiced with respect to this right because they invoked the discretion of the court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.

108 The point, however, may be academic. The proposed amendment amounts to no more than an assertion of the conclusion which the appellants submit the Court ought to come to on the main issue in the case. Since the Court must address that issue in any event, the addition of the suggested amendment could, it seems to me, make no difference one way or the other to the appellants' case.

Conclusions

109 In summary, it seems to me that the issues raised on the appeal are to be disposed of as follows:

(1) The government's decision to permit testing of the cruise missile in Canada cannot escape judicial review on any of the grounds advanced;

(2) The statement of claim may be struck out if the facts as alleged do not disclose a reasonable cause of action which in this case could be either

(a) a cause of action under s. 24(1) of the Charter; or

(b) a cause of action for declaratory relief at common law on the principle of Dyson v. Attorney-General, supra; or

(c) a cause of action under s. 52(1) of the Constitution Act, 1982 for a declaration of unconstitutionality.

(3) Taking the facts alleged as proven, they could not constitute a violation of s. 7 of the Charter so as to give rise to a cause of action under s. 24(1);

(4) The appellants could not establish their status to sue at common law for declaratory relief for the same reason that they could not establish a cause of action under s. 24(1); and

(5) The appellants could not establish a cause of action for declaratory relief under s. 52(1) since the facts as alleged could not constitute a violation of s. 7 and therefore no inconsistency with the provisions of the Constitution could be established.

110 I would accordingly dismiss the appeal with costs.
Appeal dismissed with costs.

* * * * *

Errata, published at [1986] 1 S.C.R., page iv
[1985] 1 S.C.R. p. 459, line h-3 of the English version. Read "Constitution Act, 1982" instead of "Charter".

R.D. Belanger & Associates Ltd., Belanger, Buttcon Ltd.,Butt, Crashley, Leitch, Scepter Manufacturing Co. and Larue v.Stadium Corp. of Ontario Ltd. and Bitove Corp.Indexed as: R.D. Belanger & Associates Ltd. v. Stadium Corp.of Ontario Ltd.(C.A.), 5 O.R. (3d) 778

Ontario Reports

ONTARIO

Court of Appeal for Ontario

Finlayson, Catzman and Galligan JJ.A.

November 6, 1991

Action No. 303/91

5 O.R. (3d) 778 | [1991] O.J. No. 1962

Case Summary

Civil procedure — Commencement of proceedings — Statement of claim — Striking out statement of claim — Test to be applied whether it was plain and obvious that claim disclosed no reasonable cause of action — Rules of Civil Procedure, O. Reg. 560/84, rule 21.01.

The plaintiffs sued the defendants both in contract (seeking a declaration that a provision in a licence agreement that food and beverage services be provided at "cost" meant reasonable cost) and in tort (claiming that the defendants conspired amongst themselves with the object of injuring the economic or business interests of the plaintiffs and that the defendants conspired amongst themselves to further their own objects by unlawful means). The defendants moved under rule 21.01(1)(a) and (b) of the Rules of Civil Procedure, seeking the determination of certain questions of law and the dismissal of the action. The action was dismissed and the plaintiffs appealed.

Held, the appeal should be allowed.

The test to be applied on motions of this kind was whether it was plain and obvious that the claim disclosed no reasonable cause of action. The appellate court was under no obligation to decide each and every question of law posed by the defendants; it merely had to decide whether the motions judge was correct in his decision to dismiss the action. This case should be decided under rule 21.01(1)(b), which requires that the court decide whether the statement of claim, when read as a whole, fails to disclose any reasonable cause of action. Although portions of the statement of claim could well be struck out as frivolous or vexatious, the basic contractual and tortious reliefs sought were supportable. Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this stage of the proceedings.

Hunt v. Carey Canada Ltd., [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, [1990] 6 W.W.R. 385, apld

Other cases referred to

Nelles v. Ontario, [1989] 2 S.C.R. 170, 69 O.R. (2d) 448 (note), 42 C.R.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161

Statutes referred to

Competition Act, R.S.C. 1985, c. C-34, Part VI, ss. 36 [am. R.S.C. 1985, c. 1 (4th Supp.), s. 11], 45 [am. R.S.C. 1985, c. 19 (2nd Supp.), s. 30]

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rules 21.01, 21.01(1) (a), (b), 25.11

Authorities referred to

Fridman, G.H.L., The Law of Torts in Canada (Toronto: Carswell, 1990), vol. 2, pp. 265-66

APPEAL from an order of the General Division, Hoilett J., June 3, 1991, dismissing the appellants' action.
W.L.N. Somerville, Q.C., and R.S. Russell, for appellants/ respondents.

Alan H. Mark and David A. Shiller, for the Bitove Corporation, respondent/applicant.

John A. Campion and Stephanie Brown, for Stadium Corp. of Ontario Ltd., respondent/applicant.

The judgment of the court was delivered by

FINLAYSON J.A. (orally)

FINLAYSON J.A. (orally):— This is an appeal from that part of the order of the Honourable Mr. Justice Hoilett, dated June 3, 1991, in which he dismissed the appellants' action with costs fixed at $12,000.

The corporate appellants are licensees under licence agreements with the respondent, Stadium Corporation of Ontario Limited (Stadco). The individual appellants are officers of the appellant corporations. The licence agreements are for what are called skybox suites at the Skydome Stadium in Toronto. A dispute has arisen as to the cost of food and beverage services supplied to the suites, for which the licensees are obliged under the licence agreements to pay to Stadco or to the caterer designated by it, the respondent, the Bitove Corporation (Bitove). We are asked here to consider if Hoilett J., on a motion under rule 21.01 of the Rules of Civil Procedure, O. Reg. 560/84, was correct in dismissing the appellants' action.

Stripped to its essentials, the statement of claim alleges a cause of action in contract and separate causes of action in tort. The cause of action in contract relates to the contention that the provision in the licence agreement that food and beverage services are to be supplied at "cost" means that they are to be supplied at a reasonable cost or, alternatively, that it is an implied term of the licence agreement that the food and beverages are to be supplied at a reasonable price. Declarations are sought to this effect. It is pleaded that the prices charged for the supply of unprocessed food and beverages amounted to a multiple of several times the cost of these items to the respondents. Additionally, it is alleged that Stadco unilaterally added an automatic 15 per cent service charge to these prices. Whether these allegations are factual or not can only be established at trial.

The statement of claim also alleges two torts of common law conspiracy, one, that the respondents have conspired, combined, agreed or arranged amongst themselves with the object of injuring the economic or business interests of the appellants, and the other, that they have conspired, combined, agreed or arranged amongst themselves to further their own objects by unlawful means.

Sufficient particulars, which if proved would establish both causes of action, are set out. The court heard extensive argument as to the sufficiency of these particulars in law, but in the light of the decision of the Supreme Court of Canada in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, we do not think it is necessary to go into them. In affirming that the test to be applied on motions of this kind was whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt", Wilson J., in delivering the judgment of the court, stated at p. 980 S.C.R., p. 336 D.L.R.:

> Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).
> The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

Later, in commenting on a passage on the law of conspiracy quoted from vol. 2, pp. 265-66 of G.H.L. Fridman, The Law of Torts in Canada (Toronto: Carswell, 1990), Wilson J. stated at p. 986 S.C.R., p. 340 D.L.R.:

> In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

Counsel for both Stadco and Bitove sought to distinguish Hunt v. Carey on the basis that it was determined under the British Columbia equivalent of Ontario rule 21.01(1)(b), whereas they maintained they had moved under rule 21.01(1)(a) which imposes a less onerous burden on the respondents. Rule 21.01(1) reads as follows:

> 21.01 (1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
> and the judge may make an order or grant judgment accordingly.

In point of fact, both Stadco and Bitove had moved under both clauses (a) and (b) of rule 21.01(1), Stadco asking under clause (a) that eight questions of law be decided and Bitove asking that ten issues be decided. Both parties, however, then asked that the paragraphs of the statement of claim corresponding to the points of law that they wanted decided be struck out. This is a power that is exercised under clause (b). Counsel now maintain that this court is under an obligation to decide each and every one of these questions of law, some of which require substantial research, and that we are not entitled to consider only whether Hoilett J. was correct in his decision to dismiss the action. I do not agree. An examination of the statement of claim does not reveal a discrete question or questions of law such as that in Nelles v. Ontario, [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, which can be clearly isolated from the contested issues of fact in the case. In Nelles, the Supreme Court of Canada held that a trial was not necessary to permit a conclusion on the question of prosecutorial immunity. In such circumstances, the court should exercise its jurisdiction under rule 21.01(1)(a).

This case, on the other hand, should not have its multiple questions determined under rule 21.01(1)(a). The respondents are not entitled to have their case tried by inches. They may have achieved greater success before Hoilett J. than they anticipated, but in dismissing the appellants' action, he gave them no more than they asked for. This case should be decided under rule 21.01(1)(b) which requires that the court decide whether the statement of claim, when read as a whole, fails to disclose any reasonable cause of action.

In addition to the two conspiracy torts, the appellants plead that the respondents by unlawful means have tortiously interfered with the appellants' economic interests and they claim damages therefor. Finally, they plead the statutory cause of action conferred by s. 36 [am. R.S.C. 1985, c. 1 (4th Supp.), s. 11] of the Competition Act, R.S.C.

1985, c. C-34, alleging that they have suffered loss or damage as a result of the conduct of at least some of the respondents, that conduct being contrary to the provisions of Part VI of the Competition Act, in particular s. 45 [am. R.S.C. 1985, c. 19 (2nd Supp.), s. 30] thereof.

Injunctive relief and an accounting are also claimed in addition to damages.

Counsel for Stadco submitted that there were more than 12 causes of action pleaded, but, on analysis, most of the causes of action that he listed were refinements of the broad categories that I have set out above. Counsel went through the prayer for relief and submitted that most of the declarations sought were not proper as a matter of law. He also questioned whether there was such a tort as interference with the appellants' economic interests or that s. 36 of the Competition Act could found a civil cause of action on the facts as pleaded.

All this may well be true. The statement of claim does reveal a "scatter gun" approach to the issues. Portions of the statement of claim could well be struck out under rule 25.11 as frivolous or vexatious, but we are not concerned here with niceties of pleading. Given that the basic contractual and tortious reliefs sought are supportable, it will be up to the trial judge to determine what relief, if any, is appropriate.

This lack of concern about neatness extends further to the respondents' objections to the manner in which the appellants pleaded the legal issues in this case. Matters of law which have not been settled fully in our jurisprudence should not be disposed of at this stage of the proceedings. Reference should again be made to Hunt v. Carey, where Wilson J. stated at p. 977 S.C.R., p. 334 D.L.R.:

> More recently, in Gilbert Surgical Supply Co. v. F.W. Horner Ltd., [1960] O.W.N. 289 (C.A.), at pp. 289-90, Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".
> Thus the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

Accordingly, for the reasons given, I would allow the appeal, set aside the order of Hoilett J. and in its place issue an order dismissing the motions of the two respondents. The appellants are entitled to their costs against both respondents here and below to be paid forthwith after assessment.

Appeal allowed.

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Reference re Secession of Quebec, [1998] 2 S.C.R. 217

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.
REFERENCE BY GOVERNOR IN COUNCIL

1998: February 16, 17, 18, 19 / 1998: August 20.

File No.: 25506.

[1998] 2 S.C.R. 217 | [1998] 2 R.C.S. 217 | [1998] S.C.J. No. 61 | [1998] A.C.S. no 61

IN THE MATTER OF Section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26 AND IN THE MATTER OF a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996

Case Summary

Constitutional law — Supreme Court of Canada — Reference jurisdiction — Whether Supreme Court's reference jurisdiction constitutional — Constitution Act, 1867, s. 101 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Courts — Supreme Court of Canada — Reference jurisdiction — Governor in Council referring to Supreme Court three questions relating to secession of Quebec from Canada — Whether questions submitted fall outside scope of reference provision of Supreme Court Act — Whether questions submitted justiciable — Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Constitutional law — Secession of province — Unilateral secession — Whether Quebec can secede unilaterally from Canada under Constitution.

International law — Secession of province of Canadian federation — Right of self-determination — Effectivity principle — Whether international law gives Quebec right to secede unilaterally from Canada.

Pursuant to s. 53 of the Supreme Court Act, the Governor in Council referred the following questions to this Court:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Issues regarding the Court's reference jurisdiction were raised by the amicus curiae. He argued that s. 53 of the Supreme Court Act was unconstitutional; that, even if the Court's reference jurisdiction was constitutionally valid, the questions submitted were outside the scope of s. 53; and, finally, that these questions were not justiciable.

Held: Section 53 of the Supreme Court Act is constitutional and the Court should answer the reference questions.

(1) Supreme Court's Reference Jurisdiction

Section 101 of the Constitution Act, 1867 gives Parliament the authority to grant this Court the reference jurisdiction provided for in s. 53 of the Supreme Court Act. The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. While, in most instances, this Court acts as the exclusive ultimate appellate court in the country, an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction. Even if there were any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal". A "general court of appeal" may also properly undertake other legal functions, such as the rendering of advisory opinions. There is no constitutional bar to this Court's receipt of jurisdiction to undertake an advisory role.

The reference questions are within the scope of s. 53 of the Supreme Court Act. Question 1 is directed, at least in part, to the interpretation of the Constitution Acts, which are referred to in s. 53(1)(a). Both Questions 1 and 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are "important questions of law or fact concerning any matter" and thus come within s. 53(2). In answering Question 2, the Court is not exceeding its jurisdiction by purporting to act as an international tribunal. The Court is providing an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation. Further, Question 2 is not beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law. More importantly, Question 2 does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the legislature or government of Quebec, institutions that exist as part of the Canadian legal order. International law must be addressed since it has been invoked as a consideration in the context of this Reference.

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise. Finally, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

(2) Question 1

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution" and not to usurp the prerogatives of the political forces that operate within that framework. The obligations identified by the Court are binding obligations under the Constitution. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

(3) Question 2

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a de facto secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

(4) Question 3

In view of the answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

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Referred to: Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721; Re References by Governor-General in Council (1910), 43 S.C.R. 536, aff'd [1912] A.C. 571; Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054; De Demko v. Home Secretary, [1959] A.C. 654; Re Forest and Registrar of Court of Appeal of Manitoba (1977), 77 D.L.R. (3d) 445; Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127; Muskrat v. United States, 219 U.S. 346 (1911); Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208; Reference re Ownership of Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792; Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86; Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525; McEvoy v. Attorney General for New Brunswick, [1983] 1 S.C.R. 704; Reference re Waters and Water-Powers, [1929] S.C.R. 200; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3; Reference re Education System in Island of Montreal, [1926] S.C.R. 246; Reference re Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54; Reference re Resolution to amend the Constitution, [1981] 1 S.C.R. 753; Reference re Objection by Quebec to a Resolution to Amend the Constitution, [1982] 2 S.C.R. 793; OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; Edwards v. Attorney-General for Canada, [1930] A.C. 124; New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319; Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437; Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733; Re the Initiative and Referendum Act, [1919] A.C. 935; Haig v. Canada, [1993] 2 S.C.R. 995; R. v. S. (S.), [1990] 2 S.C.R. 254; Switzman v. Elbling, [1957] S.C.R. 285; Saumur v. City of Quebec, [1953] 2 S.C.R. 299; Boucher v. The King, [1951] S.C.R. 265; Reference re Alberta Statutes, [1938] S.C.R. 100; Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158; R. v. Oakes, [1986] 1 S.C.R. 103; Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876; Roncarelli v. Duplessis, [1959] S.C.R. 121; Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148; Reference re Education Act (Que.), [1993] 2 S.C.R. 511; Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377; Adler v. Ontario, [1996] 3 S.C.R. 609; Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549; Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839; Mahe v. Alberta, [1990] 1 S.C.R. 342; R. v. Sparrow, [1990] 1 S.C.R. 1075; Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49.

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REFERENCE by the Governor in Council, pursuant to s. 53 of the Supreme Court Act, concerning the secession of Quebec from Canada.
L. Yves Fortier, Q.C., Pierre Bienvenu, Warren J. Newman, Jean-Marc Aubry, Q.C., and Mary Dawson, Q.C., for the Attorney General of Canada. André Joli-C(oe)ur, Michel Paradis, Louis Masson, André Binette, Clément Samson, Martin Bédard and Martin St-Amant, for the amicus curiae. Donna J. Miller, Q.C., and Deborah L. Carlson, for the intervener the Attorney General of Manitoba. Graeme G. Mitchell and John D. Whyte, Q.C., for the intervener the Attorney General for Saskatchewan. Bernard W. Funston, for the intervener the Minister of Justice of the Northwest Territories. Stuart J. Whitley, Q.C., and Howard L. Kushner, for the intervener the Minister of Justice for the Government of the Yukon Territory. Agnès Laporte and Richard Gaudreau, for the intervener Kitigan Zibi Anishinabeg. Claude-Armand Sheppard, Paul Joffe and Andrew Orkin, for the intervener the Grand Council of the Crees (Eeyou Estchee). Peter W. Hutchins and Carol Hilling, for the intervener the Makivik Corporation. Michael Sherry, for the intervener the Chiefs of Ontario. Raj Anand and M. Kate Stephenson, for the intervener the Minority Advocacy and Rights Council. Mary Eberts and Anne Bayefsky, for the intervener the Ad Hoc Committee of Canadian Women on the Constitution. Guy Bertrand and Patrick Monahan, for the intervener Guy Bertrand.

Stephen A. Scott, for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway. Vincent Pouliot, on his own behalf.

Solicitor for the Attorney General of Canada: George Thomson, Ottawa. Solicitors appointed by the Court as amicus curiae: Joli-C(oe)ur Lacasse Lemieux Simard St-Pierre, Sainte-Foy. Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg. Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina. Solicitor for the intervener the Minister of Justice of the Northwest Territories: Bernard W. Funston, Gloucester. Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: Stuart J. Whitley, Whitehorse. Solicitor for the intervener Kitigan Zibi Anishinabeg: Agnès Laporte, Hull. Solicitors for the intervener the Grand Council of the Crees (Eeyou Estchee): Robinson, Sheppard, Shapiro, Montréal. Solicitors for the intervener the Makivik Corporation: Hutchins, Soroka & Dionne, Montréal. Solicitor for the intervener the Chiefs of Ontario: Michael Sherry, Toronto. Solicitors for the intervener the Minority Advocacy and Rights Council: Scott & Aylen, Toronto. Solicitors for the intervener the Ad Hoc Committee of Canadian Women on the Constitution: Eberts Symes Street & Corbett, Toronto; Centre for Refugee Studies, North York. Solicitors for the intervener Guy Bertrand: Guy Bertrand & Associés, Québec; Patrick Monahan, North York. Solicitors for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway: Stephen A. Scott, Montréal. Solicitors for the intervener Vincent Pouliot: Paquette & Associés, Montréal.

The following is the judgment delivered by

THE COURT

I. Introduction

1 This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. The observation we made more than a decade ago in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 (Manitoba Language Rights Reference), at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity". In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2 The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read as follows:

> 1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
> 2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
> 3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

3 Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

4 The amicus curiae argued that s. 101 of the Constitution Act, 1867 does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the Supreme Court Act, R.S.C., 1985, c. S-26. Alternatively, it is submitted that even if Parliament were entitled to enact s. 53 of the Supreme Court Act, the scope of that section should be interpreted to exclude the kinds of questions the Governor in Council has submitted in this Reference. In particular, it is contended that this Court cannot answer Question 2, since it is a question of "pure" international law over which this Court has no jurisdiction. Finally, even if this Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s. 53 of the Supreme Court Act, it is argued that the three questions referred to the Court are speculative, of a political nature, and, in any event, are not ripe for judicial decision, and therefore are not justiciable.

5 Notwithstanding certain formal objections by the Attorney General of Canada, it is our view that the amicus curiae was within his rights to make the preliminary objections, and that we should deal with them.

A. The Constitutional Validity of Section 53 of the Supreme Court Act

6 In Re References by Governor-General in Council (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (sub nom. Attorney-General for Ontario v. Attorney-General for Canada), the constitutionality of this Court's special jurisdiction was twice upheld. The Court is asked to revisit these decisions. In light of the significant changes in the role of this Court since 1912, and the very important issues raised in this Reference, it is appropriate to reconsider briefly the constitutional validity of the Court's reference jurisdiction.

7 Section 3 of the Supreme Court Act establishes this Court both as a "general court of appeal" for Canada and as an "additional court for the better administration of the laws of Canada". These two roles reflect the two heads of power enumerated in s. 101 of the Constitution Act, 1867. However, the "laws of Canada" referred to in s. 101 consist only of federal law and statute: see Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, at pp. 1065-66. As a result, the phrase "additional courts" contained in s. 101 is an insufficient basis upon which to ground the special jurisdiction established in s. 53 of the Supreme Court Act, which clearly exceeds a consideration of federal law alone (see, e.g., s. 53(2)). Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a "general court of appeal" for Canada.

8 Section 53 of the Supreme Court Act is intra vires Parliament's power under s. 101 if, in "pith and substance", it is legislation in relation to the constitution or organization of a "general court of appeal". Section 53 is defined by two leading characteristics -- it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if (1) a "general court of appeal" may properly exercise an original jurisdiction; and (2) a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions.

(1) May a Court of Appeal Exercise an Original Jurisdiction?

9 The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. In most instances, this Court acts as the exclusive ultimate appellate court in the country, and, as such, is properly constituted as the "general court of appeal" for Canada. Moreover, it is clear that an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction.

10 The English Court of Appeal, the U.S. Supreme Court and certain courts of appeal in Canada exercise an original jurisdiction in addition to their appellate functions. See De Demko v. Home Secretary, [1959] A.C. 654 (H.L.), at p. 660; Re Forest and Registrar of Court of Appeal of Manitoba (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at p. 453; United States Constitution, art. III, sec. 2. Although these courts are not constituted under a head of power similar to s. 101, they certainly provide examples which suggest that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis.

11 It is also argued that this Court's original jurisdiction is unconstitutional because it conflicts with the original jurisdiction of the provincial superior courts and usurps the normal appellate process. However, Parliament's power to establish a general court of appeal pursuant to s. 101 is plenary, and takes priority over the province's power to control the administration of justice in s. 92(14). See Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127 (P.C.). Thus, even if it could be said that there is any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal" provided, as discussed below, advisory functions are not to be considered inconsistent with the functions of a general court of appeal.

(2) May a Court of Appeal Undertake Advisory Functions?

12 The amicus curiae submits that

> [Translation] [e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (Constitution of India, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. [Emphasis added.]

13 However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, sec. 2 restricting federal court jurisdiction to actual "cases" or "controversies". See, e.g., Muskrat v. United States, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the "case or controversy" limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 sec. 12-2-10; Del. Code Ann. tit. 10, sec. 141 (1996 Supp.)).

14 In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an "abstract or objective question" is sufficient. See L. Favoreu, "American and European Models of Constitutional Justice", in D. S. Clark, ed., Comparative and Private International Law (1990), 105, at p. 113. The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. See Treaty establishing the European Community, Art. 228(6); Protocol No. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 5, p. 36; Statute of the Inter-American Court of Human Rights, Art. 2. There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.

15 Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the Supreme Court Act is therefore constitutionally valid.

B. The Court's Jurisdiction Under Section 53

16 Section 53 provides in its relevant parts as follows:

> 53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
>
> (a) the interpretation of the Constitution Acts;
>
> . . .

> (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.
>
> (2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court ejusdem generis with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.
>
> (3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

17 It is argued that even if Parliament were entitled to enact s. 53 of the Supreme Court Act, the questions submitted by the Governor in Council fall outside the scope of that section.

18 This submission cannot be accepted. Question 1 is directed, at least in part, to the interpretation of the Constitution Acts, which are referred to in s. 53(1)(a). Both Question 1 and Question 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are clearly "important questions of law or fact concerning any matter" so that they must come within s. 53(2).

19 However, the amicus curiae has also raised some specific concerns regarding this Court's jurisdiction to answer Question 2. The question, on its face, falls within the scope of s. 53, but the concern is a more general one with respect to the jurisdiction of this Court, as a domestic tribunal, to answer what is described as a question of "pure" international law.

20 The first contention is that in answering Question 2, the Court would be exceeding its jurisdiction by purporting to act as an international tribunal. The simple answer to this submission is that this Court would not, in providing an advisory opinion in the context of a reference, be purporting to "act as" or substitute itself for an international tribunal. In accordance with well accepted principles of international law, this Court's answer to Question 2 would not purport to bind any other state or international tribunal that might subsequently consider a similar question. The Court nevertheless has jurisdiction to provide an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation.

21 Second, there is a concern that Question 2 is beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law.

22 This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (Reference re Ownership of Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792; Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86).

23 More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the amicus curiae himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. Justiciability

24 It is submitted that even if the Court has jurisdiction over the questions referred, the questions themselves are not justiciable. Three main arguments are raised in this regard:

(1) the questions are not justiciable because they are too "theoretical" or speculative;

(2) the questions are not justiciable because they are political in nature;

(3) the questions are not yet ripe for judicial consideration.

25 In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

26 Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. As we stated in Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 545:

> While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. . . . In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis added.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

(i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or

(ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

27 As to the "proper role" of the Court, it is important to underline, contrary to the submission of the amicus curiae, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

28 As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

29 Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference" sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

30 Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer: see, e.g., McEvoy v. Attorney General for New Brunswick, [1983] 1 S.C.R. 704; Reference re Waters and Water-Powers, [1929] S.C.R. 200; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (Provincial Judges Reference), at para. 256. Second, where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer: see, e.g., Reference re Education System in Island of Montreal, [1926] S.C.R. 246; Reference re Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54 (Senate Reference); Provincial Judges Reference, at para. 257.

31 There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (Patriation Reference), at pp. 875-76:

> If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or it may qualify both the question and the answer. . . .

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

III. Reference Questions

A. Question 1

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

32 As we confirmed in Reference re Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793, at p. 806, "The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the Provincial Judges Reference, supra, at para. 92. Finally, as was said in the Patriation Reference, supra, at p. 874, the Constitution of Canada includes

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us.

(2) Historical Context: The Significance of Confederation

33 In our constitutional tradition, legality and legitimacy are linked. The precise nature of this link will be discussed below. However, at this stage, we wish to emphasize only that our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.

34 Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution and the foundational principles governing constitutional amendments. Our purpose is not to be exhaustive, but to highlight the features most relevant in the context of this Reference.

35 Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat. In March 1864, a select committee of the Legislative Assembly of the Province of Canada, chaired by George Brown, began to explore prospects for constitutional reform. The committee's report, released in June 1864, recommended that a federal union encompassing Canada East and Canada West, and perhaps the other British North American colonies, be pursued. A group of Reformers from Canada West, led by Brown, joined with Étienne P. Taché and John A. Macdonald in a coalition government for the purpose of engaging in constitutional reform along the lines of the federal model proposed by the committee's report.

36 An opening to pursue federal union soon arose. The leaders of the maritime colonies had planned to meet at Charlottetown in the fall to discuss the perennial topic of maritime union. The Province of Canada secured invitations to send a Canadian delegation. On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.

37 The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.

38 Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the Constitution Act, 1867. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed.

39 Legally, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However, politically, it was thought that more was required. Indeed, Resolution 70 provided that "The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Cited in J. Pope, ed., Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (1895), at p. 52 (emphasis added).)

40 Confirmation of the Quebec Resolutions was achieved more smoothly in central Canada than in the Maritimes.

In February and March 1865, the Quebec Resolutions were the subject of almost six weeks of sustained debate in both houses of the Canadian legislature. The Canadian Legislative Assembly approved the Quebec Resolutions in March 1865 with the support of a majority of members from both Canada East and Canada West. The governments of both Prince Edward Island and Newfoundland chose, in accordance with popular sentiment in both colonies, not to accede to the Quebec Resolutions. In New Brunswick, a general election was required before Premier Tilley's pro-Confederation party prevailed. In Nova Scotia, Premier Tupper ultimately obtained a resolution from the House of Assembly favouring Confederation.

41 Sixteen delegates (five from New Brunswick, five from Nova Scotia, and six from the Province of Canada) met in London in December 1866 to finalize the plan for Confederation. To this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor changes were made to the distribution of powers, provision was made for the appointment of extra senators in the event of a deadlock between the House of Commons and the Senate, and certain religious minorities were given the right to appeal to the federal government where their denominational school rights were adversely affected by provincial legislation. The British North America Bill was drafted after the London Conference with the assistance of the Colonial Office, and was introduced into the House of Lords in February 1867. The Act passed third reading in the House of Commons on March 8, received royal assent on March 29, and was proclaimed on July 1, 1867. The Dominion of Canada thus became a reality.

42 There was an early attempt at secession. In the first Dominion election in September 1867, Premier Tupper's forces were decimated: members opposed to Confederation won 18 of Nova Scotia's 19 federal seats, and in the simultaneous provincial election, 36 of the 38 seats in the provincial legislature. Newly-elected Premier Joseph Howe led a delegation to the Imperial Parliament in London in an effort to undo the new constitutional arrangements, but it was too late. The Colonial Office rejected Premier Howe's plea to permit Nova Scotia to withdraw from Confederation. As the Colonial Secretary wrote in 1868:

> The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted. . . . I trust that the Assembly and the people of Nova Scotia will not be surprised that the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation. . . .
>
> (Quoted in H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997), 76 Can. Bar Rev. 155, at p. 168.)

The interdependence characterized by "vast obligations, political and commercial", referred to by the Colonial Secretary in 1868, has, of course, multiplied immeasurably in the last 130 years.

43 Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. It is pertinent, in the context of the present Reference, to mention the words of George-Étienne Cartier (cited in the Parliamentary Debates on the subject of the Confederation (1865), at p. 60):

> Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian -- it [is] impossible. Distinctions of this kind [will] always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation [can]not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme. . . . In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success

> [will] increase the prosperity and glory of the new Confederacy. . . . [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.

The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The Constitution Act, 1867 was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

44 A federal-provincial division of powers necessitated a written constitution which circumscribed the powers of the new Dominion and Provinces of Canada. Despite its federal structure, the new Dominion was to have "a Constitution similar in Principle to that of the United Kingdom" (Constitution Act, 1867, preamble). Allowing for the obvious differences between the governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.

45 After 1867, the Canadian federation continued to evolve both territorially and politically. New territories were admitted to the union and new provinces were formed. In 1870, Rupert's Land and the Northwest Territories were admitted and Manitoba was formed as a province. British Columbia was admitted in 1871, Prince Edward Island in 1873, and the Arctic Islands were added in 1880. In 1898, the Yukon Territory and in 1905, the provinces of Alberta and Saskatchewan were formed from the Northwest Territories. Newfoundland was admitted in 1949 by an amendment to the Constitution Act, 1867. The new territory of Nunavut was carved out of the Northwest Territories in 1993 with the partition to become effective in April 1999.

46 Canada's evolution from colony to fully independent state was gradual. The Imperial Parliament's passage of the Statute of Westminster, 1931 (U.K.), 22 & 23 Geo. 5, c. 4, confirmed in law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada was an independent country. Thereafter, Canadian law alone governed in Canada, except where Canada expressly consented to the continued application of Imperial legislation. Canada's independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the Constitution Act, 1982 removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the Canadian Charter of Rights and Freedoms.

47 Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the Patriation Reference, had ruled was in accordance with our Constitution. It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the Constitution Act, 1867, which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation. It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the Canadian Charter of Rights and Freedoms. As to the latter, to the extent that the scope of legislative powers was thereafter to be constrained by the Charter, the constraint operated as much against federal legislative powers as against provincial legislative powers. Moreover, it is to be remembered that s. 33, the "notwithstanding clause", gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s. 2), legal rights (ss. 7 to 14) and equality rights (s. 15) provisions of the Charter.

48 We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

50 Our Constitution has an internal architecture, or what the majority of this Court in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the Provincial Judges Reference, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the Manitoba Language Rights Reference, supra, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.

51 Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

52 The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance of unwritten constitutional principles in our system of government.

53 Given the existence of these underlying constitutional principles, what use may the Court make of them? In the Provincial Judges Reference, supra, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the Provincial Judges Reference that the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference, a point made earlier in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at pp. 462-63. In the Provincial Judges Reference, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

54 Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the Patriation Reference, supra, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the Manitoba Language Rights Reference, supra, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

55 It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the Constitution Act, 1867, the federal system was only partial. See, e.g., K. C. Wheare, Federal Government (4th ed. 1963), at pp. 18-20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the Constitution Act, 1867, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned (e.g., P. W. Hogg, Constitutional Law of Canada (4th ed. 1997), at p. 120).

56 In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the Constitution Act, 1867. See, e.g., Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437 (P.C.), at pp. 441-42. It is up to the courts "to control the limits of the respective sovereignties": Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733, at p. 741. In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

57 This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the Patriation Reference, supra, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the Patriation Reference, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the Charter, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

58 The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the Constitution Act, 1867, it was said in Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.), at p. 942, was

> not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in Haig v. Canada, [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in R. v. S. (S.), [1990] 2 S.C.R. 254, at pp. 287-88.

59 The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where the majority of the population is

French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

60 Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.

(c) Democracy

61 Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62 The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in OPSEU v. Ontario, supra, at p. 57, confirmed that "the basic structure of our Constitution, as established by the Constitution Act, 1867, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels". As is apparent from an earlier line of decisions emanating from this Court, including Switzman v. Elbling, [1957] S.C.R. 285, Saumur v. City of Quebec, [1953] 2 S.C.R. 299, Boucher v. The King, [1951] S.C.R. 265, and Reference re Alberta Statutes, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the Constitution Act, 1867 itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the Provincial Judges Reference, supra, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

63 Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system - such as women, minorities, and aboriginal peoples - have continued, with some success, to the present day.

64 Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, supra, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the Charter, the Court in R. v. Oakes, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

65 In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": New Brunswick Broadcasting, supra, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the Charter. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (Reference re Provincial Electoral Boundaries, supra) and as candidates (Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876). In addition, the effect of s. 4 of the Charter is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66 It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69 The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the Patriation Reference, supra, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

71 In the Manitoba Language Rights Reference, supra, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. A third aspect of the rule of law is, as recently confirmed in the Provincial Judges Reference, supra, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

73 An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74 First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78 It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates - indeed, makes possible - a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

79 The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at p. 1173, and in Reference re Education Act (Que.), [1993] 2 S.C.R. 511, at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377, at pp. 401-2, and Adler v. Ontario, [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549, at p. 564.

80 However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the Charter's provisions for the protection of minority rights. See, e.g., Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, and Mahe v. Alberta, [1990] 1 S.C.R. 342.

81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the Charter. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: Senate Reference, supra, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

83 Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada". This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84 The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85 The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the Manitoba Language Rights Reference, supra, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government". The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally.

86 The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral". We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87 Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

88 The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89 What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

90 The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

91 For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

92 However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

93 Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

94 In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.

95 Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96 No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97 In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

98 The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the Patriation Reference, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

99 The notion of justiciability is, as we earlier pointed out in dealing with the preliminary objection, linked to the notion of appropriate judicial restraint. We earlier made reference to the discussion of justiciability in Reference re Canada Assistance Plan, supra, at p. 545:

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.

In Operation Dismantle, supra, at p. 459, it was pointed out that justiciability is a "doctrine . . . founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes". An analogous doctrine of judicial restraint operates here. Also, as observed in Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49 (the Auditor General's case), at p. 91:

> There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

100 The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

101 If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

102 The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but as we explained in the Auditor General's case, supra, at p. 90, and New Brunswick Broadcasting, supra, the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

103 To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

104 Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

105 It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination.

(5) Suggested Principle of Effectivity

106 In the foregoing discussion we have not overlooked the principle of effectivity, which was placed at the forefront in argument before us. For the reasons that follow, we do not think that the principle of effectivity has any application to the issues raised by Question 1. A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation. Our Constitution does not address powers in this sense. On the contrary, the Constitution is concerned only with the rights and obligations of individuals, groups and governments, and the structure of our institutions. It was suggested before us that the National Assembly, legislature or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law: rather, it was contended that they simply could do so as a matter of fact. Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community. The principles governing secession at international law are discussed in our answer to Question 2.

107 In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an ex ante explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

108 Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected.

B. Question 2

> Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

109 For reasons already discussed, the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address. Question 2 is posed in the context of a Reference to address the existence or non-existence of a right of unilateral secession by a province of Canada. The amicus curiae argues that this question ultimately falls to be determined under international law. In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. International law has been invoked as a consideration and it must therefore be addressed.

110 The argument before the Court on Question 2 has focused largely on determining whether, under international law, a positive legal right to unilateral secession exists in the factual circumstances assumed for the purpose of our response to Question 1. Arguments were also advanced to the effect that, regardless of the existence or non-existence of a positive right to unilateral secession, international law will in the end recognize effective political realities -- including the emergence of a new state -- as facts. While our response to Question 2 will address considerations raised by this alternative argument of "effectivity", it should first be noted that the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality. These two concepts examine different points in time. The questions posed to the Court address legal rights in advance of a unilateral act of purported secession. While we touch below on the practice governing the international recognition of emerging states, the Court is as wary of entertaining speculation about the possible future conduct of sovereign states on the international level as it was under Question 1 to speculate about the possible future course of political negotiations among the participants in the Canadian federation. In both cases, the

Reference questions are directed only to the legal framework within which the political actors discharge their various mandates.

(1) Secession at International Law

111 It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state. This is acknowledged by the experts who provided their opinions on behalf of both the amicus curiae and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of "a people" to self-determination. The amicus curiae addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result in favour of secession. We agree on this point with the amicus curiae, for reasons that we will briefly develop.

(a) Absence of a Specific Prohibition

112 International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, The Acquisition of Territory in International Law (1963), at pp. 8-9). Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) The Right of a People to Self-determination

113 While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states -- such as the right of a people to self-determination.

114 The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (A. Cassese, Self-determination of peoples: A legal reappraisal (1995), at pp. 171-72; K. Doehring, "Self-Determination", in B. Simma, ed., The Charter of the United Nations: A Commentary (1994), at p. 70.)

115 Article 1 of the Charter of the United Nations, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

> Article 1
>
> . . .
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

116 Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

117 This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, supra, at p. 60:

> The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

118 For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.'s International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, and its International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

119 Similarly, the U.N. General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970 (Declaration on Friendly Relations), states:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

120 In 1993, the U.N. World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

> 1. . . .
>
> Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. . . . [Emphasis added.]

121 The right to self-determination is also recognized in other international legal documents. For example, the Final Act of the Conference on Security and Co-operation in Europe, 14 I.L.M. 1292 (1975) (Helsinki Final Act), states (in Part VIII):

> The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
>
> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]

122 As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining "Peoples"

123 International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain.

124 It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

125 While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the Declaration on Friendly Relations as

> [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. [Emphasis added.]

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

128 The Declaration on Friendly Relations, the Vienna Declaration and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to

> be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction. . . . [Emphasis added.]

129 Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Cooperation in Europe on the follow-up to the Helsinki Final Act again refers to peoples having the right to determine "their internal and external political status" (emphasis added), that statement is immediately followed by express recognition that the participating states will at all times act, as stated in the Helsinki Final Act, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

> . . . confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added.]

Accordingly, the reference in the Helsinki Final Act to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, supra, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

130 While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples

131 Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, as noted by Cassese, supra, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession:

> . . . the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the colonialist Power and the occupant Power and that their 'territorial integrity', all but destroyed by the colonialist or occupying Power, should be fully restored. . . .

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the Declaration on Friendly Relations:

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among States; and

> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
>
> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the amicus curiae, Addendum to the factum of the amicus curiae, at paras. 15-16:

> [Translation] 15. The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the amicus curiae, an oppressed people.
>
> 16. For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

136 The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138 In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.

Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

139 We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.

(2) Recognition of a Factual/Political Reality: the "Effectivity" Principle

140 As stated, an argument advanced by the amicus curiae on this branch of the Reference was that, while international law may not ground a positive right to unilateral secession in the context of Quebec, international law equally does not prohibit secession and, in fact, international recognition would be conferred on such a political reality if it emerged, for example, via effective control of the territory of what is now the province of Quebec.

141 It is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation. However, as mentioned at the outset, effectivity, as such, does not have any real applicability to Question 2, which asks whether a right to unilateral secession exists.

142 No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted . . .", H. W. R. Wade, "The Basis of Legal Sovereignty", [1955] Camb. L.J. 172, at p. 196. Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.

143 As indicated in responding to Question 1, one of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the de facto secession is, or was, being pursued. The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms. See, e.g., European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 31 I.L.M. 1486 (1992), at p. 1487. While national interest and perceived political advantage to the recognizing state obviously play an important role, foreign states may also take into account their view as to the existence of a right to self-determination on the part of the population of the putative state, and a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition. The notion that what is not explicitly prohibited is implicitly permitted has little relevance where (as here) international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional.

144 As a court of law, we are ultimately concerned only with legal claims. If the principle of "effectivity" is no more than that "successful revolution begets its own legality" (S. A. de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968), 7 West. Ont. L. Rev. 93, at p. 96), it necessarily means that legality follows and does not precede the successful revolution. Ex hypothesi, the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as "a revolution". It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.

145 An argument was made to analogize the principle of effectivity with the second aspect of the rule of law identified by this Court in the Manitoba Language Rights Reference, supra, at p. 753, namely, avoidance of a legal vacuum. In that Reference, it will be recalled, this Court declined to strike down all of Manitoba's legislation for its failure to comply with constitutional dictates, out of concern that this would leave the province in a state of chaos. In so doing, we recognized that the rule of law is a constitutional principle which permits the courts to address the practical consequences of their actions, particularly in constitutional cases. The similarity between that principle and the principle of effectivity, it was argued, is that both attempt to refashion the law to meet social reality. However, nothing of our concern in the Manitoba Language Rights Reference about the severe practical consequences of unconstitutionality affected our conclusion that, as a matter of law, all Manitoba legislation at issue in that case was unconstitutional. The Court's declaration of unconstitutionality was clear and unambiguous. The Court's concern with maintenance of the rule of law was directed in its relevant aspect to the appropriate remedy, which in that case was to suspend the declaration of invalidity to permit appropriate rectification to take place.

146 The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

C. Question 3

In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147 In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148 As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149 The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150 The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152 The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

154 We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

155 Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

156 The reference questions are answered accordingly.

Roncarelli v. Duplessis, [1959] S.C.R. 121

Supreme Court Reports

Supreme Court of Canada

Present: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

1958: June 2, 3, 4, 5, 6 / 1959: January 27.

[1959] S.C.R. 121 | [1959] R.C.S. 121

Frank Roncarelli (plaintiff), appellant; and The Honourable Maurice Duplessis (defendant), respondent.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Case Summary

Crown — Officers of the Crown — Powers and responsibilities — Prime Minister and Attorney-General — Quebec Liquor Commission — Cancellation of licence to sell liquor — Whether made at instigation of Prime Minister and Attorney-General — The Alcoholic Liquor Act, R.S.Q. 1941, c. 255 — The Attorney-General's Department Act, R.S.Q. 1941, c. 46 — The Executive Power Act, R.S.Q. 1941, c. 7.

Licences — Cancellation — Motives of cancellation — Done on instigation of Prime Minister and Attorney-General — Whether liability in damages — Whether notice under art. 88 of the Code of Civil Procedure required.

The plaintiff, the proprietor of a restaurant in Montreal and the holder of a licence to sell intoxicating liquor, sued the defendant personally for damages arising out of the cancellation of his licence by the Quebec Liquor Commission. He alleged that the licence had been arbitrarily cancelled at the instigation of the defendant who, without legal powers in the matter, had given orders to the Commission to cancel it before its expiration. This was done, it was alleged, to punish the plaintiff, a member of the Witnesses of Jehovah, because he had acted as bailsman for a large number of members of his sect charged with the violation of municipal by-laws in connection with the distribution of literature. The trial judge gave judgment for the plaintiff for part of the damages claimed. The defendant appealed and the plaintiff, seeking an increase in the amount of damages, cross-appealed. The Court of Appeal dismissed the action and the cross-appeal.

Held (Taschereau, Cartwright and Fauteux JJ. dissenting): The action should be maintained and the amount awarded at trial should be increased by $25,000. By wrongfully and without legal justification causing the cancellation of the permit, the defendant became liable for damages under art. 1053 of the Civil Code.

Per Kerwin C.J.: The trial judge correctly decided that the defendant ordered the Commission to cancel the licence, and no satisfactory reason has been advanced for the Court of Appeal setting aside that finding of fact.

Per Kerwin C.J. and Locke and Martland JJ.: There was ample evidence to sustain the finding of the trial judge that the cancellation of the permit was the result of an order given by the defendant to the manager of the Commission. There was, therefore, a relationship of cause and effect between the defendant's acts and the cancellation of the permit.

The defendant was not acting in the exercise of any of his official powers. There was no authority in the Attorney-General's Department Act, the Executive Power Act, or the Alcoholic Liquor Act enabling the defendant to direct the cancellation of a permit under the Alcoholic Liquor Act. The intent and purpose of that Act placed complete control over the liquor traffic in the hands of an independent commission.

Cancellation of a permit by the Commission, at the request or upon the direction of a third party, as was done in this case, was not a proper and valid exercise of the powers conferred upon the Commission by s. 35 of the Act.

The defendant was not entitled to the protection provided by art. 88 of the Code of Civil Procedure since what he did was not "done by him in the exercise of his functions". To interfere with the administration of the Commission by causing the cancellation of a liquor permit was entirely outside his legal functions. It involved the exercise of powers which in law he did not possess at all. His position was not altered by the fact that he thought it was his right and duty to act as he did.

Per Rand J.: To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is beyond the scope of the discretion conferred upon the Commission by the Alcoholic Liquor Act. What was done here was not competent to the Commission and a fortiori to the government or the defendant. The act of the defendant, through the instrumentality of the Commission, brought about a breach of an implied public statutory duty toward the plaintiff. There was no immunity in the defendant from an action for damages. He was under no duty in relation to the plaintiff and his act was an intrusion upon the functions of a statutory body. His liability was, therefore, engaged. There can be no question of good faith when an act is done with an improper intent and for a purpose alien to the very statute under which the act is purported to be done. There was no need for giving a notice of action as required by art. 88 of the Code of Civil Procedure, as the act done by the defendant was quite beyond the scope of any function or duty committed to him so far so that it was one done exclusively in a private capacity however much, in fact, the influence of public office and power may have carried over into it.

Per Abbott J.: The cancellation of the licence was made solely because of the plaintiff's association with the Witnesses of Jehovah and with the object and purpose of preventing him from continuing to furnish bail for members of that sect. This cancellation was made with the express authorization and upon the order of the defendant. In purporting to authorize and instruct the Commission to cancel the licence the defendant was acting, as he was bound to know, without any legal authority whatsoever. A public officer is responsible for acts done by him without legal justification. The defendant was not entitled to avail himself of the exceptional provision of art. 88 of the Code of Civil Procedure since the act complained of was not "done by him in the exercise of his functions" but was an act done when he had gone outside his functions to perform it. Before a public officer can be held to be acting "in the exercise of his functions" within the meaning of art. 88, it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform.

Per Taschereau J., dissenting: The action cannot succeed because the plaintiff did not give the notice required by art. 88 of the Code of Civil Procedure to the defendant who was a public officer performing his functions. The failure to fulfil this condition precedent was a total bar to the claim. That failure may be raised by exception to the form or in the written plea to the action, and the words "no judgment may be rendered" indicate that the Court may raise the point propio motu. Even if what was said by the defendant affected the decision taken by the Commission, the defendant remained, nevertheless, a public officer acting in the performance of his duties. He was surely a public officer, and it is clear that he did not act in his personal quality. It was as legal adviser of the Commission and also as a public officer entrusted with the task of preventing disorders and as protector of the peace in the province, that he was consulted. It was the Attorney-General, acting in the performance of his functions, who was required to give his directives to a governmental branch. It is a fallacious principle to hold that an error, committed by a public officer in doing an act connected with the object of his functions, strips that act of its official character and that its author must then be considered as having acted outside the scope of his duties.

Per Cartwright J., dissenting: The loss suffered by the plaintiff was damnum sine injuria. Whether the defendant directed or merely approved the cancellation of the licence, he cannot be answerable in damages since the act of the Commission in cancelling the licence was not an actionable wrong. The Courts below have found, on ample evidence, that the defendant and the manager of the Commission acted throughout in the honest belief that they were fulfilling their duty to the province. On the true construction of the Alcoholic Liquor Act, the Legislature, except in certain specified circumstances which are not present in the case at bar, has not laid down any rules as to the grounds on which the Commission may decide to cancel a permit; that decision is committed to the unfettered discretion of the Commission and its function in making the decision is administrative and not judicial or quasi-judicial. Consequently, the Commission was not bound to give the plaintiff an opportunity to be heard and the Court cannot be called upon to determine whether there existed sufficient grounds for its decision. Even if the function of the Commission was quasi-judicial and its order should be set aside for failure to hear the plaintiff, it is doubtful whether any action for damages would lie.

Per Fauteux J., dissenting: The right to exercise the discretion with respect to the cancellation of the permit, which under the Alcoholic Liquor Act was exclusively that of the Commission, was abdicated by it in favour of the defendant when he made the decision executed by the Commission. The cancellation being illegal, imputable to the defendant, and damageable for the plaintiff, the latter was entitled to succeed on an action under art. 1053 of the Civil Code.

As the notice required by art. 88 of the Code of Civil Procedure was not given, the action, however, could not be maintained. The failure to give notice, when it should be given, imports nullity and limits the very jurisdiction of the Court. In the present case, the defendant was entitled to the notice since the illegality reproached was committed "in the exercise of his functions". The meaning of this expression in art. 88 was not subject to the limitations attending expressions more or less identical appearing in art. 1054 of the Civil Code. The latter article deals with responsibility whereas art. 88 deals with procedure. Article 88 has its source in s. 8 of An Act for the Protection of Justices of the Peace, Cons. Stat. L.C., c. 101, which provided that the officer "shall be entitled" to the protection of the statute although "he has exceeded his powers or jurisdiction, and has acted clearly contrary to law". That section peremptorily establishes that, in pari materia, a public officer was not considered as having ceased to act within the exercise of his functions by the sole fact that the act committed by him might constitute an abuse of power or excess of jurisdiction, or even a violation of the law. An illegality is assumed under art. 88. The jurisprudence of the province, which has been settled for many years, is to the effect that the incidence of good or bad faith has no bearing on the right to the notice.

The illegality committed by the defendant did not amount to an offence known under the penal law or a delict under art. 1053 of the Civil Code. He did not use his functions to commit this illegality. He did not commit it on the occasion of his functions, but committed it because of his functions. His good faith has not been doubted, and on this fact there was a concurrent finding in the Courts below.

APPEALS from two judgments of the Court of Queen's Bench, Appeal Side, Province of Quebec [[1956] Que. Q.B. 447], reversing a judgment of Mackinnon J. Appeals allowed, Taschereau, Cartwright and Fauteux JJ. dissenting.
F. R. Scott and A.L. Stein, for the plaintiff, appellant. L.E. Beaulieu, Q.C., and L. Tremblay, Q.C., for the defendant, respondent.

Attorneys for the plaintiff, appellant: A.L. Stein and F.R. Scott, Montreal. Attorneys for the defendant, respondent: L.E. Beaulieu and Edouard Asselin, Montreal.

THE CHIEF JUSTICE

No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal Side) [[1956] Que. Q.B. 447] setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel the appellant's licence. A reading of the testimony of the respondent and of the person constituting the commission at the relevant time satisfies me that the trial judge correctly decided the point. As to the other questions, I agree with Mr. Justice Martland.

The appeals should be allowed with costs here and below and judgment directed to be entered for the appellant against the respondent in the sum of $33,123.53 with interest from the date of the judgement of the Superior Court, together with the costs of the action.

TASCHEREAU J. (dissenting)

TASCHEREAU J. (dissenting):-- L'intimé est Premier Ministre et Procureur Général de la province de Québec, et il occupait ces hautes fonctions dans le temps où les faits qui ont donné naissance à ce litige se sont passés.

L'appelant, un restaurateur de la Cité de Montréal, et porteur d'un permis de la Commission des Liqueurs pour la vente des spiritueux, lui a réclamé personnellement devant la Cour supérieure la somme de $118,741 en dommages. Il a allégué dans son action qu'il est licencié depuis de nombreuses années, qu'il a toujours respecté les lois de la Province se rapportant à la vente des liqueurs alcooliques, que son restaurant avait une excellente réputation, et jouissait de la faveur d'une clientèle nombreuse et recherchée.

Il a allégué en outre qu'il faisait et fait encore partie de la secte religieuse des "Témoins de Jéhovah", et que parce qu'il se serait rendu caution pour quelque 390 de ses coreligionnaires, traduits devant les tribunaux correctionnels de Montréal et accusés de distribution de littérature, sans permis, l'intimé serait illégalement intervenu auprès du gérant de la Commission pour lui faire perdre son permis, qui d'ailleurs lui a été enlevé le 4 décembre 1946. Ce serait comme résultat de l'intervention injustifiée de l'intimé que l'appelant aurait été privé de son permis, et aurait ainsi souffert les dommages considérables qu'il réclame.

La Cour supérieure a maintenu l'action jusqu'à concurrence de $8,123.53, et la Cour du banc de la reine [[1956] Que. Q.B. 447.], M. le Juge Rinfret étant dissident, aurait pour divers motifs maintenu l'appel et rejeté l'action.

L'intimé a soulevé plusieurs moyens à l'encontre de cette réclamation, mais je n'en examinerai qu'un seul, car je crois qu'il est suffisant pour disposer du présent appel. Le Code de procédure civile de la province de Québec contient la disposition suivante:

> Art. 88 C.P. -- Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Le défaut de donner cet avis peut être invoqué par le défendeur, soit au moyen d'une exception à la forme ou soit par plaidoyer au fond. Charland v. Kay [(1933), 54 Que. K.B. 377.]; Corporation de la Paroisse de St-David v. Paquet [(1937), 62 Que. K.B. 140.]; Houde v. Benoit [[1943] Que. K.B. 713].

Les termes mêmes employés par le législateur dans l'art. 88 C.P.C., "nul jugement ne peut être rendu" contre le défendeur, indiquent aussi que la Cour a le devoir de soulever d'office ce moyen, si le défendeur omet ou néglige de le faire par exception à la forme, ou dans son plaidoyer écrit. La signification de cet avis à un officier public, remplissant des devoirs publics, est une condition préalable, essentielle à la réussite d'une procédure judiciaire. S'il n'est pas donné, les tribunaux ne peuvent prononcer aucune condamnation en dommages. Or, dans le cas présent, il est admis qu'aucun avis n'a été donné.

Mais, c'est la prétention de l'appelant que l'intimé ne peut se prévaloir de ce moyen qui est une fin de non recevoir, car, les conseils ou avis qu'il aurait donnés et qui auraient été la cause déterminante de la perte de son permis, ne l'ont pas été en raison d'un acte posé par lui dans l'exercice de ses fonctions.

La preuve révèle que l'appelant était bien licencié de la Commission des Liqueurs depuis de nombreuses années, que la tenue de son restaurant était irréprochable, et que dans le cours du mois de décembre de l'année 1946, alors qu'il était toujours porteur de son permis, celui-ci lui a été enlevé parce qu'il se rendait caution pour plusieurs centaines de ses coreligionnaires, distributeurs de littérature que l'on croyait séditieuse.

C'était avant le jugement de cette Cour dans la cause de Boucher v. Le Roi [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.], alors que la conviction était profondément ancrée parmi la population, que les "Témoins de

Jéhovah" étaient des perturbateurs de la paix publique, des sources constantes de trouble et de désordre dans la Province. On jugeait leur mouvement dangereux, susceptible de soulever une partie de la population contre l'autre, et de provoquer de sérieuses agitations. On parlait même de conspiration séditieuse, et ce n'est sûrement pas sans cause raisonnable, car cette opinion fut plus tard unanimement confirmée par cinq juges de la Cour du Banc de la Reine dans l'affaire Boucher v. Le Roi [[1949] Que. K.B. 238.], et également par quatre juges dissidents devant cette Cour (Boucher v. Le Roi cité supra).

M. Archambault, alors gérant général de la Commission des Liqueurs, soupçonnait fortement que le "Frank Roncarelli" qui par ses cautionnements aidait financièrement ce mouvement qu'il croyait subversif, était détenteur d'un permis de restaurateur pour la vente de liqueurs alcooliques. Il pensait évidemment qu'il ne convenait pas que les bénéfices que Roncarelli retirait de son permis de la Commission, soient utilisés à servir la cause d'agitateurs religieux, dont les enseignements et les méthodes venaient en conflit avec les croyances populaires. Il en informa l'intimé, procureur général, qui en cette qualité est l'aviseur légal officiel de la province pour toutes les affaires juridiques.

Au cours d'une première conversation téléphonique, M. Archambault suggéra à l'intimé que le permis de Roncarelli lui soit enlevé, ce que d'ailleurs il avait personnellement le droit de faire, en vertu de l'art. 35 de la Loi des Liqueurs, qui est ainsi rédigé:

> 35. -- La Commission peut à sa discrétion annuler un permis en tout temps.

Or, comme l'exécutif de la Commission des Liqueurs ne se compose que d'un gérant général qui était M. Archambault, cette discrétion reposait entièrement sur lui.

L'intimé lui suggéra la prudence, et lui proposa de s'enquérir avec certitude si le Roncarelli, détenteur de permis, était bien le même Roncarelli qui prodiguait ses cautionnements d'une façon si généreuse. Après enquête, l'affirmative ayant été établie, M. Archambault communiqua de nouveau avec l'intimé, et voici ce que nous dit M. Archambault dans son témoignage au sujet de ces conversations:

> Q. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai appelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

> Voici maintenant la version de l'intimé:
>
> Probablement, à la suite du rapport que l'indicateur Y-3 a fait, le rapport qui est produit, M. le Juge Archambault m'a téléphoné et m'a dit: 'On est sûr, c'est cette personne-là.' Et comme dans l'intervalle j'avais étudié le problème et parcouru les statuts depuis l'institution de la Commission des Liqueurs et tous les amendements qui avaient eu lieu, et j'avais consulté, j'en suis arrivé à la conclusion qu'en mon âme et conscience, mon impérieux devoir c'était d'approuver la suggestion très au point du Juge et d'autoriser la cancellation d'un privilège que cet homme-là ne méritait pas, à mon sens, et dont il n'était pas digne.
>
> Et:
>
> Après avoir mûrement délibéré et conscient et sûr de faire mon devoir, j'ai dit à M. Archambault que j'approuvais sa suggestion d'annuler le permis, d'annuler le privilège.
>
> Et, plus loin:
>
> ... j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fût digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

> ... et lorsque le Juge Archambault m'a dit, après vérification, que c'était la même personne, j'ai dit: 'Vous avez raison, ôtez le permis, ôtez le privilège'.

Quand on demande à l'intimé s'il a donné un ordre à M. Archambault, voici ce qu'il dit:

> Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé.

Que le permis ait été enlevé à Roncarelli comme conséquence de la seule décision de M. Archambault, ce qu'il avait le droit de faire à sa discrétion, ou que cette discrétion ait été influencée par les paroles de l'intimé, n'a pas je crois d'effet décisif dans la détermination de la présente cause. Je demeure convaincu que même si les paroles de l'intimé ont pu avoir quelque influence sur la décision qui a été prise, ce dernier demeurait quand même un officier public, agissant dans l'exercice de ses fonctions, et qu'il était essentiel de lui donner l'avis requis par l'art. 88 C.P.C. L'absence de cet avis interdit aux tribunaux de prononcer aucune condamnation.

L'intimé est sûrement un officier public, et il me semble clair qu'il n'a pas agi en sa qualité personnelle. C'est bien comme aviseur légal de la Commission des Liqueurs, et aussi comme officier public chargé de la prévention des troubles, et gardien de la paix dans la province, qu'il a été consulté. C'est le Procureur Général, agissant dans l'exercice de ses fonctions, qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur. Vide: Loi concernant le Département du Procureur Général, R.S.Q. 1941, c. 46, art. 3, Loi des liqueurs alcooliques, S.R.Q. 1941, c. 255, art 138.

Certains, à tort ou à raison, peuvent croire que l'intimé se soit trompé, en pensant qu'il devait, pour le maintien de la paix publique et la suppression de troubles existants, et qui menaçaient de se propager davantage, conseiller l'enlèvement du permis de l'appelant. Pour ma part, je ne puis admettre le fallacieux principe qu'une erreur commise par un officier public, en posant un acte qui se rattache cependant à l'objet de son mandat, enlève à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans l'exécution de ses fonctions.

Parce que l'appelant ne s'est pas conformé aux exigences de l'art. 88 C.P.C., en ne donnant pas l'avis requis à l'intimé qui est un officier public, agissant dans l'exercice de ses fonctions, je crois que l'action ne peut réussir. Le défaut de remplir cette condition préalable, constitue une fin de non recevoir, qui me dispense d'examiner les autres aspects de cette cause.

Je crois donc que l'appel principal, de même que l'appel logé pour faire augmenter le montant accordé par le juge de première instance, doivent être rejetés avec dépens de toutes les Cours.

The judgement of Rand and Judson JJ. was delivered by

RAND J.

RAND J.:-- The material facts from which my conclusion is drawn are these. The appellant was the proprietor of a restaurant in a busy section of Montreal which in 1946 through its transmission to him from his father had been continuously licensed for the sale of liquor for approximately 34 years; he is of good education and repute and the restaurant was of a superior class. On December 4 of that year, while his application for annual renewal was before the Liquor Commission, the existing license was cancelled and his application for renewal rejected, to which was added a declaration by the respondent that no future license would ever issue to him. These primary facts took place in the following circumstances.

For some years the appellant had been an adherent of a rather militant Christian religious sect known as the Witnesses of Jehovah. Their ideology condemns the established church institutions and stresses the absolute and exclusive personal relation of the individual to the Deity without human intermediation or intervention.

The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as "The Watch Tower" and "Awake", sold at a small price.

In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to the religious beliefs and feelings of the Roman Catholic population. Large scale arrests were made of young men and women, by whom the publications mentioned were being held out for sale, under local by-laws

requiring a licence for peddling any kind of wares. Altogether almost one thousand of such charges were laid. The penalty involved in Montreal, where most of the arrests took place, was a fine of $40, and as the Witnesses disputed liability, bail was in all cases resorted to.

The appellant, being a person of some means, was accepted by the Recorder's Court as bail without question, and up to November 12, 1946, he had gone security in about 380 cases, some of the accused being involved in repeated offences. Up to this time there had been no suggestion of impropriety; the security of the appellant was taken as so satisfactory that at times, to avoid delay when he was absent from the city, recognizances were signed by him in blank and kept ready for completion by the Court officials. The reason for the accumulation of charges was the doubt that they could be sustained in law. Apparently the legal officers of Montreal, acting in concert with those of the Province, had come to an agreement with the attorney for the Witnesses to have a test case proceeded with. Pending that, however, there was no stoppage of the sale of the tracts and this became the annoying circumstance that produced the volume of proceedings.

On or about November 12 it was decided to require bail in cash for Witnesses so arrested and the sum set ranged from $100 to $300. No such bail was furnished by the appellant; his connection with giving security ended with this change of practice; and in the result, all of the charges in relation to which he had become surety were dismissed.

At no time did he take any part in the distribution of the tracts: he was an adherent of the group but nothing more. It was shown that he had leased to another member premises in Sherbrooke which were used as a hall for carrying on religious meetings: but it is unnecessary to do more than mention that fact to reject it as having no bearing on the issues raised. Beyond the giving of bail and being an adherent, the appellant is free from any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence.

The mounting resistance that stopped the surety bail sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of the appellant. Admittedly an adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. Following discussions between the then Mr. Archambault, as the personality of the Liquor Commission, and the chief prosecuting officer in Montreal, the former, on or about November 21, telephoned to the respondent, advised him of those facts, and queried what should be done. Mr. Duplessis answered that the matter was serious and that the identity of the person furnishing bail and the liquor licensee should be put beyond doubt. A few days later, that identity being established through a private investigator, Mr. Archambault again communicated with the respondent and, as a result of what passed between them, the licence, as of December 4, 1946, was revoked.

In the meantime, about November 25, 1946, a blasting answer had come from the Witnesses. In an issue of one of the periodicals, under the heading "Quebec's Burning Hate", was a searing denunciation of what was alleged to be the savage persecution of Christian believers. Immediately instructions were sent out from the department of the Attorney-General ordering the confiscation of the issue and proceedings and were taken against one Boucher charging him with publication of a seditious libel.

It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

The complementary state of things is equally free from doubt. From the evidence of Mr. Duplessis and Mr. Archambault alone, it appears that the action taken by the latter as the general manager and sole member of the Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bringing to a halt the activities of the Witnesses, to punish the appellant for the part he had played not only by revoking the existing licence but in declaring him barred from one "forever", and to warn others that they similarly would be stripped of provincial "privileges" if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. The respondent felt that action to be his duty, something which his conscience demanded of him; and as representing the provincial government his decision

became automatically that of Mr. Archambault and the Commission. The following excerpts of evidence make this clear:

> M. DUPLESSIS:
>
> R.... Au mois de novembre 1946, M. Edouard Archambault, qui était alors le gérant général de la Commission des Liqueurs m'a appelé à Québec, téléphone longue distance de Montréal, et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la Police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec. De fait, Votre Seigneurie, un permis est un privilège, ce n'est pas un droit. L'article 35 de la Loi des Liqueurs alcooliques, paragraphe 1, a été édicté en 1921 par le statut II, Geo. V, chap. 24, qui déclare ceci:
>
> > "La Commission peut, à sa discrétion annuler le permis en tout temps."
>
> * * *
>
> "Je vais m'en informer et je vous le dirai." J'ai dit au Juge: "Dans l'intervalle, je vais examiner la question avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir ce que devrai faire." Quelques jours après, et pendant cet intervalle j'ai étudié le problème, j'ai étudié des dossiers, comme Procureur Général et comme Premier Ministre, quelques jours après le Juge Archambault, M. Edouard Archambault, m'a téléphoné pour me dire qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis. Je lui ai dit: "Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là, le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait".
>
> * * *
>
> J'ai dit: "Il y a peut-être de pauvres personnes, de bonne foi, plus riches d'idéal que d'esprit, de jugement, ces personnes-là sont probablement à la merci de quelques-uns qui les exploitent, je vais donner une entrevue pour attirer l'attention de tout le monde sur l'article 69 du Code Criminel, qui déclare que les complices sont responsables au même titre que la personne qui a commis l'offense."
>
> * * *
>
> D. Vous n'avez pas reçu d'autres documents, c'est seulement les communications téléphoniques de M. le Juge Archambault?
>
> R. Oui, certainement, un message du Juge Archambault, un autre téléphone au Juge Archambault, des examens de la situation, on en a même parlé au Conseil des Ministres, j'ai discuté le cas, j'ai consulté des officiers en loi et en mon âme et conscience j'ai fait mon devoir comme Procureur Général, j'ai fait la seule chose qui s'imposait, si c'était à recommencer je ferais pareil.
>
> D. Monsieur le Premier Ministre, le 8 février 1947, dans le journal La Presse, paraissait un article intitulé: "Roncarelli subit un second refus". Le sous-titre de cet article se lit comme suit: "L'honorable M. Duplessis refuse au restaurateur, protecteur des Témoins de Jéhovah, la permission de poursuivre la Commission des Liqueurs." Vous trouverez, monsieur le Premier Ministre, presque à la fin de ce rapport, les mots suivants:
>
> > "C'est moi-même, à titre de Procureur Général, et de responsable de l'ordre dans cette province, qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis référant à Roncarelli."
>
> Je vous demande, monsieur le Premier Ministre, si c'est un rapport exact de vos paroles à cette conférence de presse?

R. Ce que j'ai dit lors de la conférence de presse, c'est ce que je viens de déclarer. Je ne connaissais pas Roncarelli, je ne savais pas que Roncarelli avait un permis,... lorsqu'il a attiré mon attention sur la situation absolument anormale d'un homme bénéficiant d'un privilège de la province, et multipliant les actes de nature à paralyser les tribunaux de la province et la police municipale de Montréal, c'est là que j'ai approuvé sa suggestion et que j'ai dit, comme Procureur général...

LA COUR

C'est une autre question que l'on vous pose, Monsieur le Premier Ministre. Voulez-vous relire la question. (La demande précédente est alors relue.)

R. Ce que j'ai dit à la presse, c'est ce que je viens de dire tout à l'heure. L'article tel que produit n'est pas conforme textuellement à ce que j'ai dit. Ce que j'ai dit, ce que je répète, c'est que le Juge Archambault, gérant de la Commission des Liqueurs m'a mis au fait d'une situation que j'ignorais et comme Procureur Général, pour accomplir mon devoir, j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fut digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

* * *

D. Les mots que je viens de vous lire tout à l'heure, c'est censé être textuellement les mots que vous avez donnés, parce que c'est précédé d'une indication d'un rapport textuel:

> "Nous n'avons fait qu'exercer en ce faisant un droit formel et incontestable, nous avons rempli un impérieux devoir. Le permis de Roncarelli a été annulé non pas temporairement mais bien pour toujours."
>
> LE TÉMOIN: Si j'ai dit cela?

L'AVOCAT: Oui.

R. Oui. Le permis de Roncarelli a été annulé pour ce temps-là et pour toujours. Je l'ai dit et je considérais que c'était mon devoir et en mon âme et conscience j'aurais manqué à mon devoir si je ne l'avais pas fait.

D. Avec ces renseignements additionnels diriez-vous que les mots: "C'est moi-même, à titre de Procureur Général et de responsable de l'ordre dans cette province qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis." Diriez-vous que c'est exact?

R. J'ai dit tout à l'heure ce qui en était. J'ai eu un téléphone de M. Archambault me mettant au courant de certains faits que j'ignorais au sujet de Roncarelli. Vérification, identification pour voir si c'était bien la même personne, étude, réflexion, consultation et décision d'approuver la suggestion du gérant de la Commission des Liqueurs d'annuler le privilège de Roncarelli.

* * *

LA COUR:

D. M. Stein veut savoir si vous avez donné un ordre à M. Archambault?

R. Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé. Le juge Archambault m'a mis au courant d'un fait que je ne connaissais pas, je ne connaissais pas les faits, c'est lui qui m'a mis au courant des faits. Je ne sais pas comment on peut appeler ça, quand la Procureur Général, qui est à la tête d'un département, parle à un officier, même à un officier supérieur, et qu'il émet une opinion, ce n'est pas directement un ordre, c'en est un sans l'être. Mais c'est à la suggestion du Juge Archambault, après qu'il eut porté à ma connaissance des faits que j'ignorais, que la décision a été prise.

* * *

D. Monsieur le Premier Ministre, excusez-moi si je répète encore la question, mais il me semble que vous n'avez pas répondu à la question que j'ai posée. Il paraît, non seulement dans ce journal, mais aussi dans d'autres journaux, et cela est répété exactement dans les même paroles, dans le Montreal Star, en anglais, dans la Gazette, en anglais, dans Le Canada, en français et aussi dans La Patrie, en français, textuellement les mêmes mots: "C'est moi-même, à titre de Procureur Général, chargé d'assurer le respect de l'ordre et le respect des citoyens paisibles qui ai donné à la Commission des Liqueurs, l'ordre d'annuler le permis." Je vous demande si c'est possible que vous ayez employé presque exactement ces mots en discutant l'affaire avec les journalistes, ce jour-là?

R. Lorsque les journalistes viennent au bureau pour avoir des entrevues, des fois les entrevues durent une demi-heure, des fois une heure, des fois une heure et demie; quels sont les termes exacts qui sont employés, on ne peut pas se souvenir exactement des termes. Mais la vérité vraie c'est ce que j'ai dit tout à l'heure, et c'est cela que j'ai dit aux journalistes, comme Premier Ministre et comme Procureur Général, je prends la responsabilité. Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rappelle pas des expressions exactes, mais ce sont les faits.

* * *

D. Référant à l'article contenue dans la Gazette du 5 décembre, c'est-à-dire le jour suivant l'annulation du permis, vous trouvez là les mots en anglais:

"In statement to the press yesterday, the Premier recalled that: 'Two weeks ago, I pointed out that the Provincial Government had the firm intention to take the most rigorous and efficient measures possible to get rid of those who under the names of Witnesses of Jehovah, distribute circulars which in my opinion, are not only injurious for Quebec and its population, but which are of a very libellous and seditious character. The propaganda of the Witnesses of Jehovah cannot be tolerated and there are more than 400 of them now before the courts in Montreal, Quebec, Three Rivers and other centers.'

'A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.'"

D. Je vous demande, monsieur le Premier Ministre, si ce sont les paroles presque exactes ou exactes que vous avez dites à la conférence de presse?

R. Que j'ai dit ici: "A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice." Je l'ai dit et je considère que c'est vrai.

* * *

M. ARCHAMBAULT:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

In these circumstances, when the de facto power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? This calls for an examination of the statutory provisions governing the issue, renewal and revocation of liquor licences and the scope of authority entrusted by law to the Attorney-General and the government in relation to the administration of the Act.

The liquor law is contained in R.S.Q. 1941, c. 255, entitled An Act Respecting Alcoholic Liquor. A Commission is created as a corporation, the only member of which is the general manager. By s.5

> The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of Manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission. R.S. 1925, c.37, s.5; 1 Ed. VII (2), c. 14, ss. 1 and 5; 1 Geo. VI, c. 22, ss. 1 and 5.

The entire staff for carrying out the duties of the Commission are appointed by the general manager -- here Mr. Archambault -- who fixes salaries and assigns functions, the Lieutenant-Governor in Council reserving the right of approval of the salaries. Besides the general operation of buying and selling liquor throughout the province and doing all things necessary to that end, the Commission is authorized by s. 9 (e) to "grant, refuse or cancel permits for the sale of alcoholic liquors or other permits in regard thereto and to transfer the permit of any person deceased". By s. 12 suits against the general manager for acts done in the exercise of his duties require the authority of the Chief Justice of the province, and the Commission can be sued only with the consent of the Attorney-General. Every officer of the Commission is declared to be a public officer and by R.S.Q. 1941, c. 10, s. 2, holds office during pleasure. By s. 19 the Commission shall pay over to the Provincial Treasurer any moneys which the latter considers available and by s. 20 the Commission is to account to the Provincial Treasurer for its receipts, disbursements, assets and liabilities. Sections 30 and 32 provide for the issue of permits to sell; they are to be granted to individuals only, in their own names; by s. 34 the Commission "may refuse to grant any permit"; subs. (2) provides for permits in special cases of municipalities where prohibition of sale is revoked in whole or part by by-law; subs. (3) restricts or refuses the grant of permits in certain cities the Council of which so requests; but it is provided that

> ... If the fyling of such by-law takes place after the Commission has granted a permit in such city or town, the Commission shall be unable to give effect to the request before the first of May next after the date of fyling.

Subsection (4) deals with a refusal to issue permits in small cities unless requested by a by-law, approved by a majority vote of the electors. By subs. (6) special power is given the Commission to grant permits to hotels in summer resorts for five months only notwithstanding that requests under subss. (2) and (4) are not made. Section 35 prescribes the expiration of every permit on April 30 of each year. Dealing with cancellation, the section provides that the "Commission may cancel any permit at its discretion". Besides the loss of the privilege and without the necessity of legal proceedings, cancellation entails loss of fees paid to obtain it and confiscation of the liquor in the possession of the holder and the receptacles containing it. If the cancellation is not followed by prosecution for an offence under the Act, compensation is provided for certain items of the forfeiture. Subsection (5) requires the Commission to cancel any permit made use of on behalf of a person other than the holder; s. 36 requires cancellation in specified cases. The sale of liquor is, by s. 42, forbidden to various persons. Section 148 places upon the Attorney-General the duty of

> 1. Assuring the observance of this Act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;
>
> 2. Conducting the suits or prosecutions for infringements of this Act or of the said Alcoholic Liquor Possession and Transportation Act. R.S. 1925, c. 37, s. 78a; 24 Geo. V, c. 17, s. 17.

The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony", and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual necessity to a superior class restaurant but also its identification with the business carried on. The provisions for assignment of the permit are to this most pertinent and they were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? the legislature cannot be so distorted.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and a fortiori to the government or the respondent: McGillivray v. Kimber [(1915), 52 S.C.R. 146, 26 D.L.R. 164.]. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in McGillivray, there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the Liquor Act? Malice in the proper sense in simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: Mostyn v. Fabrigas [98 E.R. 1021], and under art. 1053 of the Civil Code. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned.

It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

I mention, in order to make clear that it has not been overlooked, the decision of the House of Lords in Allen v. Flood [[1898] A.C. 1.], in which the principle was laid down that an act of an individual otherwise not actionable does not become so because of the motive or reason for doing it, even maliciously to injure, as distinguished from an act done by two or more persons. No contention was made in the present case based on agreed action by the respondent and Mr. Archambault. In Allen v. Flood, the actor was a labour leader and the victims non-union workmen who were lawfully dismissed by their employer to avoid a strike involving no breach of contract or law. Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In Allen v. Flood there were no such elements.

Nor is it necessary to examine the question whether on the basis of an improper revocation the appellant could have compelled the issue of a new permit or whether the purported revocation was a void act. The revocation was de facto, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

Mr. Scott argued further that even if the revocation were within the scope of discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally a fault. The proposition generalized is this: where, by a statute restricting the ordinary activities of citizens, a privilege is conferred by an administrative body, the continuance of that enjoyment is to be free from the influence of third persons on that body for the purpose only of injuring the privilege holder. It is the application to such a privilege of the proposition urged but rejected in Allen v. Flood in the case of a private employment. The grounds of distinction between the two cases have been pointed out; but for the reasons given consideration of this ground is unnecessary and I express no opinion for or against it.

A subsidiary defence was that notice of action had not been given as required by art. 88 C.C.P. This provides generally that, without such notice, no public officer or person fulfilling any public function or duty is liable in damages "by reason of any act done by him in the exercise of his functions". Was the act here, then, done by the respondent in the course of that exercise? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it. It would be only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in direct conflict with fundamental postulates of our provincial as well as dominion government; and in the actual circumstances there is not a shadow of justification for it in the statutory language.

The damages suffered involved the vocation of the appellant within the province. Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which The Court should approach as a jury would, in a view of its broad features; and in the best consideration I can give to them, the damages should be fixed at the sum of $25,000 plus that allowed by the trial court.

I would therefore allow the appeals, set aside the judgment of the Court of Queen's Bench and restore the judgment at trial modified by increasing the damages to the sum of $33,123.53. The appellant should have his costs in the Court of Queen's Bench and in this Court.

The judgment of Locke and Martland JJ. was delivered by

MARTLAND J.

MARTLAND J.:-- This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, for the Province of Quebec [[1956] Que. Q.B. 447.], District of Montreal, rendered on April 12, 1956, overruling the judgment of the Superior Court rendered on May 2, 1951, under the terms of which the appellant had been awarded damages in the sum of $8,123.53 and costs.

The appellant had appealed from the judgment of the Superior Court in respect of the amount of damages awarded. This appeal was dismissed.

The facts which give rise to this appeal are as follows:

The appellant, on December 4, 1946, was the owner of a restaurant and café situated at 1429 Crescent Street in the City of Montreal. At that time he was the holder of a liquor permit, no. 68, granted to him on May 1, 1946, pursuant to the provisions of the Alcoholic Liquor Act of the Province of Quebec and which permitted the sale of alcoholic liquors in the restaurant and café. The permit was valid until April 30, 1947, subject to possible cancellation by the Quebec Liquor Commission (hereinafter sometimes referred to as "the Commission") in accordance with the provisions of s. 35 of that Act. The business operated by the appellant had been founded by his father in the year 1912 and it had been continuously licensed until December 4, 1946. The evidence is that prior to that date the appellant had complied with the requirements of the Alcoholic Liquor Act and had conducted a high-class restaurant business.

The appellant was an adherent of the Witnesses of Jehovah. From some time in 1944 until November 12, 1946, he had, on numerous occasions, given security for Witnesses of Jehovah who had been prosecuted under City of Montreal By-laws numbered 270 and 1643 for minor offences of distributing, peddling and canvassing without a licence. The maximum penalty for these offences was a fine of $40 and costs, or imprisonment for 60 days. The total number of bonds furnished by the appellant was 390. These security bonds were accepted by the City attorney and the Recorder of the City of Montreal without remuneration to the appellant. None of the accused who had been bonded ever defaulted. Subsequently the appellant was released from these bonds at his own request and new security was furnished by others.

As a result of a change of procedure in the Recorder's Court in Montreal by the Attorney in Chief of that Court, the appellant was not accepted as a bondsman in any cases before that Court after November 12, 1946.

Up to November 12, 1946, the security bonds furnished by the appellant were accepted without question. These bonds were based upon the appellant's immovable property containing the restaurant. The appellant did not give any security in any criminal case involving a charge of sedition.

About the 24th or 25th of November 1946 the pamphlet "Quebec's Burning Hate" began to be distributed in the Province of Quebec by the Witnesses of Jehovah. The Chief Crown Prosecutor in Montreal, then Mtre. Oscar Gagnon, K.C., decided that the distribution of this pamphlet should be prevented. There is no evidence that the appellant was at any time a distributor of this pamphlet and his restaurant and café in Montreal was not used for the distribution or storage of these pamphlets by himself or by anyone else. The appellant had ceased to be a bondsman before the distribution of this pamphlet in the Province of Quebec had commenced.

On November 25, 1946, a number of pamphlets was seized in a building in the City of Sherbrooke owned by the appellant and leased from him, as a place of worship, by Witnesses of Jehovah under the control of the local minister Mr. Raymond Browning. There is no evidence that the appellant was in any way responsible for the activities of this congregation, or that he knew that the pamphlet "Quebec's Burning Hate" was in those premises.

In the course of his inquiries about the distribution of this pamphlet, Mr. Gagnon learned that the appellant had been giving bail in a large number of cases in the Recorder's Court and also that he was the holder of the liquor permit for his restaurant. These facts were brought by Mr. Gagnon to the attention of Mr. Edouard Archambault, then Chairman of the Quebec Liquor Commission and subsequently Chief Judge of the Court of Sessions of the Peace. Mr. Archambault then interviewed Recorder Paquette, who informed him that the appellant held a licence from the Quebec Liquor Commission; that he was furnishing bail in a large number of cases of infractions of municipal by-laws; that these were so numerous that a great part of the police of Montreal had been taken from their duties as a consequence and that his Court was congested by the large number of cases pending before it.

Subsequent to the receipt of this information, Mr. Archambault communicated by telephone with the respondent. The discussion which took place on that occasion and on the occasion of a subsequent telephone call will be reviewed later. Following the two telephone conversations between Mr. Archambault and the respondent, Mr. Archambault, as manager of the Quebec Liquor Commission, issued an order for the cancellation of the appellant's permit without any prior notice to the appellant. All the liquor in the possession of the appellant on his restaurant premises was seized and was taken into the custody of the Commission.

The appellant carried on his restaurant business without a liquor licence for a period of approximately six months, after which, finding that the business could not be thus operated profitably, he closed it down and later effected a sale of the premises.

The appellant commenced action against the respondent on June 3, 1947, claiming damages in the total sum of $118,741. He alleged that the respondent, without legal or statutory authority, had caused the cancellation of his liquor permit as an act of reprisal because of his having acted as surety or bondsman for the Witnesses of Jehovah in connection with the charges above mentioned. He alleged that the permit had been arbitrarily and unlawfully cancelled and that, as a result, he had sustained the damages claimed.

By his defence the respondent alleged that the Witnesses of Jehovah, in the years 1945 and 1946, had, with the consent and encouragement of the appellant, organized a propaganda campaign in the Province of Quebec, and particularly in the City of Montreal, where they had distributed pamphlets of a seditious character. The respondent referred to the fact that the appellant had acted as surety for a number of persons under arrest and thus permitted them to repeat their offences and to continue their campaign. He alleged that in his capacity as Attorney-General of the Province of Quebec, after becoming cognizant of the conduct of the appellant and of the fact that he held a permit issued by the Quebec Liquor Commission, he had decided, after careful reflection, that it was contrary to public order to permit the appellant to enjoy the benefit of the privileges of this permit and that he, the respondent, had recommended to the manager of the Quebec Liquor Commission the cancellation of that permit. It was alleged that the permit did not give any right, but constituted a privilege available only during the pleasure of the Commission. He alleged that in the matter he had acted in his quality of Prime Minister and Attorney-General of the Province of Quebec and accordingly, could not incur any personal responsibility. He further pleaded the provisions of art. 88 of the Code of Civil Procedure and alleged that he had not received notice of the action as required by the provisions of that article.

The case came on for trial in the Superior Court before MacKinnon J., who made findings of fact and reached conclusions in law as follows:

1. that the respondent gave an order to the manager of the Commission, Mr. Archambault, to cancel the appellant's permit and that it was the respondent's order which was the determining factor in relation to the cancellation of that permit;
2. that the Commission had acted arbitrarily when it cancelled the permit and had disregarded the rules of reason and justice;
3. that the respondent had failed to show that, in law, he had any authority to interfere with the administration of the Commission, or to order it to cancel a permit;

4. that the respondent was not entitled to receive notice of the action pursuant to art. 88 of the Code of Civil Procedure because his acts which were complained of were not done in the exercise of his functions.

Damages were awarded in the total amount of $8,123.53.

From this judgment the respondent appealed. The appellant cross-appealed in respect of the matter of damages, asking for an award in an increased amount.

The respondent's appeal on the issue of liability was allowed and the appellant's appeal was dismissed. Rinfret J. dissented in respect of the allowance of the respondent's appeal.

Various reasons were given for the allowance of the appeal by the majority of the Court [[1956] Que. Q.B. 447.]. They may be summarized as follows:

Bissonnette J. reached the conclusion that, upon the evidence, the decision to cancel the permit had been made by Mr. Archambault before taking the respondent's advice. He also held that, according to the strict interpretation of the Alcoholic Liquor Act, the Commission was not obliged to justify before any Court the wisdom of its acts in cancelling a liquor permit.

Pratte J. allowed the appeal of the respondent on the first ground advanced by Bissonnette J., finding that there was no relationship of cause and effect as between the acts of the respondent and the cancellation of the permit because Mr. Archambault had already made his decision to cancel before consulting with the respondent.

Casey J. was of the same view with respect to this point. He also held that, although the discretion of the Commission to cancel a permit should not be exercised arbitrarily or capriciously, no individual has an inherent right to engage in the business regulated by the Act and the continuance of a permit was conditional upon the holder being of good moral character and a suitable person to exercise that privilege. In his view the chairman of the Commission had reasonable grounds for believing that the Witnesses of Jehovah were engaged in a campaign of libel and sedition and that the appellant, an active member of the sect, was participating in the group's activities. His view was that, in the light of this, the Commission could properly cancel the permit.

Martineau J., like the other majority judges in the Court, found that there was no relationship of cause and effect as between what the respondent had done and the cancellation of the permit, also holding that Mr. Archambault had decided to cancel it before communicating with the respondent. He was also of the view that a Minister of the Crown is not liable if, in the exercise of powers granted to him by law, he makes an erroneous decision upon reliable information. He also held that, while the Commission's discretion to cancel a permit was not absolute and had to be exercised in good faith, the discretion is not quasi-judicial but "quasi-illimited" and only restricted by the good faith of its officers. He was of the opinion that the good faith of both the respondent and Mr. Archambault could not be doubted. He found that no order to cancel the permit had been given by the respondent to Mr. Archambault. He also held that, even if an order had been given and had been the determining factor in procuring the cancellation of the permit, there would be no liability upon the respondent, in view of the appellant's participation in the propaganda of the Witnesses of Jehovah.

Rinfret J., who dissented and who would have dismissed the respondent's appeal, in general agreed with the conclusions reached by the trial judge.

In view of the foregoing, it appears that there are four main points which require to be considered in the present appeal, which are as follows:

1. Was there a relationship of cause and effect as between the respondent's acts and the cancellation of the appellant's permit?
2. If there was such a relationship, were the acts of the respondent justifiable on the ground that he acted in good faith in the exercise of his official functions as Attorney-General and Prime Minister of the Province of Quebec?
3. Was the cancellation of the appellant's permit a lawful act of the Commission, acting within the scope of its powers as defined in the Alcoholic Liquor Act?

4. Was the respondent entitled to the protection provided by art. 88 of the Code of Civil Procedure?

It is proposed to consider each of these points in the above sequence.

With respect to the first point, after reviewing the evidence, I am satisfied that there was ample evidence to sustain the finding of the trial judge that the cancellation of the appellant's permit was the result of instructions given by the respondent to the manager of the Commission.

Two telephone calls were made by Mr. Archambault to the respondent. According to the evidence of the respondent, Mr. Archambault telephoned him in November 1946 "et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec."

In reply the respondent says that he said to Mr. Archambault:

> C'est une chose très grave, êtes-vous sûr qu'il s'agit de Roncarelli qui a un permis de la Commission des Liqueurs?

Mr. Archambault then replied that he would inform himself and would communicate with the respondent.

Some time after the first telephone conversation, and apparently about November 30 or December 1, 1946, Mr. Archambault again telephoned the respondent to say:

> qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder, qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis.
>
> To this the respondent replied:
>
> Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait.
>
> The respondent further says that he told Mr. Archambault:
>
> Vous avez raison, ôtez le permis, ôtez le privilège.

In February 1947 the respondent, in an interview with the press, stated that the appellant's permit had been cancelled on orders from him. His statement on this point appeared in a news dispatch to the Canadian Press from its Quebec correspondent:

> It was I, as Attorney-General of the Province charged with the protection of good order, who gave the order to annul Frank Roncarelli's permit.
>
> Mr. Duplessis said:
>
> By so doing, not only have we exercised a right but we have fulfilled an imperious duty. The permit was cancelled not temporarily but definitely and for always.

It seems to me that the only reason Mr. Archambault could have had for telephoning the respondent in the first place, after his receipt of the information given by Mr. Gagnon and Recorder Paquette, was to obtain the respondent's direction as to what should be done. I find it difficult to accept the proposition that there was no relationship of cause and effect as between what the respondent said to Mr. Archambault and the cancellation of the permit. While it is true that in his evidence Mr. Archambault states that he had decided to cancel the permit on the day he received the written report from his secret agent Y3, dated November 30, 1946 (which was subsequent to the first telephone conversation), he goes on to say:

> D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

I conclude from this evidence that any "decision" of Mr. Archambault's was at most tentative and would only be made effective if he received direction from the respondent to carry it out. I would doubt that, if the respondent had advised against the cancellation of the permit, Mr. Archambault's decision would have been implemented.

The respondent appears to have shared this view because in his evidence he states as follows:

> Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rapelle pas des expressions exactes, mais ce sont les faits.

I, therefore, agree with the learned trial judge that the cancellation of the appellant's permit was the result of an order given by the respondent.

The second point for consideration is as to whether the respondent's acts were justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister of the Province of Quebec.

In support of his contention that the respondent had so acted, we were referred by his counsel to the following statutory provisions:

THE ATTORNEY-GENERAL'S DEPARTMENT ACT, R.S.Q. 1941, c. 46

* * *

> 3. The Attorney-General is the official legal adviser of the Lieutenant-Governor, and the legal member of the Executive Council of the Province of Quebec.
>
> 4. The duties of the Attorney-General are the following:
>
> > 1. To see that the administration of public affairs is in accordance with the law;
> >
> > 2. To exercise a general superintendence over all matters connected with the administration of justice in the Province.
>
> 5. The function and powers of the Attorney-General are the following:
>
> > 1. He has the functions and powers which belong to the office of Attorney-General of England, respectively, by law or usage, insofar as the same are applicable to this Province, and also the functions and powers, which, up to the Union, belonged to such offices in the late Province of Canada, and which, under the provisions of the British North America Act, 1867, are within the powers of the Government of this Province;
> >
> > 2. He advises the heads of the several departments of the Government of the Province upon all matters of law concerning such departments, or arising in the administration thereof;

* * *

> > 7. He is charged with superintending the administration or the execution, as the case may be, of the laws respecting police.

THE EXECUTIVE POWER ACT, R.S.Q. 1941, c. 7

* * *

> 5. The Lieutenant-Governor may appoint, under the Great Seal, from among the members of the Executive Council, the following officials, who shall remain in office during pleasure:
>
> 1. A Prime Minister who shall, ex-officio, be president of the Council.

THE ALCOHOLIC LIQUOR ACT, R.S.Q. 1941, c. 255

DIVISION XII

INVESTIGATION AND PROSECUTION OF OFFENCES

> 148. The Attorney-General shall be charged with:
>
> 1. Assuring the observance of this act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;
>
> 2. Conducting the suits or prosecutions for infringements of this act or of the said Alcoholic Liquor Possession and Transportation Act.

I do not find, in any of these provisions authority to enable the respondent, either as Attorney-General or Prime Minister, to direct the cancellation of a permit under the Alcoholic Liquor Act. On the contrary, the intent and purpose of that Act appears to be to place the complete control over the liquor traffic in Quebec in the hands of an independent commission. The only function of the Attorney-General under that statute is in relation to the assuring of the observance of its provisions. There is no evidence of any breach of that Act by the appellant.

However, it is further argued on behalf of the respondent that, as Attorney- General, in order to suppress or to prevent crimes and offences, "He may do so by instituting legal proceedings; he may do so by other methods." This amounts to a contention that he is free to use any methods he chooses; that, on suspicion of participation in what he thinks would be an offence, he may sentence a citizen to economic ruin without trial. This seems to me to be a very dangerous proposition and one which is completely alien to the legal concepts applicable to the administration of public office in Quebec, as well as in the other provinces of Canada.

In my view, the respondent was not acting in the exercise of any official powers which he possessed in doing what he did in this matter.

The third point to be considered is as to whether the appellant's permit was lawfully cancelled by the Commission under the provisions of the Alcoholic Liquor Act. Section 35 of that Act makes provision for the cancellation of a permit in the following terms:

> 35. 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.
>
> The Commission may cancel any permit at its discretion.

It is contended by the respondent, and with considerable force, that this provision gives to the Commission an unqualified administrative discretion as to the cancellation of a permit issued pursuant to that Act. Such a discretion, it is contended, is not subject to any review in the Courts.

The appellant contends that the Commission's statutory discretion is not absolute and is subject to legal restraint. He cites the statement of the law by Lord Halsbury in Sharp v. Wakefield [[1891] A.C. 173 at 179.]:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

That was a case dealing with the discretionary powers of the licensing justices to refuse renewal of a licence for the sale of intoxicating liquors. This statement of the law was approved by Lord Greene M.R. in Minister of National Revenue v. Wrights' Canadian Ropes, Limited [[1947] A.C. 109 at 122.].

The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.

With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing, in view of the judgment of Lord Radcliffe in Nakkuda Ali v. Jayaratne [[1951] A.C. 66.]. However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the Alcoholic Liquor Act must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the Alcoholic Liquor Act.

Furthermore, it should be borne in mind that the right of cancellation of a permit under that Act is a substantial power conferred upon what the statute contemplated as an independent commission. That power must be exercised solely by that corporation. It must not and cannot be exercised by any one else. The principle involved is stated by the Earl of Selborne in the following passage in his judgment in Spackman v. Plumstead Board of Works [(1885), 10 App. Cas. 229 at 240.]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

While the Earl of Selborne is here discussing the rules applicable to a quasi-judicial tribunal, that portion of his statement which requires such a tribunal to act honestly and impartially and not under the dictation of some other person or persons is, I think, equally applicable to the performance of an administrative function.

The same principle was applied in respect of the performance of an administrative function by Chief Justice Greenshields in Jaillard v. City of Montreal [(1934), 72 Que. S.C. 112.].

In the present case it is my view, for the reasons already given, that the power was not, in fact, exercised by the Commission, but was exercised by the respondent, acting through the manager of the Commission. Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission by s. 35 of the Act. The Commission cannot abdicate its own functions and powers and act upon such direction.

Finally, there is the question as to the giving of notice of the action by the appellant to the respondent pursuant to art. 88 of the Code of Civil Procedure, which reads as follows:

> ACTIONS AGAINST PUBLIC OFFICERS
>
> 88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personnally or at his domicile.

The contention of the respondent is that, as Attorney-General, he was a public official whose function was to maintain law and order in the Province; that he acted as he did in the intended exercise of that function and that he is not deprived of the protection afforded by the article because he had exceeded the powers which, in law, he possessed.

The issue is as to whether those acts were "done by him in the exercise of his functions." For the reasons already given in dealing with the second of the four points under discussion, I do not think that it was a function either of the Prime Minister or of the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.

Is the position altered by the fact that apparently he thought it was his right and duty to act as he did? I do not think that it is. The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those functions, but must be determined according to law. The respondent apparently assumed that he was justified in using any means he thought fit to deal with the situation which confronted him. In my view, when he deliberately elected to use means which were entirely outside his powers and were unlawful, he did not act in the exercise of his functions as a public official.

The principle which should be applied is stated by Lopes J. in Agnew v. Jobson [(1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.]. That was an action for assault against a justice of the peace who had ordered a medical examination of the person of the plaintiff. There was no legal authority to make such an order, but it was admitted that the defendant bona fide believed that he had the authority to do that which he did. The defendant relied on absence of notice of the action as required by 11 & 12 Vic., c. 44. Section 8 of that Act provided that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office" unless within six calendar months of the act complained of. Section 9, the one relied on by the defendant, provided that "no such action shall be commenced against any such justice" until a month after notice of action. Lopes J. held that "such justice" in s. 9 referred to a justice in execution of his office in s. 8. He held that s. 9 did not provide a defence to the defendant in these words (p. 68):

> I am of opinion that the defendant Jobson is not entitled to notice of action. There was a total absence of any authority to do the act, and although he acted bona fide, believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such a belief might be based on.

Similarly here there was nothing on which the respondent could found the belief that he was entitled to deprive the appellant of his liquor permit.

On the issue of liability, I have, for the foregoing reasons, reached the conclusion that the respondent, by acts not justifiable in law, wrongfully caused the cancellation of the appellant's permit and thus caused damage to the appellant. The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justification, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the Civil Code.

I now turn to the matter of damages.

The learned trial judge awarded damages to the appellant in the sum of $8,123.53, made up of $1,123.53 for loss of value of liquor seized by the Commission, $6,000 for loss of profits from the restaurant from December 4, 1946, the date of the cancellation of the permit, to May 1, 1947, the date when the permit would normally have expired, and $1,000 for damages to his personal reputation. No objection is taken by the appellant in respect of these awards, but he contends that he is also entitled to compensation under certain other heads of damage in respect of which no award was made by the learned trial judge. These are in respect of damage to the good will and reputation of his business, loss of property rights in his permit and loss of future profits for a period of at least one year from May 1, 1947. Damages in respect of these items were not allowed by the learned trial judge because of the fact that the appellant's permit was "only a temporary asset."

The appellant contends that, although his permit was not permanent, yet, in the light of the long history of his restaurant and the continuous renewals of the permit previously, he had a reasonable expectation of renewal in the future, had not the cancellation been effected in December 1946. He contends that the value of the good will of his business was substantially damaged by that cancellation.

His position on this point is supported by the reasoning of Duff J. (as he then was) in McGillivray v. Kimber [(1915), 52 S.C.R. 146, 26 D.L.R. 164.]. That was an action claiming damages for the wrongful cancellation of the appellant's pilot's licence by the Sydney Pilotage Authority. At p. 163 he says:

> The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598.

The statement by Bowen L.J. to which he refers appears at p. 613 of the report and is also of significance in relation to the appellant's right of action in this case. It is as follows:

> Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.

The evidence establishes that there was a substantial reduction in the value of the good will of the appellant's restaurant business as a result of what occurred, apart from the matter of any loss which might have resulted on the sale of the physical assets. It is difficult to assess this loss and there is not a great deal of evidence to assist in so doing. The appellant did file, as exhibits, income tax returns for the three years prior to 1946, which showed in those years a total net income from the business of $23,578.88. The profit-making possibilities of the business are certainly an item to be considered in determining the value of the good will.

However, in all the circumstances, the amount of these damages must be determined in a somewhat arbitrary fashion. I consider that $25.000 should be allowed as damages for the diminution of the value of the good will and for the loss of future profits.

I would allow both appeals, with costs here and below, and order the respondent to pay to the appellant damages in the total amount of $33,123.53, with interest from the date of the judgment in the Superior Court, and costs.

CARTWRIGHT J. (dissenting)

CARTWRIGHT J. (dissenting):-- This appeal is from two judgments of the Court of Queen's Bench (Appeal Side) for the Province of Quebec [[1956] Que. Q.B. 447.], of which the first allowed an appeal from a judgment of MacKinnon J. and dismissed the appellant's action, and the second dismissed a cross-appeal asking that the damages awarded by the learned trial judge be increased.

The respondent is, and was at all relevant times, the Prime Minister and Attorney-General of the Province of Quebec.

The appellant on December 4, 1946, was the owner of an immovable property, known as 1429 Crescent Street in the City of Montreal, where he had for many years successfully carried on the business of a restaurant and cafe. He was the holder of liquor permit no. 68 granted to him on May 1, 1946, for the sale of alcoholic liquors in his restaurant and cafe pursuant to the provisions of the Alcoholic Liquor Act, R.S.Q. 1941, c. 255, hereinafter referred to as "the Act". This permit would normally have expired on April 30, 1947. The business carried on by the appellant had been founded by his father in 1912 and had been licensed uninterruptedly from that time until 1946. Prior to December 4, 1946, the appellant had complied with all the requirements of the Act and had carried on his restaurant business in conformity with the laws of the Province.

The appellant was at all relevant times a member of a sect known as "The Witnesses of Jehovah" and from some time in 1944 up to November 12, 1946, had on about 390 occasions, acted as bailsman for numbers of his co-religionists prosecuted under by-laws of the City of Montreal for distributing literature without a licence. None of those for whom he acted as bailsman defaulted in appearance, and all of them were ultimately discharged upon the by-laws under which they were charged being held to be invalid.

About the 24th or 25th of November 1946 members of the sect commenced distributing copies of a circular entitled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada". Copies of this circular are printed in the record, the English version being exhibit D7 and the French version exhibit D11. The then senior Crown Prosecutor in Montreal, Mtre Oscar Gagnon, formed the opinion that the circular was a seditious libel and that its distribution should be prevented. It results from the judgment of this Court in Boucher v. The King [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.] that the learned Crown Prosecutor was in error in forming the opinion that the circular could be regarded as seditious. It, however, can hardly be denied that it was couched in terms which would outrage the feelings of the great majority of the inhabitants of the Province of Quebec; and the same may be said of a number of other documents circulated by the sect, copies of which form part of the record in the case at bar.

The evidence does not show that the appellant took part in the distribution of any of the circulars mentioned or that he was a leader or chief of the sect. He did not act as bailsman for any member of the sect charged in connection with the distribution of the circular, "Quebec's burning hate".

On November 25, 1946, pamphlets, including copied of "Quebec's burning hate" were sized in a building in the City of Sherbrooke owned by the appellant and leased by him to a congregation of Witnesses of Jehovah as a "Kingdom Hall" or place of worship. The appellant was not aware that the pamphlets were in this building.

From his investigations and the reports which he received M. Gagnon concluded that the distribution of the pamphlets "convergeait autour de M. Roncarelli ou de personnes qui étaient près de lui" and he so informed M. Edouard Archambault, the manager of the Quebec Liquor Commission. It may well be that M. Gagnon reached the conclusion mentioned on insufficient evidence. M. Gagnon also informed M. Archambault that the appellant had acted as bailsman for a great number of Witnesses of Jehovah.

On receiving this information from M. Gagnon, M. Archambault read the circular, "Quebec's burning hate" and had a conversation with M. Paquette, the Recorder-in-Chief at Montreal, who confirmed the statements as to the appellant furnishing bail.

At this point M. Archambault formed the opinion that he should cancel the permit held by the appellant, but before taking any action he telephoned the respondent at Quebec, told him what information he had received and that he proposed cancelling the permit. The respondent told him to be careful to make sure that the Roncarelli who had furnished bail was in fact the appellant. M. Archambault satisfied himself as to this through the report of an agent "Y3", in whom he had confidence, and thereupon, according to his uncontradicted evidence, decided to cancel the permit. The reasons which brought him to this decision were stated by him as follows:

> D. Alors, à ce moment-là, vous aviez déjà décidé d'enlever cette licence?
>
> R. Oui
>
> D. Vous basant, je suppose, sur les rapports que vous aviez déjà reçus de monsieur Oscar Gagnon et du recorder-en-chef Paquette que monsieur Roncarelli avait fourni des cautionnements?
>
> R. Oui; et, à part de cela, de la littérature que j'avais lue.
>
> D. Et le pamphlet auquel vous avez référé: "Quebec's Burning Hate"?
>
> R. Oui, monsieur.

M. Archambault then telephoned the respondent. The substance of the two telephone conversations between M. Archambault and the respondent is summarized by the former as follows:

> D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

The evidence of the respondent is also that the suggestion of cancelling the permit was made by M. Archambault, and there is no evidence to the contrary.

There has been a difference of opinion in the Courts below as to whether what was said by the respondent to M. Archambault amounted to an order to cancel or merely to an "approbation énergique" of a decision already made. I do not find it necessary to choose between these conflicting views as I propose to assume for the purposes of this appeal that what was said by the respondent was so far a determining factor in the cancellation of the permit as to render him liable for the damages caused thereby to the appellant if the cancellation was an actionable wrong giving rise to a right of action for damages.

All of the Judges in the Courts below who have dealt with that aspect of the matter have concluded that the respondent acted throughout in the honest belief that he was fulfilling his duty to the Province, and this conclusion is supported by the evidence.

The opinion of M. Archambault and of the respondent appears to have been that a permit to sell liquor under the Act is a privilege in the gift of the Province which ought not to be given to, or allowed to continue to be enjoyed by, one who was actively supporting members of a group of persons who were engaged in a concerted campaign to vilify the Province and were persistently acting in contravention of existing by-laws. Once it is found, as I think it must be on the evidence, that this opinion was honestly entertained, I have reached the conclusion, for reasons that will appear, that the Court cannot inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit.

The permit was cancelled on December 4, 1946, without any prior notice to the appellant and without his being given any opportunity to show cause why it ought not to be cancelled. It is clear that the appellant suffered substantial financial loss as a result of the cancellation.

In determining whether the cancellation of the permit in these circumstances was an actionable wrong on the part of the commission or of M. Archambault, its manager, it is necessary to consider the relevant provisions of the Act. These appear to me to be as follows:

> S.5 A Commission is by this act created under the name of "The Quebec Liquor Commission", or "Commission des liqueurs de Québec", and shall constitute a corporation, vested with all the rights and powers belonging generally to corporations. The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission.
>
> * * *
>
> S.9 The function, duties and powers of the Commission shall be the following:
>
> * * *
>
> d. To control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of this act;
>
> e. To grant, refuse, or cancel permits for the sale of alcoholic liquor or other permits in regard thereto, and to transfer the permit of any person deceased;
>
> * * *
>
> S.32 No permit shall be granted other than to an individual, and in his personal name.
>
> The application for a permit may be made only by a British subject, must be signed by the applicant before witnesses, and must give his surname, Christian names, age, occupation, nationality and domicile, the kind of permit required and the place where it will be used, and must be accompanied by the amount of the duties payable upon the application for the permit. The applicant must furnish all additional information which the commission may deem expedient to ask for.
>
> If the permit is to be used for the benefit of a partnership or corporation, the application therefore must likewise be accompanied by a declaration to that effect, and duly signed by such partnership or corporation.

In such case, the partnership or corporation shall be responsible for any fine and costs, to which the holder of the permit may be condemned; and the amount thereof may be recovered before any court having jurisdiction, without prejudice to imprisonment, if any.

All applications for permits must be addressed to the Commission before the 10th of January in each year, to take effect on the 1st of May in the same year.

* * *

S.34 1. The Commission may refuse to grant any permit.

2. The Commission must refuse to grant any permit for the sale of alcoholic liquor in any municipality where a prohibition by-law is in force.

Subsections 2 to 6 of s. 34 enumerate special cases in which the commission must refuse a permit.

S.35 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th day of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

2. Saving the provisions of subsection 4 of this section, the cancellation of a permit shall entail the loss of the privilege conferred by such permit, and of the duties paid to obtain it, and the seizure and confiscation by the Commission of the alcoholic liquor found in the possession of the holder thereof, and the receptacles containing it, without any judicial proceedings being required for such confiscation.

The cancellation of a permit shall be served by a bailiff leaving a duplicate of such order of cancellation, signed by three members of the Commission, with the holder of such permit or with any other reasonable person at his domicile or place of business.

The cancellation shall take effect as soon as the order is served.

* * *

S.35 4. If the cancellation of the permit be not preceded or followed by a conviction for any offence under this act committed by the holder of such permit while it was in force, the Commission shall remit to such holder.

a. Such part of the duties which such person has paid upon the granting of such permit, proportionate to the number of full calendar months still to run up to the 1st of May following;

b. The proceeds of every sale by the Commission, after the seizure and confiscation thereof, of beer having an alcoholic content of not more than four per cent, in weight, less ten per cent of such proceeds;

c. The value, as determined by the Commission, of the other alcoholic liquor seized and confiscated, less ten per cent of such value.

5. Save in the case where a permit is granted to an individual on behalf of a partnership or corporation, in accordance with section 32, the Commission must cancel every permit made use of on behalf of any person other than the holder.

S.36 The Commission must cancel a permit:

1. Upon the production of a final condemnation, rendered against the permit-holder, his agent or employee, for selling, in the establishment, alcoholic liquor manufactured illegally or purchased in violation of this act;

2. Upon the production of three final condemnations rendered against the permit-holder for violation of this act;

3. If it appears that the permit-holder has, without the Commission's authorization, transferred, sold, pledged, or otherwise alienated the rights conferred by the permit.

On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial. The submission of counsel for the respondent, made in the following words, appears to me to be well founded:

> Under the Statute, no one has a pre-existing right to obtain a permit, and the permit being granted under the condition that it may be cancelled at any time, and no cause of cancellation being mentioned and no form of procedure being indicated, the cancellation is a discretionary decision of a purely administrative character.

I accept as an accurate statement of the distinction between a judicial and an administrative tribunal that adopted by Masten J.A. in giving the judgment of the Court of Appeal for Ontario in re Ashby et al [[1934] O.R. 421 at 428, 3 D.L.R. 565, 62 C.C.C. 132.]:

> The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 106, 107 and 108:
>
> "A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilities are treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.
>
> In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.
>
> Leeds (Corp.) v. Ryder (1907) A.C. 420, at 423, 424, per Lord Loreburn L.C.; Shell Co. of Australia v. Federal Commissioner of Taxation (1931) A.C. 275, at 295; Boulter v. Kent JJ. (1897) A.C. 556, at 564.
>
> A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself."

In re Ashby the Court found that the statute there under consideration set up certain fixed standards and prescribed conditions on which persons might have their certificates revoked by the board, and accordingly held its function to be quasi-judicial; in the case at bar, on the contrary, no standards or conditions are indicated and I am forced to conclude that the Legislature intended the commission "to be a law unto itself".

If I am right in the view that in cancelling the permit M. Archambault was performing an administrative act in the exercise of an unfettered discretion given to him by the statute it would seem to follow that he was not bound to give the appellant an opportunity to be heard before deciding to cancel and that the Court cannot be called upon to determine whether there existed sufficient grounds for his decision. If authority is needed for this conclusion it may be found in the judgment of the Judicial Committee, delivered by Lord Radcliffe, in Nakkuda Ali v. M.F De S. Jayaratne [[1951] A.C. 66.] and in the reasons of my brother Martland on Calgary Power Limited et al v. Copithorne [[1959] S.C.R. 24, 16 D.L.R. (2d) 241.]. The wisdom and desirability of conferring such a power upon an official without specifying the ground upon which it is to be exercised are matters for the consideration of the Legislature not of the Court.

If, contrary to my conclusion, the function of the commission was quasi-judicial, it may well be that its decision to cancel the permit would be set aside by the Court for failure to observe the rules as to how such tribunals must proceed which are laid down in many authorities and are compendiously stated in the following passage in the judgment of the Earl of Selborne in Spackman v. Plumstead Board of Works [(1885), 10 App. Cas. 229 at 240.]:

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the Statute if there were anything of that sort done contrary to the essence of justice.

But even if it were assumed that the function of the commission was quasi-judicial and that its order cancelling the permit should be set aside for failure to observe the rules summarized in the passage quoted, I would be far from satisfied that any action for damages would lie.

If that question arose for decision it would be necessary to consider the judgments delivered in this Court in McGillivray v. Kimber [(1915), 52 S.C.R. 146, 26 D.L.R. 164.], the cases cited in Halsbury, 2nd ed., vol. 26, pp. 284 and 285, in support of the following statement:

> Persons exercising such quasi-judicial powers ... in the absence of fraud, collusion, or malice, are not liable to any civil action at the suit of any person aggrieved by their decisions...

and the judgment of Wilmot C.J., concurred in by Gould J. and Blackstone J., in Bassett v. Godschall [(1770), 3 Wils. 121 at 123, 95 E.R. 967.]:

> The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licences for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B.R. I cannot think a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly and maliciously injures or oppresses the King's subjects, under colour of his office, and contrary to law: but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a licence, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

For the above reasons I have reached the conclusion that the heavy financial loss undoubtedly suffered by the appellant was damnum sine injuria. The whole loss flowed directly from the cancellation of the permit which was an act of the commission authorized by law. I have formed this opinion entirely apart from any special statutory protection afforded to the commission or to its manager, M. Archambault, as, for example, by s. 12 of the Act.

The case of James v. Cowan [[1932] A.C. 542.] relied upon by counsel for the appellant as supporting the existence of a right of action for damages seems to me to be clearly distinguishable. In that case the right of action asserted was for damages for the wrongful taking of the plaintiff's goods. The only justification put forward was an order held to be ultra vires and therefore void. It may be mentioned in passing that if, contrary to my view, the decision of the commission in the case at bar was made in the exercise of a judicial function, its failure to follow a rule of natural justice would appear to render the order voidable but not void; Dimes v. Grand Junction Canal Proprietors [(1852), 3 H.L. Cas. 759, 10 E.R. 301.].

Having concluded that the act of the commission in cancelling the permit was not an actionable wrong, it appears to me to follow that the respondent cannot be answerable in damages for directing or approving, as the case may be, the doing of that act.

As it was put by Bissonnette J. [[1956] Que. Q.B. 447 at 457]:

> D'où il découle, en saine logique, que si dans l'exercice de son pouvoir dicrétionnaire, il (M. Archambault) ne commettait ni faute, ni illégalité, personne n'est justifié à chercher à atteindre, au delà de sa personne, un conseiller, voire un chef ou supérieur politique, pour le motif que sans la faute du premier, celle qu'on veut imputer au second ne peut exister.

On this branch of the matter, I should perhaps mention that there is, in the record, no room for any suggestion that the respondent coerced an unwilling Commission into making a decision contrary to the view of the latter as to what that decision should be.

For the above reasons it is my opinion that the appeal fails and it becomes unnecessary for me to consider the alternative defence as to lack of notice of action, based upon art. 88 of the Code of Civil Procedure or the question of the quantum of damages.

The appeal, as to both of the judgments of the Court of Queen's Bench, should be dismissed with costs.

FAUTEUX J. (dissenting)

FAUTEUX J. (dissenting):-- L'appelant se pourvoit à l'encontre de deux décisions majoritaires de la Cour du banc de la reine [[1956] Que. Q.B. 447.], dont la première infirme un jugement de la Cour supérieure condamnant l'intimé à lui payer une somme de $8,123.53 à titre de dommages-intérêts, et dont la seconde rejette l'appel logé par lui-même pour faire augmenter le quantum des dommages ainsi accordés.

Les faits donnant lieu à ce litige se situent dans le cadre des activités poursuivies dans la province de Québec, au cours particulièrement des années 1944, 1945 et 1946, par la secte des Témoins de Jéhovah. Ces activités prenaient forme d'assemblées, de distribution de circulaires, de pamphlets et de livres, et de sollicitation, dans les rues et à domicile. Dirigée ouvertement contre les pratiques des religions professées dans la province et, plus particulièrement, de la religion catholique, les enseignements de cette secte étaient diffusés dans un langage manifestement, sinon délibérément, insultant et, par suite, provoquèrent dans les cités et les villages où ils étaient propagés, des troubles à la paix publique. Il y eut bris d'assemblées, assauts de personnes et dommages à la propriété. De plus, et partageant l'opinion généralement acceptée que cette campagne provocatrice était l'oeuvre de la licence et non de la liberté sous la loi, plusieurs autorités civiles refusaient d'accorder la protection recherchée par les membres de la secte ou adoptaient des moyens pour paralyser ces activités considérées comme une menace à la paix publique. L'intimé, comme Procureur Général, eut en son ministère où des plaintes nombreuses affluèrent, tous les échos de cette situation. Devant les tribunaux, actions ou poursuites se multiplièrent. A Montréal, les arrestations pour distribution de littérature, sans permis, atteignirent et dépassèrent plusieurs centaines. Devant la Cour du Recorder, où furent traduits ceux qu'on accusait de violer le règlement municipal, on plaidait l'invalidité ou l'inapplication du règlement et attendant le prononcé d'un tribunal supérieur sur le bien-fondé de ces prétentions on ajournait les causes. C'était l'appelant, l'un des membres de la secte, qui, dans la plupart de ces arrestations, à Montréal, fournissait le cautionnement garantissant la comparution des accusés. Une entente était même intervenue entre lui et les avocats chargés des poursuites, suivant laquelle on le considérait en quelque sorte comme la caution officielle des membres de la secte. L'appelant continua d'agir comme caution jusqu'au 12 novembre 1946 alors que les autorités de la Cour du Recorder, s'inquiétant de la congestion du rôle des causes résultant de la progressive multiplication des arrestations, aussi bien que du fait que le temps de nombre de constables était absorbé par ces enquêtes et ces poursuites, au préjudice de leurs autres devoirs, tentèrent de décourager les activités de la secte en exigeant des cautionnements en argent et plus substantiels, soit de $100 à $300.

Deux semaines après cette décision, apparut dans la province une nouvelle publication de la secte, intitulée: "La haine ardente du Québec pour Dieu, le Christ et la liberté." Ce livre, publié en français, en anglais et en ukrainien, étant, dans les termes les plus provocateurs, une attaque dirigée particulièrement contre les pratiques religieuses de la majorité de la population et contre l'administration de la justice dans la province, fut soumis par la police à la considération de l'avocat en chef de la Couronne, à Montréal, Me Gagnon, c.r., lequel émit l'opinion que cette publication constituait, au sens de la loi criminelle, un libelle séditieux.

Ajoutons immédiatement que le mérite de cette opinion fut par la suite judiciairement considéré avec le résultat qui suit. Un certain Aimé Boucher, distributeur de ce livre dans le district judiciaire de St-Joseph de Beauce, fut accusé sous les articles 133, 134 et 318 du Code Criminel et fut trouvé coupable par un jury dont le verdict fut confirmé par une décision majoritaire de la Cour du banc du roi en appel [[1949] Que. K.B. 238.]. Sur un pourvoi subséquent devant cinq des membres de cette Cour, une majorité, trouvant justifiés les griefs fondés sur l'adresse du juge au procès, mais étant d'opinion qu'il était loisible à un jury légalement dirigé de juger cette publication séditieuse, ordonna un nouveau procès. Sur une seconde audition du même appel, -- cette fois devant les neuf Juges de cette Cour [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.] -- ces vues furent partagées par quatre des membres de cette Cour. Les cinq autres, d'autre part, acquittèrent l'accusé, en déclarant en substance suivant le sommaire fidèle du jugé, qu'en droit:

> Neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

En somme, la majorité écarta, comme étant la loi en la matière, la définition de l'intention séditieuse, donnée à la page 94 de la 8e édition de Stephen's Digest of Criminal Law, dans la mesure où cette définition différait de la loi telle que précisée au sommaire ci-dessus. Boucher v. His Majesty the King [[1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.]. Ainsi appert-il que l'opinion émise par le représentant du Procureur Général à Montréal lors de l'apparition de ce livre en fin de 1946, fut par la suite partagée par une majorité de tous les juges qui eurent à considérer la question mais rejetée par ce qui constitue, depuis 1951, le jugement de cette Cour sur la question.

Ayant donc formé l'opinion que cette publication constituait un libelle séditieux, Me Gagnon participa à l'enquête faite pour en rechercher les distributeurs et les traduire en justice. Vers le même temps, la police saisissait en la cité de Sherbrooke, un nombre considérable de pamphlets, livres, y compris le livre en question dans un établissement appartenant à l'appelant et par lui loué aux membres de la secte. Un examen de la situation et du rôle joué par l'appelant dans les procédures mues devant la Cour du Recorder à Montréal, amena Me Gagnon à conclure à sa participation dans la distribution. Apprenant, en la même occasion, que ce dernier était propriétaire d'un restaurant et détenteur de permis de la Commission des Liqueurs pour y vendre des spiritueux, il communiqua les faits ci-dessus à M. Archambault, alors gérant général de la Commission des Liqueurs. Après avoir conféré avec le recorder en chef de la cité de Montréal et Me Gagnon, M. Archambault téléphona au Procureur Général pour lui faire part de ces agissements des membres de la secte, et de l'appelant en particulier, et de son intention d'annuler le permis en faveur de l'appelant. L'intimé demanda à M. Archambault de bien s'assurer que le détenteur du permis était bien la même personne qui, au dire de M. Archambault, "multipliait les cautionnements à la Cour du Recorder de façon désordonnée, contribuait à désorganiser les activités de la police et à congestionner les tribunaux". Et l'intimé ajouta: "Dans l'intervalle, je vais examiner les questions avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir à ce que je devrai faire." M. Archambault vérifia l'identité de l'appelant et, de son côté, le Procureur Général étudia le problème, la Loi de la Commission des Liqueurs et ses amendements, discuta de la question au Conseil des Ministres et avec des officiers en loi de son ministère. Quelques jours plus tard, M. Archambault téléphona au Procureur Général confirmant l'identité du détenteur de permis et, témoigne M. Archambault, "là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder".

A la suite de cette conversation téléphonique, le permis fut annulé et tous les spiritueux du restaurant furent confisqués. En raison de la perte d'opérations résultant de l'absence de permis, l'appelant, quelques mois plus tard, vendait ce restaurant, licencié pour vente de spiritueux depuis nombre d'années et exploité par son père, d'abord, et lui, par la suite. C'est alors que l'appelant institua la présente action en dommages contre l'intimé personnellement invoquant en substance que, dans les circonstances, le fait de cette annulation constituait, suivant les dispositions de l'art. 1053 du Code Civil, un fait dommageable, illicite et imputable à l'intimé et, dès lors, donnant droit à réparation.

En défense, et en outre des moyens plaidés sur le mérite de l'action, l'intimé invoqua spécifiquement le défaut de l'appelant de s'être conformé aux prescriptions de l'art. 88 du Code de procédure civile, lequel conditionne impérativement l'exercice du droit d'action contre un officier public à la signification d'un avis d'au moins un mois avant l'émission de l'assignation.

Après considération attentive de la question et pour les motifs donnés ci-après, je suis arrivé à la conclusion que ce moyen est bien fondé. Il convient de dire, cependant, que n'eût été ce défaut de l'appelant, j'aurais, au mérite, conclu au bien-fondé de son action et ce, pour des raisons qu'il suffit, dans les circonstances, de résumer comme suit. Personne ne met en doute que le fait invoqué au soutien de l'action en dommages, c'est-à-dire l'annulation du permis, ait constitué un fait dommageable pour l'appelant. De plus, et suivant la preuve au dossier, il est manifeste que ce fait est imputable, et exclusivement imputable, à l'intimé. Sans doute, lorsque le gérant général de la Commission des Liqueurs téléphona au Procureur Général pour le mettre au courant des faits ci-dessus, il lui indiqua au même temps son intention d'annuler le permis. Il y a loin, cependant, de l'indication d'une intention à la réalisation de cette intention; et à la vérité, dès cette première conversation téléphonique, c'est le Procureur Général qui prit l'entière responsabilité. Tel que déjà indiqué, il demanda à M. Archambault de vérifier l'identité de personne, l'avisant que, pendant ce temps-là, il étudierait le problème et verrait ce que lui devait faire. C'est d'ailleurs précisément pour décider de l'action à prendre qu'il examina la loi et discuta de l'affaire au Conseil des Ministres et avec ses officiers en loi. Lorsque, subséquemment, M. Archambault le rappela pour lui affirmer qu'il s'agissait de la même personne, "c'est là", dit le gérant général, que le Procureur Général "m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder". Le Juge de la Cour supérieure et tous les Juges de la Cour d'Appel n'ont jeté, et je crois avec raison, aucun doute sur la bonne foi du Procureur Général, pas plus qu'on n'en saurait avoir sur celle du gérant général, de la Commission des Liqueurs. Ni l'un ni l'autre n'ont agi malicieusement. Mais, en témoignant que l'intimé l'avait autorisé, lui avait donné son consentement, son approbation, sa permission et son ordre de procéder, le gérant général de la Commission a bien indiqué, à mon avis, que, dans un esprit de subordination, il avait, dès la première conversation téléphonique, abdiqué, en faveur du Procureur Général s'en chargeant, le droit d'exercer la discrétion, qu'à l'exclusion de tous autres, il avait suivant l'esprit de la Loi des Liqueurs Alcooliques. Il a exécuté, mais non rendu, une décision arrêtée par le Procureur Général. D'ailleurs, ce dernier ne s'en est pas caché; il s'en est ouvert au public par la voix des journaux. En prenant lui-même cette décision, comme Premier Ministre et Procureur Général, il s'est arrogé un droit que lui nie virtuellement la Loi des Liqueurs Alcooliques; il a commis une illégalité. Dans l'espèce, l'annulation du permis est exclusivement imputable à l'intimé et précisément pour cette raison, constitue, dans les circonstances, un acte illicite donnant droit à l'appelant d'obtenir réparation pour les dommages lui en résultant.

L'article 88 du Code de procédure civile. -- Cet article se lit comme suit:

> Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui, à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Vu la forme prohibitive de la disposition et la règle de droit édictée en l'art. 14 du Code Civil, le défaut de donner cet avis, lorsqu'il y a lieu de ce faire, emporte nullité. Cette règle de droit est ainsi exprimée:

> 14. Les lois prohibitives emportent nullité, quoiqu'elle n'y soit pas prononcée.

De plus, et en raison de la prescription que "...nul verdict ou jugement ne peut être rendu...", ce défaut limite la juridiction même du tribunal. Aussi bien, non seulement, comme il a été reconnu au jugement de première instance, ce défaut peut-il être soulevé dans les plaidoiries, mais la Cour elle-même doit agir proprio motu et se conformer à la prescription.

En l'espèce, il est admis qu'aucun avis ne fut donné au Procureur Général. L'intimé a plaidé spécifiquement ce moyen dans sa défense et il l'a invoqué tant en Cour supérieure et en Cour d'Appel que devant cette Cour. Le juge au procès en disposa dans les termes suivants, dont les soulignés sont siens:

> Defendant is not entitled to avail himself of this exceptional provision as the acts complained of were not "done by him in the exercise of his functions", but they were acts performed by him when he had gone outside his functions to perform them. They were not acts "in the exercise of" but "on the occasion of public duties". Defendant was outside his functions in the acts complained of.

En Cour d'Appel [[1956] Que. Q.B. 447], seul le Juge dissident, M. le Juge Rinfret, se prononce sur la question. S'inspirant, je crois, de l'interprétation donnée par la jurisprudence à l'expression "dans l'exécution de ses fonctions", apparaissant à l'art. 1054 C.C. et plus particulièrement du critère indiqué dans Plumb v. Cobden Flour Mills [[1914] A.C. 62.], il prononce d'abord comme suit, sur le mérite même de l'action:

> L'action du défendeur, on l'a vu, ne peut pas être classifiée parmi les actes permis, par les statuts, au procureur général, ni au premier ministre; elle ne peut pas être considérée comme ayant été faite dans l'exercice ou dans l'exécution de ses fonctions comme telles; elle entre dans la catégorie des actes

> prohibés, des actes commis hors les limites des fonctions, et comme telle, elle engendre la responsabilité personnelle.

puis, précisant que l'art. 88 C.P.C. pose comme condition que le défendeur soit poursuivi "à raison d'un acte par lui fait dans l'exercice de ses fonctions", déclare que l'art. 88 n'a pas d'application en l'espèce.

Les juges de la majorité ont référé à ce moyen sans cependant s'y arrêter vu que dans leur opinion l'action, de toutes façons était mal fondée.

D'où l'on voit que le droit de l'intimé à l'avis dépend uniquement, dans la présente cause, de la question de savoir si l'acte reproché a été fait par lui "dans l'exercice de ses fonctions" au sens qu'il faut donner à ces expressions dans le contexte de l'art. 88 C.P.C., et suivant l'esprit et la fin véritables de cet article.

L'article 1054 C.C. prescrit que les maîtres et les commettants sont responsables du dommage causé par leurs domestiques ou ouvriers dans l'exécution des fonctions auxquelles ces derniers sont employés. On est dès lors porté à donner aux expressions, plus ou moins identiques, apparaissant à l'art. 88 C.P.C., le même sens que donne la jurisprudence sur l'art. 1054 C.C. La règle d'interprétation visant la similarité des expressions n'établit qu'une présomption; cette présomption étant que les expressions similaires ont le même sens lorsqu'elles se trouvent, -- ce qui n'est pas le cas en l'espèce, -- dans une même loi. On accorde, d'ailleurs, peu de poids à cette présomption. Maxwell, On Interpretation of Statutes, 9e ed., p. 322 et seq. Les considérations présidant à l'établissement, la fin et la portée de l'art 88 C.P.C., d'un part, et de l'art. 1054 C.C., d'autre part, sont totalement différents. Sanctionnant la doctrine Respondeat superior, l'art 1054 c.c., établit la responsabilité du commettant pour l'acte de son préposé, ce dernier étant considéré le continuateur de la personne juridique du premier. L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction. Les motifs apportés par la jurisprudence pour limiter le champ de l'exercice des fonctions, quant à la responsabilité édictée en l'art. 1054 C.C., sont étrangers à ceux conduisant la Législature à donner, quant à la procédure seulement, une protection aux officiers publics. Aussi bien, et en toute déférence, je ne crois pas que la portée de cette protection soit assujettie aux limitations de la responsabilité frappant les dispositions de l'art. 1054 C.C. L'article 8 du c. 101 des Statuts Refondus du Bas Canada, loi-source de l'art. 88 C.P.C., établit péremptoirement à mon avis que, in pari materia, un officier public n'est pas tenu comme ayant cessé d'agir dans l'exercice de ses fonctions du seul fait que l'acte reproché constitue un excès de pouvoir, ou de juridiction, ou une violation à la loi. La version française de cette loi n'étant pas en disponibilité, je cite de la version anglaise qu'on trouve dans Consolidated Statutes, Lower Canada, 1860, l'art. 8:

> Protection to extend to the magistrate only etc., and in what cases to him.
>
> 8. The privileges and protection given by this Act, shall be given to such justice, officer of other person acting as aforesaid, only, and to no other person or persons whatever, and any such justice, officer and other person shall be entitled to such protection and privileges in all cases where he has acted bona fide in the execution of his duty, although in such act done, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

L'article 88 C.P.C. assume que ceux au bénéfice desquels il est établi se sont rendus coupables d'une illégalité pour laquelle ils doivent répondre. Tout doute qu'on pourrait avoir sur le point est dissipé par le texte même de l'art. 429 C.P.C. lequel, pourvoyant à un changement de venue dans le cas du procès d'un officier public, édicte:

> 429. Dans toute poursuite en dommages contre un officier public, à raison de quelque illégalité dans l'exécution de ses fonctions, le juge peut ordonner que le procès ait lieu dans un autre district, s'il est démontré que la cause ne peut être instruite avec impartialité dans le district où l'action a été portée.

On doit donc se garder d'associer au droit à l'avis toute idée de justification pour l'acte reproché ou de déduire du seul fait que l'officier public doive au mérite d'être tenu personnellement responsable, qu'il ait perdu tout droit à l'avis. Dans Beattey v. Kozak [[1958] S.C.R. 177 at 188, 13 D.L.R. (2d) 1, 120 C.C.C. 1.], où la nécessité d'éviter cette confusion se présentait, une semblable observation est faite par notre collègue M. le Juge Rand. Il faut ajouter, cependant, que cette décision n'est d'aucune autre assistance sur la question qui nous intéresse; le litige portait, en droit, sur l'interprétation d'une loi différente et fut décidé en donnant effet à la jurisprudence d'un droit également différent sur l'incidence, en la matière, du rôle de la bonne foi.

L'incidence du rôle de la bonne foi de l'officier public dans la commission d'un acte reproché, en ce qui concerne la portée de l'art. 88 C.P.C., et non en ce qui a trait au mérite de l'action, a fait, dans la province de Québec, depuis le jour où la disposition fut établie par l'art. 22 du Code de procédure civile de 1867, dont les termes sont reproduits à l'art. 88 du Code de 1897, l'objet d'un conflit dans la jurisprudence. Suivant certains jugements, la bonne foi conditionnait le droit à l'avis et dès que la déclaration contenait une allégation de mauvaise foi, le défendeur se voyait privé du droit d'invoquer le défaut de l'avis, même si, au mérite, la preuve, révélant que cette allégation était mal fondée, on devait alors rejeter l'action parce que l'avis n'avait pas été donné. Suivant d'autres jugements, on tenait le droit à l'avis absolu dans tous les cas. La bonne foi, disait-on, en s'appuyant sur le principe sanctionné par l'art. 2202 C.C., est toujours présumée et cette présomption ne peut être écartée par une simple allégation mais par une preuve de mauvaise foi. On jugeait qu'une simple allégation aux plaidoiries ne pouvait virtuellement abroger le droit au bénéfice de l'art. 88. Considérant que cet article conditionnait l'exercice même du droit d'action, on décidait que ce droit d'action devait être nié ab initio et non à la fin du procès. Ce conflit n'existe plus. Depuis plus de vingt-cinq ans, la Cour d'Appel y a mis fin en décidant que l'incidence de la bonne ou de la mauvaise foi n'a aucune portée sur le droit à l'avis et que, dans tous les cas, il doit être donné. Acceptant les arguments déjà exprimés en ce sens, la Cour d'Appel s'est particulièrement basée sur la source historique de cette disposition et sur la modification qui y fut apportée lors et par suite de son insertion au Code de procédure civile. Les sources de l'article sont indiquées dans Dame Chaput v. Crépeau [(1917), 57 Que. S.C. 443.] par M. le Juge Bruneau et les modifications faites à la situation antérieure par l'insertion de l'article dans le Code, afin d'en généraliser l'application à tous les officiers publics, sont indiquées dans cette jurisprudence définitivement arrêtée par la Cour d'Appel dans Charland v. Kay [(1933), 50 Que. K.B. 377.]; Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres [(1937), 62 Que. K.B. 143.] et Houde v. Benoît [[1943] Que. K.B. 713.].

En somme, et comme le note M. le Juge Hall dans Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres, supra, l'art. 22 du Code de procédure de 1867, prédécesseur de l'art. 88 du Code de 1897, a sa source dans la Loi pour la protection des juges de paix, c. 101 des Status Refondus du Bas Canada. Le premier article de cette loi prescrivait l'avis d'action, alors que dans les autres dispositions, d'autres privilèges étaient établis, y compris celui fixant la prescription à six mois. L'article 8 conditionnait le droit aux privilèges y accordés à la bonne foi. Lors de la confection du Code de procédure, la disposition ayant trait à l'avis fut extraite de la loi pour devenir l'art. 22 du Code de procédure et être déclarée applicable à tous les officiers publics. Dans le procédé, cependant, on laissa la disposition touchant la bonne foi dans la Loi pour la protection des juges de paix et on évita de l'inclure dans l'art. 22 C.P.C. comme condition de l'opération de cet article. D'autres considérations, tel, par exemple, le changement apporté par la Législature, le 4 août 1929, à l'art. 195 C.P.C. par la Loi 19 George V, c. 81, ayant pour effet de prohiber toute ordonnance de preuve avant faire droit qui jusqu'alors réservait au mérite les questions soulevées par l'inscription en droit, militent en faveur de ces vues. C'est ce changement, je crois, qui a provoqué l'occasion amenant la Cour d'Appel à fixer définitivement la jurisprudence. Les motifs déjà mentionnés suffisent pour partager les vues exprimées par la Cour d'Appel dans les causes précitées et pour conclure, comme M. le Juge Dorion dans Charland v. Kay, supra, qu'il faut s'en tenir au texte de la loi et lui donner son effet.

En assumant l'exercice d'un pouvoir discrétionnaire conféré au gérant général par la loi, l'intimé a commis une illégalité mais aucune offense connue de la loi pénale et aucun délit au sens de l'art. 1053 C.C. Il a fait ce qu'il n'avait pas le droit de faire, fermement et sincèrement convaincu, a-t-il affirmé sous serment, que non seulement il en avait le droit, mais qu'il y était tenu pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalité. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions. Sa bonne foi n'a pas été mise en doute, et sur ce fait, les Juges de la Cour d'Appel, qui ont considéré la question, sont d'accord avec le Juge de première instance. Suivant les décisions considérées par cette Cour dans Beatty v. Kozak, supra, on retient, sous un droit différent de celui de la province de Québec, l'incidence de la bonne foi lorsque celle-ci se fonde sur l'erreur de fait, ou sur l'erreur de fait et de droit à la fois, sinon uniquement sur l'erreur de droit, pour décider du caractère exculpatoire de l'illégalité commise, voir même du droit à l'avis. Exclusivement compétente à légiférer sur la procédure civile, la Législature de Québec par l'art. 88 C.P.C., n'a pas voulu assujettir le droit à l'avis d'action à l'incidence de la bonne ou de la mauvaise foi. Dans les circonstances de cette cause, je

suis d'opinion que l'illégalité commise par l'intimé l'a été dans l'exercice de ses fonctions et que, de plus, ce serait faire indirectement ce que l'art. 88 C.P.C., ne permet pas, suivant l'interprétation de la Cour d'Appel, que de s'appuyer sur la bonne ou la mauvaise foi, que ce soit au sens vulgaire ou technique du mot, pour conclure que l'intimé est sorti de l'exercice de ses fonctions, au sens qu'ont ces expressions dans l'art. 88 C.P.C., et qu'il ait perdu le droit à l'avis d'action.

Pour ces raisons, l'appelant aurait dû être débouté de son action. Je renverrais les appels avec dépens.

ABBOTT J.

ABBOTT J.:-- In his action appellant claimed from respondent the sum of $118,741 as damages alleged to have been sustained as a result of the cancellation of a licence or permit for the sale of alcoholic liquors held by appellant. The action was maintained by the learned trial judge to the extent of $8,123.53. From that judgment two appeals were taken, one by respondent asking that the action be dismissed in its entirety, the other by appellant asking that the amount allowed as damages be increased by an amount of $90,000. The Court of Queen's Bench [[1956] Que. Q.B. 447.] allowed the respondent's appeal, Rinfret J. dissenting, and dismissed the action. The appeal taken by appellant to increase the amount of the trial judgment was dismissed unanimously. The present appeals are from those two judgments.

The facts are these. On December 4, 1946, appellant was conducting a restaurant business in the City of Montreal, a business which he and his father and mother before him had been carrying on continuously for some thirty-four years prior to that date. The restaurant had been licensed for the sale of alcoholic beverages throughout the entire period.

In 1946 and for many years prior thereto, persons operating establishments of this kind and selling alcoholic beverages had been required to obtain a licence or permit under the Alcoholic Liquor Act, R.S.Q. 1941, c. 255. Unless granted for a shorter period, these were annual licences and expired on April 30 in each year. Moreover, s. 35, subs. 1., of the Act provides as follows:

> The Commission may cancel any permit at its discretion.

The Commission referred to is the "Quebec Liquor Commission" established as a corporation under the Act in question and, generally speaking, it has been entrusted by the Legislature with the responsibility of directing and administering the provincial monopoly of the sale and distribution of alcoholic beverages.

On December 4, 1946, without previous notice to the appellant, his licence to sell alcoholic beverages was cancelled by the Quebec Liquor Commission, and at about 2 p.m. on that date the stock of liquor on his premises was seized and removed. The licence was not restored and after operating for some months without such a licence, in 1947 appellant sold the restaurant and the building in which it was located.

Appellant learned from press reports either in the afternoon of December 4 or early the following day, that his licence had been cancelled and the stock of liquor seized because he was an adherent of a religious sect or group known as the Witnesses of Jehovah. It soon became clear from statements made by the respondent to the press and confirmed by him at the trial as having been made by him, that the cancellation of the licence had been made because of the appellant's association with the sect in question and in order to prevent him from continuing to furnish bail for members of that sect summoned before the Recorder's Court on charges of contravening certain city by-laws respecting the distribution of printed material.

It might be added here that in December 1946 and for some time prior thereto the Witnesses of Jehovah appear to have been carrying on in the Montreal district and elsewhere in the Province of Quebec, an active campaign of meetings and the distribution of printed pamphlets and other like material of an offensive character to a great many people of most religious beliefs, and I have no doubt that at that time many people believed this material to be seditious.

The evidence is referred to in detail in the Courts below and I do not propose to do so here. I am satisfied from a consideration of this evidence: First: that the cancellation of the appellant's licence was made for the sole reason which I have mentioned and with the object and purpose to which I have referred; Second: that such cancellation was made with the express authorization and upon the order of the respondent; Third: that the determining cause of the cancellation was that order, and that the manager of the Quebec Liquor Commission would not have cancelled the licence without the order and authorization given by the respondent.

There can be no question as to the first point. It was conceded by respondent in his evidence at the trial and by his counsel at the hearing before us. As to the second and third points, I share the view of the learned trial judge and of Rinfret J. that both were clearly established.

The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question had no connection whatever with his obligations as the holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without any legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the Alcoholic Liquor Act, and the powers and responsibilities of the manager of the Quebec Liquor Commission are confined to the administration and enforcement of the provisions of the said Act. This may be one explanation of the latter's decision to consult the respondent before taking the action which he did to cancel appellant's licence.

At all events a careful reading of the evidence and a consideration of the surrounding circumstances has convinced me that without having received the authorization, direction, order, or "approbation énergique" of the respondent -- however one chooses to describe it -- the manager of the Quebec Liquor Commission would not have cancelled the licence.

The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly, I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification. I content myself with quoting the well known passage from Dicey's "Law of the Constitution", 9th ed., p. 193, where he says

> ... every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

In the instant case, the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission although as Attorney-General of the Province the Commission and its officers could of course consult him for legal opinions and legal advice. The Commission is not a department of government in the accepted sense of that term. Under the Alcoholic Liquor Act the Commission is an independent body with corporate status and with the powers and responsibilities conferred upon it by the Legislature. The Attorney-General is given no power under the said Act to intervene in the administration of the affairs of the Commission nor does the Attorney-General's Department Act, R.S.Q. 1941, c. 46, confer any such authority upon him.

I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority. I have no doubt also that respondent knew and was bound to know as Attorney-General that neither as Premier of the province nor as Attorney-General was he authorized in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorization to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.

It follows, therefore, that in purporting to authorize and instruct the manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority.

The respondent is therefore liable under art. 1053 of the Civil Code for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority.

Respondent also contended that appellant's action must fail because no notice of such action was given under art. 88 of the Code of Civil Procedure, which reads as follows:

> 88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action had been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

None of the learned judges constituting the majority in the Court of Queen's Bench has given as a reason for dismissing appellant's action, the failure to give such notice. The learned trial judge and Rinfret J. held that respondent is not entitled to avail himself of this exceptional provision since the act complained of was not "done by him in the exercise of his functions" but was an act done by him when he had gone outside his functions to perform it. I am in agreement with their views and there is little I need add to what they have said on this point. In this connection, however, reference may usefully be made to the decision of the Court of Appeal in Lachance v. Casault [(1902), 12 Que. K.B. 179 at 202.]. In that case a bailiff had attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the articles seized, as called for by the order of the Court requiring the guardian to give up possession to the seizing creditor. When the bailiff's action was resisted by the guardian as being unauthorized, the bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of art. 88 C.C.P., he was not entitled to notice under the said article since at the time the act complained of was committed, he was not "dans l'exercice légal de ses fonctions".

In my opinion before a public officer can be held to be acting "in the exercise of his functions", within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform; Asselin v. Davidson [(1914), 23 Que. K.B. 274 at 280.]. In the instant case, as I have said, in my view the respondent was bound to know that the act complained of was beyond his legal authority.

I now deal with the second appeal asking that the amount awarded to appellant by the trial judge be increased by an amount of $90,000. This amount is claimed under three heads, namely:

Damages to goodwill and reputation of business	$50,000
Loss of property rights in liquor permit	$15,000
Loss of profits for a period of one year, May 1st, 1947 to May 1st, 1948	$25,000
	$90,000

The licence to sell alcoholic beverages was, of course, only an annual licence subject to revocation at any time and the renewal of which might have been properly refused for a variety of reasons. Nevertheless, in my view, appellant could reasonably expect that so long as he continued to observe the provisions of the Alcoholic Liquor Act his licence would be renewed from year to year, as in fact it had been for many years past.

There can be no doubt that cancellation of appellant's licence without legal justification resulted in a substantial reduction in the value of the goodwill and profit making possibilities of the restaurant business carried on by him at 1429 Crescent St., Montreal, and in a pecuniary loss to him for which in my opinion he is entitled to recover damages from respondent.

The restaurant business is probably no less hazardous than most other businesses, and damages of this sort are obviously difficult to assess, the amount being of necessity a more or less arbitrary one. The learned trial judge awarded appellant the sum of $6,000 as loss of profits for the period from December 4, 1946, to May 1, 1947, the date on which the licence would have expired, and this would appear to be supported by the evidence. I have reached the conclusion that the amount awarded to the appellant by the learned trial judge should be increased by an amount of $25,000, as damages for diminution in the value of the goodwill of the business and for loss of future profits.

In the result, therefore, I would allow both appeals with costs here and below, and modify the judgment at the trial by increasing the amount of the damages to $33,123.53 with interest from the date of the judgment in the Superior Court.

Appeals allowed with costs, Taschereau, Cartwright and Fauteux J.J. dissenting.

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ONTARIO SUPERIOR COURT OF JUSTICE (TORONTO REGION)

CIVIL ENDORSEMENT FORM

(Rule 59.02(2)(c)(i))

BEFORE	**Judge/Case Management Master** **Vermette J.**	**Court File Number:** **CV-21-00661200-0000**

Title of Proceeding:

Sgt. Julie Evans *et al.* Applicants

-v-

Attorney General for Ontario *et al.* Respondents

Case Management: ☐ **Yes** If so, by whom: **X No**

Participants and Non-Participants:*(Rule 59.02(2)((vii))*

Party	Counsel	E-mail Address	Phone #	Participant (Y/N)
1) **Respondent Attorney General for Ontario**	**S. Zachary Green**	**zachary.green@ontario.ca**		**N**
2) **Applicants**	**Rocco Galati**	**rocco@idirect.com**		**N**
3)				
4)				
5)				

Date Heard: *(Rule 59.02(2)(c)(iii))* **May 5, 2021**

Nature of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☐ Motion ☐ Appeal ☐ Case Conference ☐ Pre-Trial Conference ☐ Application

Format of Hearing (mark with an "X"): *(Rule 59.02(2)(c)(iv))*

☒ In Writing ☐ Telephone ☐ Videoconference ☐ In Person

If in person, indicate courthouse address:

Relief Requested: *(Rule. 59.02(2)(c)(v))*

Request by the Respondent Attorney General for Ontario that the court make an order under Rule 2.1.01(1) of the *Rules of Civil Procedure* dismissing this Application because it appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

Disposition made at hearing or conference (operative terms ordered): *(Rule 59.02(2)(c)(vi))*

The request is denied.

Costs: On a **N/A** indemnity basis, fixed at $ are payable by to [when]

Brief Reasons, if any: *(Rule 59.02(2)(b))*

Without commenting on the merits of the Application, there is no basis on the face of the pleading for this matter to be dealt with under Rule 2.1.01 of the *Rules of Civil Procedure* rather than by way of motion.

Additional pages attached: ☐ Yes **X** No

May 5, , 20 **21**
Date of Endorsement *(Rule 59.02(2)(c)(ii))*

Signature of Judge/Case Management Master *(Rule 59.02(2)(c)(i))*

Singh v. Canada (Minister of Citizenship and Immigration), [2010] F.C.J. No. 921

Federal Court Judgments

Federal Court

Toronto, Ontario

de Montigny J.

Heard: May 17, 2010.

Judgment: July 19, 2010.

Docket IMM-2234-09

[2010] F.C.J. No. 921 | [2010] A.C.F. no 921 | 2010 FC 757 | 2010 CF 757 | 372 F.T.R. 40 | 90 Imm. L.R. (3d) 239 | 2010 CarswellNat 2397 | 191 A.C.W.S. (3d) 597

Between Yadwinder Singh, Applicant, and The Minister of Citizenship and Immigration and Canada Border Services Agency, Respondents

(56 paras.)

Case Summary

Administrative law — Prerogative and private law remedies — Mandamus — Conditions precedent — Extraordinary circumstances — Application for judicial review for declaratory relief, or alternatively mandamus compelling Citizenship and Immigration Canada to confirm the applicant's status as a permanent resident allowed — The applicant's landing was taken back on Dec. 23, 1998 due to his inability to present a valid and subsisting passport — However, in the context of the respondent losing his passport, it should have been sufficient to demonstrate he was the legal bearer of a valid passport — The CIC erred in law in finding non-compliance with s. 14(1) of the prior Immigration Regulations — The 10-year-delay was unreasonable — Immigration Regulations, s. 14(1).

Immigration law — Immigrants — Application for immigrant visa — Humanitarian and compassionate considerations — Practice and judicial review — Judicial review — Grounds for — Application for judicial review for declaratory relief, or alternatively mandamus compelling Citizenship and Immigration Canada to confirm the applicant's status as a permanent resident allowed — The applicant's landing was taken back on Dec. 23, 1998 due to his inability to present a valid and subsisting passport — However, in the context of the respondent losing his passport, it should have been sufficient to demonstrate he was the legal bearer of a valid passport — The CIC erred in law in finding non-compliance with s. 14(1) of the prior Immigration Regulations — The 10-year-delay was unreasonable — Immigration Regulations, s. 14(1).

Application for judicial review for declaratory relief, or alternatively mandamus compelling Citizenship and Immigration Canada to confirm his status as a permanent resident. In the further alternative, the applicant sought to compel the CIC to complete the processing of his humanitarian and compassionate application for permanent residence class within a defined timeframe. The applicant was an Indian citizen who has been married to a Canadian citizen for 14 years. They had two Canadian-born children. He arrived in Canada in 1994 and claimed refugee status, but his claim was rejected. His subsequent application for permanent residence on H & C grounds was received in Dec. 1995 and approved in principle in April 2006. While this application proceeded to stage two, the applicant decided to apply for a student visa in the summer of 1997. This application never progressed, due to the applicant's passport being confiscated by border officials and subsequently lost. By the time he obtained a new passport in Jan. 2003, the second processing stage resumed in the H & C application; however, the applicant's

clearances had expired. However, the applicant's new passport and his 2004 medical examination expired by the time these documents were processed. On Aug. 31, 2005, CIC sent two letters requiring a valid passport and an updated medical exam. However, before the application was finalized, CIC received information that the applicant was the subject of drug trafficking charges in the U.S. and that his extradition was sought. The applicant's H & C file has been on hold since then. In April 2007, he was ordered to surrender to American authorities. The applicant argued the CIC's refusal to land him on Dec. 23, 1998 and Feb. 3, 2003 was unlawful, as he had met all the requirements on those dates. Alternatively, he sought mandamus compelling CIC to grant his application within 30 days, or compelling CIC to complete the processing of his application within 30 days. The respondents brought a motion pursuant to s. 87 of the Immigration and Refugee Protection Act.
HELD: Application granted with $2,000 in party and party costs.

The respondents' motion pursuant to s. 87 of the IRPA was granted. The only reason the applicant's landing was taken back on Dec. 23, 1998 was his inability to present a valid and subsisting passport. However, depending on the legal context, a person may be considered in possession of something if they held a legal right to assume immediate control over an object. Interpreting s. 14(1) of the Regulations to require physical control of the passport by the applicant would make no sense. The purpose of that subsection was to verify that an immigrant wishing to come to Canada was a citizen of another country and to ascertain the identity of the immigrant before landing him. It should have been sufficient to demonstrate he was the legal bearer of a valid passport. The respondents had a copy of his passport on the file showing it was valid until 2001. The applicant should not be made to suffer for the loss of his passport by officials of the respondents. The CIC erred in law in finding the applicant did not comply with the requirement in s. 14(1) of the prior Immigration Regulations. The applicant had met all the requirements for an order of mandamus. Prior to the charges being laid, he waited almost 10 years for his application to be processed, which amounted to unreasonable delay. The decision not to land the applicant on Dec. 23, 1998 was quashed, and the applicant's file was remitted to be processed in accordance with the law as it stood on that date and on the basis of the applicant's record at the time.

Statutes, Regulations and Rules Cited:

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1(3)

Federal Courts Immigration and Refugee Protection Rules, SOR/ 93-22, Rule 17

Immigration Act, R.S.C. 1985, c. I-2, s. 5(2), s. 14(2)

Immigration Regulations, SOR/78-172,

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 2, s. 11, s. 12(1), s. 12(4), s. 16(1), s. 16(2), s. 18, s. 21(1), s. 25, s. 50, s. 68, s. 72, s. 83(1)(c), s. 87, s. 190

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 13, s. 14(1)

Counsel

Jeremiah Eastman, for the Applicant.

Ian Hicks, for the Respondents.

REASONS FOR ORDER AND ORDER

de MONTIGNY J.

1 de This is an application for judicial review whereby the Applicant seeks declaratory relief against the unwillingness of Citizenship and Immigration Canada ("CIC") to confirm his status as a permanent resident. In the alternative, the Applicant seeks a *mandamus* order compelling CIC to grant him permanent residence or, in the further alternative, compelling CIC to complete the processing of his humanitarian and compassionate ("H&C") application for permanent residence class within a defined timeframe. The Applicant also seeks his costs on a solicitor-client basis.

I. Facts

2 The Applicant is an Indian citizen who has been married for over 14 years to a Canadian citizen with whom he has two Canadian-born children. He first arrived in Canada on January 21, 1994 and claimed refugee status. After the rejection of his refugee claim, he applied for permanent residence in Canada on H & C grounds. This application was received by CIC on December 28, 1995, and approved in principle on April 12, 1996. His application then proceeded to stage two in order to determine whether he met the statutory requirements for landing.

3 In the summer of 1997, the Applicant decided to apply for a student visa. Since the process was shorter if he applied from outside of Canada, and because he could not enter the United States, he gave his application and his passport to a friend who was a Canadian citizen so that he could bring it to the Canadian visa office in Buffalo, New York. The visa officer serving his friend said the Canadian visa office in Buffalo could not process the application without the Applicant being present. His friend therefore returned to Canada with the application and the Applicant's passport. Upon entry into Canada, the friend was searched by a port of entry officer, who seized the Applicant's passport, telling him that he could not carry someone else's passport. The officer gave the Applicant's friend a receipt for the passport to be picked up by the Applicant.

4 Despite the Applicant's numerous attempts to obtain his passport, he never succeeded in doing so. The evidence in the record is not clear as to what happened to the Applicant's passport. It appears to have been lost between the port of entry office in Fort Erie and the Immigration office in Niagara Falls, although there is also an indication in the record that it may have been returned to someone believed to be the Applicant.

5 The Applicant was called in to pick up his landing documents on December 23, 1998. The officer apparently handed the Applicant his Record of Landing and welcomed him as a new Canadian permanent resident, and asked to see his passport. When the Applicant showed him a copy of his passport and explained that his original passport had been lost, he was told that a copy was not sufficient; as a result, the officer asked the Applicant to give him back his Record of Landing.

6 The Applicant immediately initiated an application to obtain a new passport from the Indian consulate. The passport not having been issued after several years, the Applicant inquired about the reason for the delay at the Indian consulate. He was told that the consulate could not process his application before CIC confirmed some technical information about his status in Canada. The Applicant finally obtained a new passport in January 2003, which he submitted to CIC in February 2003.

7 By the time the second processing stage resumed, however, the Applicant's medical, criminal and security clearances had expired. The Applicant therefore submitted updated medical and criminal examinations. In a somewhat Kafkaesque turn of events, however, the Applicant's new passport and his 2004 medical examination had expired at the time these documents were processed and CIC had finalized the security checks. Thus, CIC sent the Applicant two letters on August 31, 2005, requesting a valid passport and an updated medical examination.

8 Unfortunately for the Applicant, CIC received information from the Canadian Border Services Agency ("CBSA") in September 2005, before the Applicant's permanent residence application was finalized, indicating that the Applicant was the subject of criminal charges for drug trafficking in the United States and that his extradition was sought by the American authorities. On April 24, 2007, the Applicant was ordered to surrender to the American authorities to face prosecution. Although he had initially filed an application for judicial review of that decision, he surrendered to the American authorities on August 14, 2009.

9 The Applicant's file has been on hold ever since CIC learned of the criminal charges laid against him in the United States. CIC sent him a letter on May 25, 2009, requesting new and updated medical and police certificates, passport and American police certificate in order to resume the assessment of his application for permanent residence.

10 The Applicant now seeks a declaration from this Court declaring that CIC's refusal to land him on December 23, 1998 and on February 3, 2003 was unlawful because he had allegedly met all the requirements for landing on those dates and had therefore become a permanent resident.

11 In the alternative, the Applicant seeks an order of *mandamus* compelling CIC to grant the Applicant's application for permanent residence within thirty days of the Court's order.

12 In the further alternative, the Applicant seeks an order of *mandamus* compelling the Respondents to complete the processing of the Applicant's application for permanent residence within thirty days of the Court's order.

13 The application was originally directed only against the Minister of Citizenship and Immigration. But in order to have a complete record before the Court, counsel for the Applicant brought a motion for an Order directing that the CBSA be added as a respondent. This motion was granted, on consent, on March 9, 2010, and both Respondents therefore filed a Certified Tribunal Record ("CTR"). Both Respondents also filed an application for non-disclosure pursuant to section 87 of the Immigration and Refugee Protection Act (2001, c. 27) ("*IRPA")*, thereby requesting that some information be blacked out from the record for national security reasons.

II. Issues

14 There are only two issues to be decided by this Court in the context of this application for judicial review. First, should an order for declaratory relief be issued by this Court to the effect that the Applicant met all the legal requirements for landing on December 23, 1998 and/or on June 28, 2002, and that the CIC acted illegally in refusing to land him as a permanent resident? Second, should the Court order the Respondents either to grant the Applicant's application for permanent residence, or to complete the processing of his application, within 30 days of this Court's order? These questions raise both jurisdictional and factual issues for which there are scant precedents. Moreover, the first question must be dealt with in the context of two different legal regimes, since prior to the coming into force of the *IRPA* and its Regulations, (*Immigration and Refugee Protection Regulations,* SOR/2002-227, hereafter "*IRPR"*) on June 28, 2002, the *Immigration Act* (R.S.C., 1985, c. I-2) and the *Immigration Regulations* (SOR/78-172) ("*Regulations*") governed the Applicant's application for permanent residence.

15 Before addressing these issues, however, I shall deal briefly with the Respondents' motions for non-disclosure that were made pursuant to section 87 of the *IRPA*. After holding an *ex parte* and *in camera* hearing of that motion, and a further teleconference hearing with counsel for both parties, I granted the Respondents' motion on May 7, 2010 subject to my direction given at the *in camera* hearing that paragraph 4 of p. 2 of the supplementary record be unredacted except for two words. At the time, I gave only brief oral reasons for that decision, and indicated that I would provide fuller reasons as part of my decision on the merit of the judicial review application. Accordingly, the first part of my analysis will be devoted to this issue.

III. The legislative scheme

16 Pursuant to subsection 14(2) of the *Immigration Act* an officer shall grant landing to an immigrant, defined in section 2 of that *Immigration Act* as "a person seeking landing", when the officer is satisfied, following an examination, that it would not be contrary to the Act or Regulations to grant landing:

> 14. (2) Where an immigration officer is satisfied that it would not be contrary to this Act or the regulations to grant landing to an immigrant whom the officer has examined, the officer shall
>
> (a) grant landing to that immigrant; or

> (b) authorize that immigrant to come into Canada on condition that the immigrant be present for further examination by an immigration officer within such time and at such place as the immigration officer who examined the immigrant may direct.

* * *

> 14. (2) L'agent d'immigration qui convaincu, après l'interrogatoire d'un immigrant, que l'octroi du droit d'établissement ne contreviendrait pas, dans son cas, à la présente loi ni à ses règlements est tenu :
>
> a) soit de lui accorder ce droit ;
>
> b) soit de l'autoriser à entrer au Canada à condition qu'il se présente, pour interrogatoire complémentaire, devant un agent d'immigration dans le délai et au lieu fixés.

17 Pursuant to subsection 14(1) of the *Regulations*, an immigrant must be in possession of a valid and subsisting passport or travel document issued to him or her by their country of origin:

> 14. (1) Subject to subsection (2), every immigrant shall be in possession of
>
> (a) a valid and subsisting passport issued to that immigrant by the country of which he is a citizen or national, other than a diplomatic, official or other similar passport;

* * *

> 14. (1) Sous réserve du paragraphe (2), tout immigrant doit avoir
>
> a) un passeport en cours de validité, autre qu'un passeport diplomatique, officiel ou autre passeport semblable, qui lui a été délivré par le pays dont il est citoyen ou ressortissant;

18 Since the coming into force of the *IRPA* and the *IRPR* on June 28, 2002, the following legislative provisions apply to the Applicant's application for permanent residence. First of all, a foreign national, which is defined in section 2 as "a person who is not a Canadian citizen or a permanent resident", becomes a permanent resident pursuant to subsection 21(1) of the *IRPA* if an officer is satisfied that the foreign national meets the requirements of the legislation:

> 21. (1) A foreign national becomes a permanent resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(a) and subsection 20(2) and is not inadmissible.

* * *

> 21. (1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)a) et au paragraphe 20(2) et n'est pas interdit de territoire.

19 Pursuant to subsection 72(1) of the *IRPR*, a foreign national in Canada becomes a permanent resident if it is established through an examination that he or she meets the requirements of the legislation:

> **Obtaining status**
>
> 72. (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that
>
> (a) they have applied to remain in Canada as a permanent resident as a member of a class referred to in subsection (2);
>
> (b) they are in Canada to establish permanent residence;
>
> (c) they are a member of that class;
>
> (d) they meet the selection criteria and other requirements applicable to that class;

(e) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class,

(i) they and their family members, whether accompanying or not, are not inadmissible,

(ii) they hold a document described in any of paragraphs 50(1)(a) to (h), and

(iii) they hold a medical certificate, based on the most recent medical examination to which they were required to submit under these Regulations within the previous 12 months, that indicates that their health condition is not likely to be a danger to public health or public safety and, unless subsection 38(2) of the Act applies, is not reasonably expected to cause excessive demand; and

(f) in the case of a member of the protected temporary residents class, they are not inadmissible.

* * *

Obtention du statut

72. (1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis :

a) il en a fait la demande au titre d'une des catégories prévues au paragraphe (2);

b) il est au Canada pour s'y établir en permanence;

c) il fait partie de la catégorie au titre de laquelle il a fait la demande;

d) il satisfait aux critères de sélection et autres exigences applicables à cette catégorie;

e) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés :

(i) ni lui ni les membres de sa famille -- qu'ils l'accompagnent ou non -- ne sont interdits de territoire,

(ii) il est titulaire de l'un des documents visés aux alinéas 50(1)a) à h),

(iii) il est titulaire d'un certificat médical attestant, sur le fondement de la plus récente visite médicale à laquelle il a été requis de se soumettre aux termes du présent règlement dans les douze mois qui précèdent, que son état de santé ne constitue vraisemblablement pas un danger pour la santé ou la sécurité publiques et, sauf si le paragraphe 38(2) de la Loi s'applique, ne risque pas d'entraîner un fardeau excessif;

f) dans le cas de l'étranger qui fait partie de la catégorie des résidents temporaires protégés, il n'est pas interdit de territoire.

20 In the case of a foreign national who, like the Applicant, has obtained an exemption under section 25 of the *IRPA* to apply for permanent residence from within Canada, section 68 of the *IRPR* provides that the foreign national becomes a permanent resident if it is established through an examination that he or she is not inadmissible and holds a passport or other document listed in section 50 of the *IRPR*:

Applicant in Canada

68. If an exemption from paragraphs 72(1)(a), (c) and (d) is granted under subsection 25(1) of the Act with respect to a foreign national in Canada who has made the applications referred to in section 66, the foreign national becomes a permanent resident if, following an examination, it is established that the foreign national meets the requirements set out in paragraphs 72(1)(b) and (e) and

(a) in the case of a foreign national who intends to reside in the Province of Quebec and is not a member of the family class or a person whom the Board has determined to be a Convention refugee, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province;

(b) the foreign national is not otherwise inadmissible; and

(c) the family members of the foreign national, whether accompanying or not, are not inadmissible.

* * *

Demandeur au Canada

68. Dans le cas où l'application des alinéas 72(1)a), c) et d) est levée en vertu du paragraphe 25(1) de la Loi à l'égard de l'étranger qui se trouve au Canada et qui a fait les demandes visées à l'article 66, celui-ci devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après, ainsi que ceux prévus aux alinéas 72(1)b) et e), sont établis :

a) dans le cas où l'étranger cherche à s'établir dans la province de Québec, n'appartient pas à la catégorie du regroupement familial et ne s'est pas vu reconnaître, par la Commission, la qualité de réfugié, les autorités compétentes de la province sont d'avis qu'il répond aux critères de sélection de celle-ci;

b) il n'est pas par ailleurs interdit de territoire;

c) les membres de sa famille, qu'ils l'accompagnent ou non, ne sont pas interdits de territoire.

21 Section 50 of the *IRPR* provides a list of acceptable documents of which a foreign national must be in possession to become a permanent resident:

Documents -- permanent residents

50. (1) In addition to the permanent resident visa required of a foreign national who is a member of a class referred to in subsection 70(2), a foreign national seeking to become a permanent resident must hold

(a) a passport, other than a diplomatic, official or similar passport, that was issued by the country of which the foreign national is a citizen or national;

(b) a travel document that was issued by the country of which the foreign national is a citizen or national;

(c) an identity or travel document that was issued by a country to non-national residents, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality or who have no country of citizenship or nationality;

(d) a travel document that was issued by the International Committee of the Red Cross in Geneva, Switzerland, to enable and facilitate emigration;

(e) a passport or travel document that was issued by the Palestinian Authority;

(f) an exit visa that was issued by the Government of the Union of Soviet Socialist Republics to its citizens who were compelled to relinquish their Soviet nationality in order to emigrate from that country;

(g) a British National (Overseas) passport that was issued by the Government of the United Kingdom to persons born, naturalized or registered in Hong Kong; or

(h) a passport that was issued by the Government of Hong Kong Special Administrative Region of the People's Republic of China.

* * *

Documents : résidents permanents

50. (1) En plus du visa de résident permanent que doit détenir l'étranger membre d'une catégorie prévue au paragraphe 70(2), l'étranger qui entend devenir résident permanent doit détenir l'un des documents suivants :

a) un passeport -- autre qu'un passeport diplomatique, officiel ou de même nature -- qui lui a été délivré par le pays dont il est citoyen ou ressortissant;

b) un titre de voyage délivré par le pays dont il est citoyen ou ressortissant;

c) un titre de voyage ou une pièce d'identité délivré par un pays aux résidents non-ressortissants, aux réfugiés au sens de la Convention ou aux apatrides qui sont dans l'impossibilité d'obtenir un passeport ou autre titre de voyage auprès de leur pays de citoyenneté ou de nationalité, ou qui n'ont pas de pays de citoyenneté ou de nationalité;

d) un titre de voyage délivré par le Comité international de la Croix-Rouge à Genève (Suisse) pour permettre et faciliter l'émigration;

e) un passeport ou un titre de voyage délivré par l'Autorité palestinienne;

f) un visa de sortie délivré par le gouvernement de l'Union des républiques socialistes soviétiques à ses citoyens obligés de renoncer à leur nationalité afin d'émigrer de ce pays;

g) un passeport intitulé "British National (Overseas) Passport", délivré par le gouvernement du Royaume-Uni aux personnes nées, naturalisées ou enregistrées à Hong Kong;

h) un passeport délivré par les autorités de la zone administrative spéciale de Hong Kong de la République populaire de Chine.

22 Finally, it appears from section 13 of the *IRPR* that a passport or any other document may be produced only by producing the original document:

Production of documents

13. (1) Subject to subsection (2), a requirement of the Act or these Regulations to produce a document is met

(a) by producing the original document;

(b) by producing a certified copy of the original document; or

(c) in the case of an application, if there is an application form on the Department's website, by completing and producing the form printed from the website or by completing and submitting the form on-line, if the website indicates that the form can be submitted on-line.

Exception

(2) Unless these Regulations provide otherwise, a passport, a permanent resident visa, a permanent resident card, a temporary resident visa, a temporary resident permit, a work permit or a study permit may be produced only by producing the original document.

* * *

Production de documents

13. (1) Sous réserve du paragraphe (2), la production de tout document requis par la Loi ou le présent règlement s'effectue selon l'une des méthodes suivantes :

a) la production de l'original;

b) la production d'un double certifié conforme;

c) dans le cas d'une demande qui peut être produite sur un formulaire reproduit à partir du site Web du ministère, la production du formulaire rempli, ou l'envoi de celui-ci directement sur le site Web du ministère s'il y est indiqué que le formulaire peut être rempli en ligne.

Exception

(2) Sauf disposition contraire du présent règlement, les passeports, visas de résident permanent, cartes de résident permanent, visas de résident temporaire, permis de séjour temporaire, permis de travail et permis d'études ne peuvent être produits autrement que par présentation de l'original.

23 When determining whether the declaratory relief sought by the Applicant should be granted, the applicable legal regime will vary depending on the date upon which CIC's refusal to land the Applicant is being considered. To the extent that the date upon which the Applicant argues he should have been landed is that of December 23, 1998, the requirements to be applied are those found in the *Immigration Act* and the *Regulations*. If, on the other hand, the Court examines whether the Applicant should have been landed on February 3, 2003, it is the *IRPA* and the *IRPR* that must be applied.

24 No such issue as to the relevant legislation arises when considering the application for an order of *mandamus*. Section 190 of the *IRPA* indicates clearly that Parliament intended the new Act to apply retrospectively, as it specifically provides that the *IRPA* shall apply to all pending applications:

> **Application of this Act**
>
> 190. Every application, proceeding or matter under the former Act that is pending or in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.
>
> * * *
>
> **Application de la nouvelle loi**
>
> 190. La présente loi s'applique, dès l'entrée en vigueur du présent article, aux demandes et procédures présentées ou instruites, ainsi qu'aux autres questions soulevées, dans le cadre de l'ancienne loi avant son entrée en vigueur et pour lesquelles aucune décision n'a été prise.

25 Consequently, if a *mandamus* order requiring the Respondents to complete the processing of the Applicant's application were to be granted, the application would have to be made in accordance with the new legislative scheme: *Dragan v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211, [2003] F.C.J. No. 260.

IV. Analysis

A. The Respondents' Motion for Non-Disclosure

26 Rule 17 of the *Federal Courts Immigration and Refugee Protection Rules* (SOR/93-22) ("*Rules*") *requires* the tribunal to include in the CTR "all papers relevant to the matter that are in the possession or control of the tribunal". Section 87 of *IRPA* allows for the non-disclosure of information if its disclosure would be injurious to national security or to the safety of any person.

27 In *Mohammed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1310, [2006] F.C.J. No. 1630, this Court held that "the decision as to whether something can be withheld or not should be made by the Court and not by the Respondent alone" (at para. 19). Similarly, in *Mekonen v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133, [2007] F.C.J. No. 1469, the Court held that "it is for the Court and not the tribunal to decide what information can be withheld from an applicant..." (at para. 10).

28 The combined effect of Rule 17 of the *Rules* and this Court's decisions in *Mohammed*, above, and *Mekomen*, above, is that a section 87 motion is required to be filed in all cases where information is redacted from the CTR for reasons of national security.

29 As provided for in paragraph 83(1)(c) of the *IRPA*, upon the request of the Minister, a judge shall hear information or other evidence, in the absence of the public, and the Applicant and his counsel if, in the judge's opinion, its disclosure could be injurious to national security or endanger the safety of any person. The evidence that is adduced in support of this application through the secret affidavit and the attachments thereto must be heard in the absence of the public, the Applicant and his counsel because disclosure of the evidence would be injurious to the national security or endanger the safety of any person.

30 Pursuant to sections 87 and 87.1, and paragraph 83(1)(b), the Court may appoint a special advocate to represent the interests of the permanent resident or foreign national if the Court is of the opinion that considerations of fairness and natural justice so require. In the case at bar, counsel for the Applicant made no such request.

31 After having held an *in camera* and *ex parte* hearing with counsel for the Respondents, during which the witness who filed the secret affidavit in support of the motion was questioned, counsel for the Applicant and for the Respondents were invited to make submissions by way of teleconference. As previously mentioned, it is at the end of this process that I granted the motion brought by the Respondents, with the caveat that one paragraph of the supplementary record be disclosed save for two words.

32 The state has a considerable interest in protecting national security and the security of its intelligence services. The disclosure of confidential information could have a detrimental effect on the ability of investigative agencies to fulfil their mandates in relation to Canada's national security. Although overturned by the Supreme Court on other grounds, the Federal Court found in *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 420, [2004] F.C.J. No. 509, that the Court has a duty to ensure the confidentiality of information if, in the opinion of the judge, its disclosure would be injurious to national security or endanger the safety of any person. Quoting from paragraph 25 of the United Kingdom House of Lords decision in *Regina v. Shayler*, [2002] H.L.J. No. 11, Justice Edmond Blanchard stated (at para. 58):

> There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign counties will decline to entrust their own secrets to an insecure recipient...

In *Henrie v. Canada (Security Intelligence Review Committee)*, [1989] 2 F.C. 229 (T.D.); aff'd in (1992) 5 Admin. L.R. (2d) 269 (C.A.), this Court recognized the rule that information related to national security ought not to be disclosed as an important exception to the principle that the court process should be open and public:

> There are, however, very limited and well defined occasions where the principle of complete openness must play a secondary role and where, with regard to the admission of evidence, the public interest in not disclosing the evidence may outweigh the public interest in disclosure. This frequently occurs where national security is involved for the simple reason that the very existence of our free and democratic society as well as the continued protection of the rights of litigants ultimately depend on the security and continued existence of our nation and of its institutions and laws.

33 The notion of the sometimes competing interests of the public's right to an open system and the state's need to protect information and its sources was discussed by the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] S.C.J. No. 73. In that case, the Supreme Court acknowledged that the state has a legitimate interest in preserving Canada's supply of intelligence information received from foreign sources and noted that the inadvertent release of such information would significantly injure national security.

34 Disclosure of confidential information related to national security or which would endanger the safety of any person could cause damage to the operations of investigative agencies. In the hands of an informed reader, seemingly unrelated pieces of information, which may not in themselves be particularly sensitive, can be used to develop a more comprehensive picture when compared with information already known by the recipient or available from another source. In *Henrie*, above, Justice David Addy also stated (at paras. 29-30):

> By contrast, in security matters, there is a requirement to not only protect the identity of human sources of information but to recognize that the following types of information might require to be protected with due regard of course to the administration of justice and more particularly to the openness of its proceedings: information pertaining to the identity of targets of the surveillance whether they be individuals or groups, the technical means and sources of surveillance, the methods of operation of the Service, the identity of certain members of the Service itself, the telecommunications and cipher systems and, at times, the very fact that a surveillance is being or is not being carried out. This means for instance that evidence, which of itself might not be of any particular use in actually identifying the threat, might nevertheless require to be protected if the mere divulging of the fact that C.S.I.S. is in possession of it would alert the targeted

> organization to the fact that it is in fact subject to electronic surveillance or to a wiretap or to a leak from some human source within the organization.
>
> It is of some importance to realize that an "informed reader", that is, a person who is both knowledgeable regarding security matters and is a member of or associated with a group which constitutes a threat or a potential threat to the security of Canada, will be quite familiar with the minute details of its organization and of the ramifications of its operations regarding which our security service might well be relatively uninformed. As a result, such an informed reader may at times, by fitting a piece of apparently innocuous information into the general picture which he has before him, be in a position to arrive at some damaging deductions regarding the investigation of a particular threat or of many other threats to national security.

35 Having reviewed the redacted information, and having duly considered the secret affidavit as well the explanations given by the deponent at the *in camera* and *ex parte* hearing, I have come to the conclusion that the redactions sought were necessary in order to protect national security as well as the security of persons mentioned in the secret material. Moreover, the redacted portions of the Certified Tribunal Record are minimal in content and do not seriously prejudice the Applicant's ability to know and comprehend the case he has to meet. In any event, the resolution of this application does not turn on the security clearances of the Applicant. It is for all of these reasons that the motion of the Respondents pursuant to s. 87 of the *IRPA* was granted.

B. The Application for Declaratory Relief

36 Counsel for the Applicant seeks a declaration from this Court that he was landed on December 23, 1998 (the date on which the Applicant attended CIC Etobicoke office for his landing examination), on June 28, 2002 (the date on which the *IRPR* came into force) or in February 2003 (the date on which he submitted a passport obtained from the Indian consulate in replacement of the lost one). On each of these dates, the Applicant submitted that he met all the legal requirements for landing and therefore became a permanent resident.

37 Counsel for the Respondents, for his part, argued that the Applicant could not be granted permanent residence on either of these dates because he could not satisfy an officer that he met all the requirements of the legislation. On December 23, 1998, he was not in possession of a valid and subsisting passport as required by subsection 14(1) of the former *Regulations*, while in February 2003, his medical, criminal and security clearances had expired.

38 There is no doubt that this Court has jurisdiction to grant declaratory relief. Section 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, permits the Court to make whatever declaration is appropriate including both positive and negative declarations. The preconditions to be met before declaratory relief can be granted have been spelled out by the Supreme Court of Canada in the following terms:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> *Canada v. Solosky*, [1980] 1 S.C.R. 821, at p. 830.

39 In the present case, these preconditions are clearly met. First of all, the parties obviously share a legal relationship ever since the Applicant made his application for permanent residence in 1995. When a person applies for permanent residence, a legal relationship is created as between that person and CIC. For instance, an applicant has a duty to truthfully answer all questions asked by the visa officer (*IRPA*, s. 16(1); *Immigration Act*, s. 12(4)), and to undergo a medical examination (*IRPA*, s. 16(2); *Immigration Act*, s. 11) and an examination by the visa officer (*IRPA*, s. 18; *Immigration Act*, s. 12(1)). CIC, on the other hand, as a duty to grant landing to immigrants who meet all legal requirements (*IRPA*, s. 21; *Immigration Act*, s. 5(2) and 14(2)).

40 Furthermore, the issue at stake is clearly a real one in that it affects the parties' interests and has not been resolved yet. Indeed, the issue is not academic or hypothetical; what is at stake is the Applicant's status in Canada and the possibility to re-enter Canada if he is ever found guilty of the charges that have been laid against him in the United States. This is not to say that the declaration sought by the Applicant would automatically provide any relief to the Applicant. Disregard of a declaratory judgment does not amount to contempt, as such a declaratory judgment merely states an existing legal situation: *L.C.U.C. v. Canada (Canada Post Corp.)* (1986), 8 F.T.R. 93 (T.D.). For a declaratory order to have any practical and immediate effect, it would have to be accompanied by an order in the nature of a *mandamus*. I shall return to that question shortly. Suffice it to say that even if the Court were not prepared to compel the Respondents to perform any specific duty, there would still be merit in declaring the law. As the Supreme Court stated in another context, government officials and administrative boards are not above the law, and if an official acts contrary to statute, the courts are entitled to so declare: see *Canada v. Kelso*, [1981] 1 S.C.R. 199, at p. 210.

41 I have to agree with counsel for the Respondents that the Applicant could not be landed on February 23, 2003, or indeed at any point in time after the coming into force of *IRPA*, as an officer could not be satisfied that he was not inadmissible. Through no fault of his own, Mr. Singh's medical, criminal and security clearances had expired and needed to be reinitiated when he submitted a valid passport. That being said, this was a most unfortunate state of affairs. For all those years, the Applicant was on a kind of merry-go-round, as one clearance after another had to be redone since their validity periods never all coincided. This is clearly an example of the bureaucracy at its worst, and one can only sympathize with the Applicant's Kafkaesque experience. But from a strictly legal point of view, it is impossible to conclude that the various officials who dealt with Mr. Singh's application after he obtained a new passport erred in applying the requirements of the law.

42 The same cannot be said with respect to the refusal to land him on December 23, 1998. It is not in dispute that the only reason his Record of Landing was taken back from him on that date was his inability to present a valid and subsisting passport. At that point, Mr. Singh had met all the other requirements of the *Immigration Act* and its attendant *Regulations*.

43 The requirement to be in possession of a valid and subsisting passport is found in subsection 14(1) of the *Regulations*, reproduced above at paragraph 17 of these reasons. Being in possession of something generally refers to the control over an object. However, depending of the legal context, a person may be considered in possession of something if that person holds a legal right to assume immediate control over an object: see *Ready John Inc. v. Canada (Department of Public Works and Government Services)*, 2004 FCA 222, [2004] F.C.J. No. 1002 at paras. 42-45. In the specific context of the *Immigration Act*, interpreting the regulatory requirement found in subsection 14(1) as the physical control of the passport by the Applicant would make no sense. The purpose of that subsection is clearly to verify that an immigrant wishing to come to Canada is a citizen of another country and to ascertain the identity of the immigrant before landing him. This is confirmed by an amendment made to the legal regime governing refugees in 1992 (S.C. 1992, ch. 49). Pursuant to s. 38 of that statute, section 46.04 of the *Immigration Act* was modified. The modified paragraph 46.04(8) states:

> (8) An immigration officer shall not grant landing either to an applicant under subsection (1) or to any dependant of the applicant until the applicant is in possession of a valid and subsisting passport or travel document or a satisfactory identity document.

44 Moreover, the French version of subsection 14(1) of the former *Immigration Regulations* stipulates that an immigrant "doit avoir" a valid passport. This expression is clearly much broader than "being in possession of" in the English version. To have a valid passport doesn't necessarily mean to physically hold on the passport, but rather to be the bearer of that document or to have the legal use of it. It should have been sufficient for the Applicant to demonstrate that he was the legal bearer of a valid passport; this is obviously done in general by showing the passport itself, but there may be circumstances where the showing of the physical passport may not be necessary in order to meet this requirement.

45 In the specific context of this case, the interpretation of subsection 14(1) proposed by the Respondents would not only make no sense but would also bring about a terrible injustice on the Applicant. Mr. Singh would be made to suffer for the loss of his passport by officials of the Respondents. Besides, the Respondents had a copy of his passport in the file, which showed that it was valid until 2001. In those very exceptional circumstances, it would be absurd and not in keeping with the wording and the spirit of subsection 14(1) to find that the Applicant could only satisfy the requirement set out in that provision by having with him the passport itself that was issued to him by the Indian authorities.

46 Counsel for the Respondents cited section 13 of the *IRPR* to bolster his argument. Section 13 of the *IRPR* prescribes an evidentiary rule to the effect that, if the "production" of a document is required by the legislation, it is the original document that must be "produced". Quite apart from the fact that section 13 of the *IRPR* finds no equivalent in the *Immigration Act* or in the former *Regulations*, it must be borne in mind that section 14(1) of the former *Regulations* did not speak of a requirement to produce but to hold a valid passport. These are two different requirements. The requirement to hold (in French "être titulaire de") a document is more than an evidentiary rule; it goes to the substance of being entitled to a valid passport issued by one's country of citizenship.

47 For all of those reasons, I am therefore of the view that CIC erred in law in finding that the Applicant did not comply with the requirement enunciated in s. 14(1) of the former *Immigration Regulations*, and in refusing to land the Applicant on December 23, 1998.

C. ***The Application for Mandamus***

48 The necessary conditions to be met for the issuance of a writ of *mandamus* have been set out by the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742, at para. 45; aff'd [1994] 3 S.C.R. 1100) and aptly summarized by my colleague Justice Danièle Tremblay-Lamer in the following terms:

> (1) there is a public legal duty to the applicant to act;
>
> (2) the duty must be owed to the applicant;
>
> (3) there is a clear right to the performance of that duty, in particular:
>
> > (a) the applicant has satisfied all conditions precedent giving rise to the duty;
> >
> > (b) there was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and
>
> (4) there is no other adequate remedy.
>
> *Conille v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 F.C. 33, (T.D.) at para. 8

49 In the case at bar, the Applicant seeks two alternative *mandamus* orders. The first order sought is to direct CIC to grant the Applicant his permanent residence within 30 days of the Court's order. Alternatively, the Applicant seeks an order compelling CIC to complete the processing of the Applicant's application within 30 days of the Court's order.

50 There is no doubt in my mind that the Applicant has met all the requirements for the issuance of a *mandamus* order. It is clear that CIC has a public legal duty to process the Applicant's permanent residence application. Section 5(2) of the former *Immigration Act* imposed on CIC a clear obligation to grant landing to an applicant for permanent residence who meets the relevant statutory requirements, and the same is true by virtue of section 11(1) of *IRPA*: see, for example, *Dragan*, above, at para. 40; *Vaziri v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1159, [2006] F.C.J. No. 1458 at para. 41.

51 I also find that the Applicant had a right to the performance of that duty. He submitted a completed application accompanied by all required supporting documents and paid the required processing fees. The record also shows that the Applicant and his counsel repeatedly contacted the Respondents to request updates or a final decision to be made. Yet, more than 14 years after he filed his application, a decision has yet to be made. The Respondents are correct in pointing out that the Applicant, due to the outstanding criminal charges that have been laid against him in the fall of 2005, cannot now satisfy an officer that he is not inadmissible under section 36 of *IRPA*. The fact remains that, prior to those charges having been laid, he had waited almost ten years for his application to be processed. If such a long period of time does not amount to an unreasonable delay, I truly wonder what does.

52 In light of the foregoing, I am of the view that the Applicant is entitled to an order in the nature of a *mandamus*. There is, however, authority for the proposition that while *mandamus* will be issued to compel the performance of a duty, it cannot dictate the result to be reached: see, for example, *Schwartz Hospitality Group Ltd. v. Canada (Minister of Canadian Heritage)*, 2001 FCT 112, at para. 34. Indeed, the jurisprudence is to the effect that issuing specific directions may sometimes be warranted, but only in very limited and exceptional circumstances. As stated by the Federal Court of Appeal in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, [2002] F.C.J. No. 91 at par. 14:

> While the directions that the Court may issue when setting aside a tribunal's decision include directions in the nature of a directed verdict, this is an exceptional power that should be exercised only in the clearest of circumstances: *Xie, supra*, at paragraph 18. Such will rarely be the case when the issue in dispute is essentially factual in nature (*Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.)), particularly when, as here, the tribunal has not made the relevant finding.
>
> See also: *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] F.C.J. No. 1523, at paras. 20-22; *Xie v. Canada (Minister of Employment and Immigration)* (1994), 75 F.T.R. 125 (F.C.T.D.) at para. 18.

53 In the case at bar, the issue of the Applicant's inadmissibility was apparently resolved in his favour at the time of his interview on December 23, 1998. Had it not been for the error of the officer in determining that the Applicant did not hold a valid passport because it had been seized at the visa office in Buffalo and never returned to him, the Applicant would most probably have been landed on that date. The evidence in that respect, however, is not devoid of all ambiguity, and does not allow the Court to bypass the assessment of an immigration officer and to substitute its decision to that of the Minister and those who are entrusted with his delegated authority.

54 Accordingly, the decision not to land the Applicant on December 23, 1998 is quashed, and the Applicant's file is remitted back to the Respondents to be processed in accordance with the law as it stood on that date and on the basis of the Applicant's record at the time. The processing of the Applicant's file shall also be made in light of these reasons, and in particular in light of the declaratory order with respect to s. 14(1) of the *Immigration Act*. Because of the long delays through which the Applicant already had to go through, the redetermination shall be made within 90 days of the release of this Court's order.

55 Counsel proposed no question for certification, and none will be certified.

56 Counsel for the Applicant seeks his costs on a solicitor-client basis. I agree with the Respondents that there is no justification for such an award. That being said, I am prepared to grant costs on a party to party basis to the Applicant. I am of the view that the long delay in processing the Applicant's file amounts to "special circumstances" for the purpose of Rule 22 of the *Federal Courts Immigrations and Refugee Protection Rules*, SOR/93-22. Accordingly, the Respondents are jointly ordered to pay $2,000 to the Applicant.

ORDER

THIS COURT ORDERS that this application for judicial review be granted. More specifically, the Court makes the following two orders:

- The Court declares that the requirement to hold a valid passport found in s. 14(1) of the *Regulations* adopted under the former *Immigration Act* did not require an Applicant to actually have in his or her possession a hard copy of his or her passport, when it can be established by other means that the Applicant holds a valid passport;
- The Court further orders CIC to process the application for landing of the Applicant within 90 days of the release of this Order, in accordance with the law as it stood on December 23, 1998 and as interpreted in the reasons for this Order, and on the basis of the Applicant's record on that date.
- The Respondents are ordered to pay the Applicant a lump sum of $2,000.00.

de MONTIGNY J.

End of Document

Toronto-Dominion Bank v. Deloitte Haskins & Sellsand Deloitte & ToucheIndexed as: Toronto-Dominion Bank v. Deloitte Haskins & Sells(Gen. Div.), 5 O.R. (3d) 417

Ontario Reports

Ontario Court (General Division)

Blair J.

September 26, 1991

Action No. 72863/91Q

5 O.R. (3d) 417 | [1991] O.J. No. 1618

Case Summary

Torts — Negligent misstatement — Liability of auditor to third parties — Pure economic loss — Bank suing auditor of debtor for negligent preparation of financial statements — Bank pleading that auditor knew that financial statements would be provided to bank by debtor in connection with loan agreement and that bank relied on information to its detriment — Auditor's motion to strike out statement of claim as disclosing no reasonable cause of action dismissed.

The plaintiff loaned money to L Ltd., a company of which the defendant was auditor. The defendant prepared audited financial statements for the year ended March 31, 1989 and issued an unqualified auditor's report in connection therewith. In April 1990, L Ltd. made an assignment in bankruptcy; the plaintiff was an unsecured creditor in the bankruptcy for the full amount of the loan. The plaintiff sued the defendant on the basis of the auditor's alleged negligence in the preparation of the audited financial statements. The plaintiff alleged that the defendant knew or ought to have known that the audited financial statements would be provided to the plaintiff after they were received by L Ltd.; that the plaintiff would rely on the audited financial statements in continuing to extend credit to L Ltd. and might rely on them to extend further credit; and that the audited financial statements would be delivered to the plaintiff to assess the financial condition of L Ltd. and as a basis to continue to extend or to increase the credit. The defendant moved under rule 21.01(1) of the Rules of Civil Procedure for the determination of the question whether, in the absence of a special relationship with the claimant, an auditor is liable for pure economic loss, and for an order striking out the statement of claim on the ground that it disclosed no reasonable cause of action.

Held, the motion should be dismissed.

The question to be determined on this motion was whether or not, on the facts as assumed from the pleadings, it could be said to be plain, obvious and beyond doubt that the plaintiff would not be successful in establishing the existence of a special relationship at trial.

The liability of an auditor to third parties for negligent misstatement in cases of pure economic loss must be grounded on something narrower than the broad question of foreseeability. Whether this narrowing concept is characterized as the requirement for a "special relationship" or a knowledge of the "nature and purpose of the transaction", or more generally as "knowledge" amounted to the same thing, i.e. to "knowledge". Knowledge of the requisite sort was pleaded.

Al Saudi Banque v. Clark Pixley (a firm), [1990] Ch. 313, [1989] 3 All E.R. 361, [1990] 2 W.L.R. 344 (Ch. D.); Caparo Industries plc v. Dickman, [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358 (H.L.); Haig v. Bamford, [1977] 1 S.C.R. 466, 27 C.P.R. (2d) 149, 72 D.L.R. (3d) 68, 9 N.R. 43, [1976] 3 W.W.R. 331, consd

Other cases referred to

Air India Flight 182 Disaster Claimants v. Air India (1987), 62 O.R. (2d) 130, 44 D.L.R. (4th) 317 (H.C.J.); Al-Nakib Investments (Jersey) Ltd. v. Longcroft, [1990] 3 All E.R. 321, [1990] 1 W.L.R. 1390 (Ch. D.); Canada Deposit Insurance Corp. v. Prisco (1990), 2 C.B.R. (3d) 96 (Alta. Q.B.); Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164, [1951] 1 All E.R. 426, [1951] 1 T.L.R. 371, 95 Sol. Jo. 171 (C.A.); Dixon v. Deacon Morgan McEwan Easson (1989), 41 B.C.L.R. (2d) 82, 64 D.L.R. (4th) 441, [1990] 2 W.W.R. 500 (S.C.); Federal Business Development Bank v. Morris, Burk, Luborsky, David & Kale (1988), 38 B.L.R. 1 (Ont. H.C.J.); Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575, [1963] 3 W.L.R. 101, 107 Sol. Jo. 454, [1963] 1 Lloyd's Rep. 485 (H.L.); Hong Kong Bank of Canada v. Touche Ross & Co. (1989), 36 B.C.L.R. (2d) 381, 74 C.B.R. (N.S.) 164 (C.A.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, [1990] 6 W.W.R. 385; James McNaughton Paper Group Ltd. v. Hicks Anderson & Co., [1991] 2 Q.B. 113, [1991] 1 All E.R. 134, [1991] 2 W.L.R. 641 (C.A.); Kripps v. Touche Ross & Co. (1990), 52 B.C.L.R. (2d) 291 (S.C.); McGauley v. British Columbia (1990), 44 B.C.L.R. (2d) 217 (S.C.), revd (1991), 56 B.C.L.R. (2d) 1 (C.A.); MacPherson v. Schachter (1989), 1 C.C.L.T. (2d) 65 (B.C. S.C.); Morgan Crucible Co. plc v. Hill Samuel & Co. Ltd., [1991] Ch. 295, [1991] 1 All E.R. 148, [1991] 2 W.L.R. 655 (C.A.); Moriarity v. Slater (1989), 67 O.R. (2d) 758, 42 B.L.R. 52 (H.C.J.); Surrey Credit Union v. Willson (1990), 49 B.C.L.R. (2d) 102, 80 C.B.R. (N.S.) 171, 73 D.L.R. (4th) 207, [1990] 6 W.W.R. 578 (S.C.); Toromont Industrial Holdings Ltd. v. Thorne, Gunn, Helliwell & Christenson (1975), 10 O.R. (2d) 65, 23 C.P.R. (2d) 59, 62 D.L.R. (3d) 225 (H.C.J.), varied (1976), 14 O.R. (2d) 87, 73 D.L.R. (3d) 122, 30 C.P.R. (2d) 93 (C.A.); Ultra Mares Corp. v. Touche, 255 N.Y. 170 (1931)

Rules and regulations referred to

Rules of Civil Procedure, O. Reg. 560/84, rule 21.01, 21.01(1) (a), (b)

MOTION for a determination before trial of a question of law and for an order striking out a statement of claim.
John A. Campion and Paul F. Monahan, for plaintiff (responding party).

J.W. Mik and Lisa S. Corne, for defendant (moving party).

BLAIR J.

Nature of the proceeding

In this action there arises a broad and very important question of law. That question concerns the development and scope in Canada of an auditor's liability in tort for negligent misstatement.

The motion before me is under rule 21.01(1) of the Rules of Civil Procedure, O. Reg. 560/84, for:

(a) the determination before trial of a question of law raised by a pleading where the determination of the question may dispose of the claim, and

(b) an order striking out the statement of claim on the ground that it discloses no reasonable cause of action.

On such a motion the principles or tests to be applied are the following:

(i) the allegations of fact in the statement of claim, unless patently ridiculous or incapable of proof, must be accepted as proven:

(ii) the moving party, in order to succeed, must show that it is plain, obvious and beyond doubt the plaintiff could not succeed;

(iii) the novelty of the cause of action will not militate against the plaintiff; and,

(iv) the statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies.

See Air India Flight 182 Disaster Claimants v. Air India (1987), 62 O.R. (2d) 130, 44 D.L.R. (4th) 317 (H.C.J.), at p. 135 O.R., p. 322 D.L.R.; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, at pp. 979-80 and 990-92 S.C.R., pp. 335-36 and 343-44 D.L.R.

I am of the view that these same principles or tests apply whether the motion is brought under rule 21.01(1)(a) or (b). Both involve a consideration of legal principles applied to facts as set out in the pleadings. Although he did not say so specifically, Mr. Justice White suggested as much in Moriarity v. Slater (1989), 67 O.R. (2d) 758, 42 B.L.R. 52 (H.C.J.). There, in reference to the procedure under both subrules, he commented that the proposition in question must be "crystal clear" to the motions judge and that caution and prudence should govern the exercise of the court's discretion.

Facts

The plaintiff, Toronto-Dominion Bank (the Bank), was banker to a company called Leigh Instruments Limited (Leigh) from 1982 until April 1990. By that time Leigh was indebted to the Bank in the amount of $40.5 million. The indebtedness was secured by a "letter of comfort" from Leigh's parent, the Plessy Company plc (Plessy).

The defendant, which I will refer to as "Deloitte", was Leigh's auditor. In the course of its general mandate from the company, it prepared audited financial statements for the year ended March 31, 1989 and issued an unqualified auditor's report in connection therewith. The bank loan appeared on Leigh's balance sheet, and the fact that it was secured by a comfort letter was described in a note to the financial statements.

On April 12, 1990, Leigh made an assignment in bankruptcy. I am told that there is other litigation between the Bank and Plessy regarding the Plessy security, which has apparently turned out to be somewhat less than a comfort to the Bank. In any event, the Bank is left as an unsecured creditor in the Leigh bankruptcy for the full amount of the loan advanced at the time.

In this action the Bank sues Deloitte on the basis of the auditor's alleged negligence in the preparation of the audited financial statements. The Bank asserts that the statements were provided to it as a term of the loan agreement, that it relied upon them in continuing and making further advances under the loan agreement, and that the auditors knew this would be the case. More specifically, the allegations which are of central importance for the disposition of this proceeding are the allegations that Deloitte knew (or ought to have known):

(a) that the audited financial statements would be provided to the Bank after they were received by Leigh;

(b) that the Bank would rely on the audited financial statements in continuing to extend credit to Leigh and might rely on them to extend further credit;

(c) that the audited financial statements would be delivered to the Bank to assess the financial condition of Leigh and as a basis to continue to extend or to increase the credit.

These facts, of course, have not been proved, but as outlined above, I am required to assume their truth for the purposes of this motion.

Issue

In his factum, Mr. Mik, on behalf of Deloitte, articulates the issue and the question of law for determination as one of "the liability of an auditor, in the absence of a special relationship with the claimant, for pure economic loss".

By "a special relationship" he means something more than mere knowledge or foreseeability, which he concedes is established on the pleadings. That "something more" (my term) he characterizes as the requirements of "proximity" and "fairness", relying strongly on the decision of the House of Lords in Caparo Industries plc v. Dickman, [1990] 1 All E.R. 568, [1990] 2 W.L.R. 358, and a companion decision of Millett J. in the Court of Queen's Bench in England, called Al Saudi Banque v. Clark Pixley (a firm), [1990] Ch. 313, [1989] 3 All E.R. 361 (Ch. D.).

In my view, the issue before me is more accurately articulated in another way. The question is whether or not, on the facts as assumed from the pleading, it can be said to be "plain, obvious and beyond doubt" that the plaintiff will not be successful in establishing the existence of such a special relationship (however that relationship is characterized), at a trial.

Law

Since the House of Lords broke through the barrier to liability in tort for negligent misstatement in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465, [1963] 2 All E.R. 575, there has been no dirth of authorities fastening auditors with such a responsibility.

In Canada, Mr. Justice R.E. Holland found against a firm of auditors in Toromont Industrial Holdings Ltd. v. Thorne, Gunn, Helliwell & Christenson (1975), 10 O.R. (2d) 65, 62 D.L.R. (3d) 225 (H.C.J.), although he was reversed in part on appeal ((1976), 14 O.R. (2d) 87, 73 D.L.R. (3d) 122 (C.A.)). There are other examples -- here and in England -- and the Supreme Court of Canada, itself, considered the question in Haig v. Bamford, [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68.

The law is clear, therefore, that auditors may be liable to third parties in tort for negligent misstatement. Mr. Mik submits, however, that Caparo and Al Saudi Banque, and several decisions in British Columbia that appear to have accepted those cases, have narrowed the ambit of that liability in cases of pure economic loss. Haig v. Bamford (when considered in light of its facts and the root decision on which it is based -- Lord Justice Denning's dissent in Candler v. Crane, Christmas & Co., [1951] 2 K.B. 164, [1951] 1 All E.R. 426 (C.A.)) is not inconsistent with the principles enunciated in those cases, he argues, and the law is now refined and settled in this respect in a way that precludes this action against the defendant.

Caparo and its progeny of cases stand for the proposition that the following ingredients are necessary to establish a duty of care for negligent misstatement on the part of advisers such as accountants: (1) foreseeability of damage; (2) proximity or neighbourhood; (3) a sense that it is fair, just and reasonable to impose a duty in the circumstances.

Throughout the very thorough arguments of counsel for both parties, I was referred to a number of authorities on this subject, in addition to those mentioned above. These included: Federal Business Development Bank v. Morris, Burk, Luborsky, David & Kale (1988), 38 B.L.R. 1 (Ont. H.C.J.); Hong Kong Bank of Canada v. Touche Ross & Co. (1989), 36 B.C.L.R. (2d) 381, 74 C.B.R. (N.S.) 164 (C.A.); MacPherson v. Schachter (1989), 1 C.C.L.T. (2d) 65 (B.C. S.C.); Dixon v. Deacon Morgan McEwan Easson (1989), 64 D.L.R. (4th) 441, [1990] 2 W.W.R. 500 (B.C. S.C.); Surrey Credit Union v. Willson (1990), 49 B.C.L.R. (2d) 102, 73 D.L.R. (4th) 207 (S.C.); Kripps v. Touche Ross & Co. (1990), 52 B.C.L.R. (2d) 291 (S.C.); McGauley v. British Columbia (1990), 44 B.C.L.R. (2d) 217 (S.C.), appeal allowed to the extent of granting the plaintiff one last chance to amend statement of claim (1991), 56 B.C.L.R. (2d) 1 (C.A.); Al-Nakib Investments (Jersey) Ltd. v. Longcroft, [1990] 3 All E.R. 321, [1990] 1 W.L.R. 1390 (Ch. D.); Canada Deposit Insurance Corp. v. Prisco, Alta. Q.B., Wachowich J., November 30, 1990 [now reported 2 C.B.R. (3d) 96]; Morgan Crucible Co. plc v. Hill Samuel & Co. Ltd., [1991] Ch. 295, [1991] 1 All E.R. 148 (C.A.); James McNaughton Paper Group Ltd. v. Hicks Anderson & Co., [1991] 2 Q.B. 113, [1991] 2 W.L.R. 641 (C.A.).

Mr. Campion, on behalf of the Bank, does not concede that the law in this area has been redefined in any definitive way in Canada. He does accept that liability must be grounded on something narrower than the broad question of foreseeability in order to balance the policy considerations between a right to recovery for economic loss and the exposure of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" (the oft-cited remark of Chief Justice Cardozo in Ultra Mares Corp. v. Touche, 255 N.Y. 170 (1931), at p. 179). He submits, however, that whether this narrowing concept is characterized as the requirement for a "special relationship" or as knowledge of the "nature or purpose of the transaction", or more generally as "knowledge", it amounts to the same thing: it amounts to "knowledge". And "knowledge" of the requisite sort, he argues, is pleaded.

He also submits that even if the test for liability is that set out in the Caparo line of authorities, the Bank has met those tests on the facts as pleaded, at least for the purposes of a motion such as this.

I agree.

In Haig v. Bamford, supra, the Supreme Court of Canada deliberately left open the question of whether foreseeability was a proper test to apply in determining the full extent of the duty owed by accountants to third parties. It held that "actual knowledge of the limited class that will use and rely on the statement" was sufficient to found liability on the facts of that case (supra, p. 476 S.C.R., p. 75 D.L.R.). Mr. Justice Dickson (as he then was) adopted [p. 477 S.C.R., p. 75 D.L.R.] as his starting point Lord Justice Denning's question in Candler v. Crane, Christmas & Co., supra, "To whom do these professional people owe this duty?", and his following answer:

> They owe the duty, of course, to their employer or client, and also, I think, to any third person to whom they themselves show the accounts, or to whom they know their employer is going to show the accounts so as to induce him to invest money or take some other action on them.

(Emphasis added)

Later, in summarizing his decision, Mr. Justice Dickson also stated [pp. 483-84 S.C.R., p. 80 D.L.R.]:

> I can see no good reason for distinguishing between the case in which a defendant accountant delivers information directly to the plaintiff at the request of his employer ... and the case in which the information is handed to the employer who, to the knowledge of the accountant, passes it to members of a limited class (whose identity is unknown to the accountant) in furtherance of a transaction the nature of which is known to the accountant.

(Emphasis added)

It is pleaded in this action that Deloitte knew that the financial statements would be provided to the Bank by Leigh in connection with the loan agreement and for the purpose of assessing the credit facility, and that the Bank relied on the information to its detriment. Having regard to this and to the passages from Haig v. Bamford cited above and having regard, I must say, even to the requirements of the Caparo line of cases -- if, indeed, they do establish the criteria -- I am not able to conclude that it is "plain, obvious and beyond doubt" that the plaintiff cannot succeed at trial.

I am mindful also of the following cautionary guideline noted by Madam Justice Wilson in Hunt v. Carey Canada Inc., supra, at pp. 990-91 S.C.R., p. 344 D.L.R.:

> ... I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

This is just such a case, it seems to me. Tempting though it may be as a judge in matters such as this, to whet one's interest and appetite in a delicious legal issue, the whetting, in my view, is best left to a time when the whole meal can be digested.

Conclusion

Accordingly, an order will go dismissing the defendant's motion, with costs to the plaintiff in the cause.

I am grateful to counsel for their skilful arguments and for the helpful materials which were provided to me.

Motion dismissed.

Thorson v. Canada (Attorney General), [1975] 1 S.C.R. 138

Supreme Court Reports

Supreme Court of Canada

Present: Fauteux C.J. and Abbott, Martland, Judson, Ritchie, Spence, Pigeon, Laskin and Dickson JJ.

1973: June 6, 7 / 1974: January 22.

[1975] 1 S.C.R. 138 | [1975] 1 R.C.S. 138

Joseph Thorarinn Thorson, Appellant; and The Attorney General of Canada, The Secretary of State of Canada, The Receiver General of Canada, Keith Spicer, The Bilingual Districts Advisory Board, Roger Duhamel, Paul Fox and Roger St. Denis, Respondents.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Actions — Status — Standing of taxpayer in class action — Interest no greater than that of any other taxpayer — Challenge of federal legislation — Official Languages Act, R.S.C. 1970, c. 0-2.

The appellant, suing as a taxpayer in a class action, claimed that the Official Languages Act, 1968-69 (Can.), c. 54 and Appropriation Acts providing money to implement it were unconstitutional. The question of standing was raised as a preliminary question of law and was decided against the appellant, both at first instance and on appeal.

Held (Fauteux C.J. and Abbott and Judson JJ. dissenting): The appeal should be allowed.

Per Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ.: A question of alleged excess of legislative power is a justiciable one, and it is open to the Court, in the exercise of a discretionary power, to allow a taxpayer to have such a question adjudicated in a class action, being in effect a class action by a member of the public, when otherwise it could be immune from judicial review because there is no person or class of persons particularly aggrieved and because of the unwillingness of the Attorney-General to institute proceedings or of the Government to direct a reference. Any attempt to place standing in a federal taxpayer suit on the likely tax burden is as unreal as it is in the case of municipal taxpayer suits. It is not the alleged waste of public funds alone but the right of citizenry to constitutional behaviour that will support standing. As a matter of discretion the appellant should be allowed to proceed to have the suit determined on the merits.

Per Fauteux C.J., Abbott and Judson JJ. dissenting: The ratio of the judgments in the Ontario courts is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. Municipal taxpayer class actions are in a class of their own since municipal corporations and municipal councils are creatures of a statute and can only do those things which they are authorized to do.

Cases Cited

[MacIlreith v. Hart, (1907), 39 S.C.R. 657; Smith v. Attorney General of Ontario, [1924] S.C.R. 331; Dyson v. The Attorney General, [1911] 1 K.B. 410, (2nd Dyson case) [1912] 1 Ch. 158; Attorney General v. Independent Broadcasting Authority, ex parte McWhirter, [1973] 1 All E.R. 689; London County Council v. Attorney General, [1902] A.C. 165; Wallasey Local Board v. Gracey, (1887), 36 Ch. 593; Tottenham U.D.C. v. Williamson & Sons Ltd., [1896] 2 Q.B. 353; Boyce v. Paddington Borough Council, [1903] 1 Ch. 109; Electrical Development Co. of Ontario v. Attorney General of Ontario, [1919] A.C. 687; B.C. Power Corpn. Ltd. v. B.C. Electric Co. Ltd., [1962] S.C.R. 642;

Attorney General for Victoria v. The Commonwealth (1946), 71 C.L.R. 237; Massachusetts v. Mellon, (1923), 262 U.S. 447; Ref. Re ss. (1), (3), (4), s. 11, Official Languages Acts, s. 14 Official Languages Act (N.B.), (1972), 5 N.B.R. (2d) 653; Paterson v. Bowes, (1853), 4 Gr. 170; Toronto v. Bowes, (1853), 4 Gr. 489 affd. (1856), 6 Gr. 1, affd. (1858), 11 Moo. P.C. 463, 14 E.R. 770; Crampton v. Zabriskie, (1879), 101 U.S. 601; Bromley v. Smith, (1826), 1 Sim. 8, 57 E.R. 482; Prescott v. Birmingham, [1955] Ch. 210; Bradbury v. Enfield, [1967] 1 W.L.R. 1311; Holden v. Bolton, (1887), 3 T.L.R. 676; Collins v. Lower Hutt City Corporation, [1961] N.Z.L.R. 250; Bradford v. Municipality of Brisbane, [1901] Queensland L.J. 44; Frothingham v. Mellon, (1923), 262 U.S. 447; Flast v. Cohen, (1968), 392 U.S. 83; Everson v. Board of Education, (1947), 330 U.S.1; Doremus v. Board of Education, (1952), 342 U.S. 429; Sierra Club v. Morton, (1972), 405 U.S. 727; Anderson v. Commonwealth (1932), 47 C.L.R. 50; R. v. Barker, (1762), 3 Burr. 1265, 97 E.R. 823 referred to.]

APPEAL from a judgment of the Court of Appeal for Ontario [[1972] 2 O.R. 340] dismissing an appeal from a judgment of Houlden J. whereby the appellants action was dismissed for want of status.
J.T. Thorson, Q.C., in person. J.J. Robinette, Q.C., T.B. Smith, Q.C., for the respondent.

Solicitor for the appellant: J.T. Thorson, Ottawa. Solicitor for the respondents: D.S. Maxwell, Ottawa.

The judgment of Fauteux C.J. and Abbott and Judson JJ. was delivered by

JUDSON J.

JUDSON J.:— The appellant, Joseph Thorarinn Thorson, sued in the Supreme Court of Ontario for a declaration that the Official Languages Act is ultra vires of the Parliament of Canada, and for a similar declaration in respect of appropriation Acts of the Parliament of Canada insofar as they grant money out of the Consolidated Revenue Fund for the purposes of this Act. The appellant also asked for an order compelling repayment into the Consolidated Revenue Fund of moneys already expended.

One of the defences raised by the defendants in the action was that the appellant had no status to maintain the action. Following the close of pleadings, the defendants applied for an order under Rule 124 of the Rules of Practice of the Supreme Court of Ontario for leave to set down for hearing two questions of law before the trial of the action. These are:

> 1. That the plaintiff (appellant) has no status or standing to maintain this action;
>
> 2. That since the plaintiff (appellant) has not alleged that he as a taxpayer of Canada has suffered any special damage or damage that would set him apart from other taxpayers of Canada as a result of the enactment of the Official Languages Act, the plaintiff (appellant) has no status or standing to obtain the relief claimed in the amended statement of claim.

Leave was granted and these two questions came on for hearing before Mr. Justice Houlden. He found that the appellant had no status to maintain the action and accordingly dismissed it. His judgment [[1972] 1 O.R. 86] was affirmed by a unanimous Court of Appeal [[1972] 2 O.R. 340].

The ratio of the judgments in the Ontario courts is that an individual has no status to challenge the constitutional validity of an Act of Parliament unless he is specially affected or exceptionally prejudiced by it. The plaintiff in this action had only the same interest as any other taxpayer in Canada, and any increased taxes resulting from the implementation of the Act would be borne by all the taxpayers of Canada.

In my opinion, this decision is sound and the case is governed directly by the judgment of this Court in Smith v. Attorney General of Ontario [[1924] S.C.R. 331]. In this action, Smith was asking for a declaratory judgment that Part IV of the Canada Temperance Act was not validly in force in the Province of Ontario. The ratio of the judgment of the Court is contained in the reasons of Duff J., at pp. 337 and 338, in the following terms:

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could

> maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.
>
> We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities; MacIlreith v. Hart (1907), 39 S.C.R. 657. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.

These reasons were accepted by Mignault J. and Maclean J. Idington J. thought that the action was an attempt to get an opinion which, on the facts presented, the Court had no right to give. He declined to express any opinion on the questions submitted and concurred in the dismissal of the action for the reasons given by him. The Chief Justice, who presided at the hearing, died before judgment was pronounced.

In the Smith case, as in the present appeal, much emphasis was laid on the decision in Dyson v. Attorney-General [[1911] 1 K.B. 410, and [1912] 1 Ch. 158]. In my opinion Dyson's case has no bearing upon the problem before us. The appellant in this case is seeking a declaration that Parliament had no power to enact a certain piece of legislation. Dyson's case was concerned with no such issue. The attack in Dyson's case was upon the action of the Commissioners of Inland Revenue. They had devised a form which required all land owners to state the annual value of their land on a certain basis. Dyson's objection was that this demand was not authorized by the Act, and the Court of Appeal agreed with him [[1911] 1 K.B. 410]. The decision was, therefore, a declaratory judgment against a certain form of administrative action. It was sought in the Smith case to extend this principle to legislation and this request was rejected, and rightly so in my opinion. It is being repeated in this appeal and should be rejected again.

It is also my opinion that Duff J. was right in refusing to extend the ratepayer's action in municipal cases to the kind of action before him in the Smith case and before us in the present case. These actions to restrain illegal or ultra vires expenditures, to recover funds illegally paid out or retained by a member of council (MacIlreith v. Hart [(1908), 39 S.C.R. 657]; Paterson v. Bowes [(1853), 4 Gr. 170]) bear no analogy to the present case. I do not regard them as a relaxation of the rule enunciated in the Smith case. They are in a class of their own. Municipal corporations and municipal councils are creatures of a statute and can only do those things which they are authorized, expressly or implicitly, to do. The ratepayer's action is one means of keeping municipal action within municipal powers.

I would dismiss the appeal with costs.

The judgment of Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ. was delivered by

LASKIN J.

LASKIN J.:-- An important question of standing is raised by this appeal, brought here by leave of this Court. The appellant, suing as a taxpayer in a class action, claims a declaration against the Attorney General of Canada that the Official Languages Act, 1968-69 (Can.), c. 54, now R.S.C. 1970, c. 0-2, and Appropriation Acts providing money to implement it, are unconstitutional. There are other defendants in the action as framed, against whom specific relief is claimed, but it seems to have been assumed that their liability depends initially on whether the appellant can succeed in his claim against the Attorney General of Canada; and that unless the appellant has standing to seek a declaration of unconstitutionality, the various claims of relief must fail in limine.

The question of standing was, on the motion of the defendants under R.124 (Ont.), set down for hearing as a preliminary question of law, and was decided by Houlden J. in their favour. An appeal by the plaintiff to the Ontario Court of Appeal was dismissed without calling on counsel for the defendants. The Court of Appeal, in short reasons, approved the interpretation placed by Houlden J. on the two judgments of this Court upon which, in his view, the issue turned, namely MacIlreith v. Hart [(1907), 39 S.C.R. 657] and Smith v. Attorney General of Ontario [[1924]

S.C.R. 331]. Houlden J. regarded the Smith case as laying down the applicable principle as expounded in the reasons of Duff J., speaking in this respect for the majority of the Court. Houlden J. said this in the course of his reasons:

> In my judgment, the principle stated in the Smith case is one of general application. This principle is that an individual has no status or standing to challenge the constitutional validity of an Act of Parliament in an action of this type unless he is specially affected or exceptionally prejudiced by it ... The fact that the taxes of the plaintiff and the taxes of every taxpayer in Canada will be raised as a result of the implementation of the Official Languages Act is not, in my opinion, sufficient to constitute special damage or prejudice to the plaintiff so as to enable the plaintiff to bring this action.
>
> I think there is sound reason for this result. If every taxpayer could bring an action to test the validity of a statute that involved the expenditure of public money it would in my view lead to grave inconvenience and public disorder. It is for this reason, I believe, that the plaintiff has been unable to find any Canadian or English decision as authority for the position he is asserting.

I do not think that anything is added to the reasons for denying standing, if otherwise cogent, by reference to grave inconvenience and public disorder. An effective answer to similar arguments advanced in Dyson v. The Attorney General [[1911] 1 K.B. 410], was given by Farwell L.J. in his reasons at p. 423, reasons endorsed by Fletcher Moulton L.J. in the second Dyson case [[1912] 1 Ch. 158], at p. 168. The Courts are quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs; and as a matter of experience, MacIlreith v. Hart, to which I will return, does not seem to have spawned any inordinate number of ratepayers' actions to challenge the legality of municipal expenditures. A more telling consideration for me, but on the other side of the issue, is whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute. That, in my view, is the consequence of the judgments below in the present case. The substantive issue raised by the plaintiff's action is a justiciable one; and, prima facie, it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

Because of the way in which the matter now before this Court arose, the facts alleged in the amended statement of claim are taken as admitted for present purposes. They do not, of course, answer the legal question which has been posited on those facts. There is one admission of fact to which I wish to refer, however, which was not considered in the reasons of the Courts below. Before bringing his action, the plaintiff wrote to the Attorney General of Canada inviting him, in his capacity as representative of the Crown in right of Canada in matters legal, to take appropriate proceedings to test the validity of the Official Languages Act. The letter noted that prior to the enactment of this statute the plaintiff had asked for a reference to this Court to have its validity considered but his request was refused. Although the record contains no reply to the plaintiff's letter there is an admission by the defendants in their amended statement of defence that the Attorney General declined to act in his public capacity to challenge the constitutionality of the statute.

If a previous request to the Attorney General to institute proceedings or to agree to a relator action is a condition of a private person's right to initiate proceedings such as this on his own (see Attorney General v. Independent Broadcasting Authority, ex parte McWhirter [[1973] 1 All E.R. 689], at p. 698) that condition has been met in this case. I doubt, however, whether such a condition can have any application in a federal system where the Attorney General is the legal officer of a Government obliged to enforce legislation enacted by Parliament and a challenge is made to the validity of the legislation. The situation is markedly different from that of unitary Great Britain where there is no unconstitutional legislation and the Attorney General, where he proceeds as guardian of the public interest, does so against subordinate delegated authorities. Indeed, in such situations the decision of the Attorney General to proceed on his own or to permit a relator action is within his discretion and not subject to judicial control: see London County Council v. Attorney General [[1902] A.C. 165]. Nevertheless, what was said by Lord Denning in the McWhirter case, supra, on the position of a member of the public where the Attorney General refuses without good reason to take proceedings ex officio or to give leave for relator proceedings, is relevant to a distinction that I take and on which, in my opinion, the result in this case turns. I shall come to this later in these reasons.

I agree with the submission of counsel for the respondents that the appellant's taxpayer class action here is realistically a class action by a member of the public. He is bringing what has been called a "public action" (see Jaffe, Judicial Control of Administrative Action (1965), p. 483), and the question that arises is whether the principle of MacIlreith v. Hart should be extended to cover such federal taxpayer actions (and, if so, it would extend as well to provincial taxpayer actions), as contended for by the appellant, or whether this kind of action should never be permitted for the reasons given in the Smith case, as contended for by the respondents. It is my view that this statement of the issue is both too broad and too narrow. It is too broad because it does not take account of the nature of the legislation whose validity is challenged; it is too narrow because it suggests an "either or" approach by the Courts. I am of the opinion that the Court is entitled in taxpayer actions to control standing no less than it is entitled to control the granting of declaratory orders sought in such actions. In short, the matter to me is one for the discretion of the Court, and relevant to this discretion is the nature of the legislation under attack.

Where regulatory legislation is the object of a claim of invalidity, being legislation which puts certain persons, or certain activities theretofore free of restraint, under a compulsory scheme to which such persons must adhere on pain of a penalty or a prohibitory order or nullification of a transaction in breach of the scheme, they may properly claim to be aggrieved or to have a tenable ground upon which to challenge the validity of the legislation. In such a situation, a mere taxpayer or other member of the public not directly affected by the legislation would have no standing to impugn it. Smith v. Attorney General of Ontario is this class of case. Disregarding for this purpose the significant point that the wrong Attorney General was sued, the correctness of the decision might be put in doubt if it be taken to hold that the amended Canada Temperance Act was immune from challenge by a declaratory action at the suit of either Smith or the Montreal firm which refused, because of the amended legislation, to fill Smith's liquor order and hence brought to a halt a proposed business relationship.

Why, in such a case, should Smith be disqualified as a plaintiff in a declaratory action and be compelled to violate the statute and risk prosecution in order to raise the question of its invalidity? The reasons of Duff J. mention this point but then dispose of it in the following passage, at p. 337 of [1924] S.C.R., quoted and relied upon by Houlden J.:

> Much may be said, no doubt, for the view that an individual in the position of the appellant ought, without subjecting himself to a prosecution for a criminal offence, to have some means of raising the question of the legality of official acts imposing constraint upon him in his daily conduct which, on grounds not unreasonable, he thinks are unauthorized and illegal. We think, however, that to accede to appellant's contention upon this point would involve the consequence that virtually every resident of Ontario could maintain a similar action; and we can discover no firm ground on which the appellant's claim can be supported which would not be equally available to sustain the right of any citizen of a province to initiate proceedings impeaching the constitutional validity of any legislation directly affecting him, along with other citizens, in a similar way in his business or in his personal life.
>
> We think the recognition of such a principle would lead to grave inconvenience and analogy is against it. An individual, for example, has no status to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act. It is true that in this court this rule has been relaxed in order to admit actions by ratepayers for restraining ultra vires expenditures by the governing bodies of municipalities; MacIlreith v. Hart. We are not sure that the reasons capable of being advanced in support of this exception would not be just as pertinent as arguments in favour of the appellant's contention, but this exception does not rest upon any clearly defined principle, and we think it ought not to be extended.
>
> On the whole we think the principle contended for, since it receives no sanction from legal analogy, and since it is open to serious objection as calculated to be attended by general inconvenience in practice, ought not to be adopted. But the question is an arguable one; and, as the merits of the appeal have been fully discussed, we are loath to give a judgment against the appellant solely based upon a fairly disputable point of procedure; and accordingly we think it right to say that in our opinion the appellant's action also fails in substance.

Much of the argument in the present appeal, especially in the submissions of the appellant, related to the significance of the assertion of Duff J., upon which Houlden J. grounded his decision and which I have already quoted, that "an individual, for example, has no right to maintain an action restraining a wrongful violation of a public right unless he is exceptionally prejudiced by the wrongful act." The plaintiff's contention was that, on the pleadings, taking the facts alleged as established for the purposes of a motion under R.124 (Ont.), he was within this proposition, and that he was not called upon to show that he was more exceptionally prejudiced than others who, like him, were also exceptionally prejudiced. Put another way, the submission is that the issue is not magnitude of the exceptional prejudice but merely whether it exists in the case of the plaintiff, albeit many others are under the same exceptional prejudice.

I am of the opinion that the foregoing statement of Duff J. cannot be torn from the context of case law and principle out of which it obviously arises, and that the submissions of the plaintiff become somewhat tortuous in seeking to parse the words "exceptional prejudice" as if they were disembodied terms of a statute. Although Duff J. cited no authority for his assertion, it is a derivation from English cases, relating to private attempts to enjoin a public nuisance. In this class of case, which involves no question of the constitutionality of legislation, there is a clear way in which the public interest can be guarded through the intervention of the Attorney General who would be sensitive to public complaint about an interference with public rights: see Wallasey Local Board v. Gracey [(1887), 36 Ch. 593]; Tottenham Urban District Council v. Williamson & Sons Ltd. [[1896] 2 Q.B. 353], Boyce v. Paddington Borough Council [[1903] 1 Ch. 109]. It is on this basis that the Courts have said that a private person who seeks relief from what is a nuisance to the public must show that he has a particular interest or will suffer an injury peculiar to himself if he would sue to enjoin it.

This is not a principle which is capable of wholesale transfer to a field of federal public law concerned with the distribution of legislative power between central and unit legislatures, and with the validity of the legislation of one or other of those two levels. There is no question in such a case of respecting legislative sovereignty, as in unitary Great Britain, but rather a question of whether Parliament or a Legislature has itself respected the limits of its authority under the Constitution.

The Official Languages Act is not a regulatory type of statute akin to the Canada Temperance Act which was involved in the Smith case. It is both declaratory and directory in respect of the use of English and French by and in federal authorities and agencies, including Courts, and in the provision of services to the public through communication in both languages by those authorities and agencies, whether in the national capital region, or at their head or central office elsewhere in Canada, or at each principal office in a federal bilingual district established under the Act. Administration of the Act is confided to a Commissioner of Official Languages who is charged to ensure recognition of the status of both official languages and compliance with the spirit and intent of the Act. He is authorized to inquire into complaints, to recommend remedial action after investigation of any complaint and to report to Parliament if appropriate remedial action is not taken. The Act creates no offences and imposes no penalties; there are no duties laid upon members of the public, although the public service may be said, broadly speaking, to be affected by the promotion of bilingualism in order that members of the public may be served and may communicate in both official languages. Public officials only might be exposed to prosecution under s. 115 of the Criminal Code.

The question of the constitutionality of legislation has in this country always been a justiciable question. Any attempt by Parliament or a Legislature to fix conditions precedent, as by way of requiring consent of some public officer or authority, to the determination of an issue of constitutionality of legislation cannot foreclose the Courts merely because the conditions remain unsatisfied: Electrical Development Co. of Ontario v. Attorney General of Ontario [[1919] A.C. 687], B.C. Power Corp. Ltd. v. B.C. Electric Co. Ltd. [[1962] S.C.R. 642]. Should they then foreclose themselves by drawing strict lines on standing, regardless of the nature of the legislation whose validity is questioned?

Short of a reference either to a provincial appellate Court by the Lieutenant Governor in Council or to this Court by the Governor General in Council, is there any other way in which the validity of a statute like the Official Languages Act can be determined in a judicial proceeding when the federal Attorney General has declined to act? Counsel for the respondents contended that a provincial Attorney General could take declaratory proceedings, but he could cite no authority for this proposition nor could I find any. However, want of authority is not an answer if principle supports the submission. I am unable to appreciate upon what principle this submission stands. Can it be said that one Attorney General of one Province is in any different position than any others of other Provinces, or is it suggested that an Attorney General class action be taken? Even if a provincial Attorney General might validly be authorized by provincial legislation to take such declaratory proceedings, I am unaware of any such legislation. As an ordinary common law matter, I do not think a provincial Attorney General is in as strong a position in a case such as the present one as is a federal taxpayer bringing a class action. The provincial Attorney General would be representing the public interest of his Province only, and, moreover, the invalidation of the Official Languages Act would not result in any accretion to, or vindicate any legislative power of the Province.

There is Australian authority to support a declaratory action by a State Attorney General to challenge the validity of Commonwealth legislation where that legislation amounts to an invasion of State legislative power: see Attorney General for Victoria v. The Commonwealth [(1946), 71 C.L.R. 237]. This, and other like cases cited therein, represent an adaptation to Australian federalism of the English position of the Attorney General as the guardian of public rights, those rights being the rights of the citizens of the State whom the State Attorney General represents. On the other hand, authority in the United States is to the contrary. In Massachusetts v. Mellon [(1923), 262 U.S. 447], a companion case to Frothingham v. Mellon considered below, the Supreme Court of the United States said this on the point (at p. 485):

> It cannot be conceded that a State, as parens patriae, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof ... While the State, under some circumstances, may sue in that capacity for the protection of its citizens ... it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government.

The merit of the Australian position does not reach the present case because, as I have already noted, there is no invasion of provincial legislative power in the enactment of the Official Languages Act even assuming it to be unconstitutional; and the cited Australian case does not go so far as to support the right of a State Attorney General to challenge a mere Appropriation Act of the Commonwealth.

Counsel for the respondents also relied in this connection upon Reference re Subsections (1) (3) and (4) of S. 11 of the Official Languages Act, S. 23C of the New Brunswick Evidence Act and S. 14 of the New Brunswick Official Languages Act [(1972), 5 N.B.R. (2d) 653], which was a judgment of the New Brunswick Court of Appeal on a reference. There, one Leonard C. Jones applied successfully to the Court for leave to be joined as an interested party and to have all rights as a party including a right of appeal. This does not assist in the present case because a reference was refused by the federal authorities, and I do not think that a plaintiff is compelled to shop around for a reference by one of the ten provincial governments.

I come finally to the judgment of this Court in MacIlreith v. Hart [(1907), 39 S.C.R. 657]. In that case a municipal council had paid $231 to the mayor to reimburse him for his expenses in attending a municipal convention. A ratepayer of the municipality brought a class action against the mayor (the municipal council having refused to do so) for a declaration that the payment was illegal and that the sum in question should be returned by the mayor. There was at the time no authority for the municipal council to pay convention expenses. On the question whether a ratepayer's action lay, the trial judge dismissed the suit on the ground that the Attorney General was a necessary party. The Supreme Court of Nova Scotia en banc reversed, holding the action to be maintainable as brought, and this decision was affirmed by this Court.

Case law in Ontario has sanctioned such actions for a long time. The leading case is Paterson v. Bowes [(1853), 4 Gr. 170], and on the merits, sub nom Toronto v. Bowes [(1853), 4 Gr. 489 aff'd. (1856), 6 Gr. 1 aff'd (1858), 11 Moo. P.C. 463; 14 E.R. 770]. The law in the United States is the same: see Crampton v. Zabriskie [(1879), 101 U.S. 601]. Paterson v. Bowes founded itself on Bromley v. Smith [(1826), 1 Sim. 8, 57 E.R. 482] which, on its facts, falls short of being in a strict sense a ratepayers' action to challenge an illegal municipal expenditure. It does not seem to have enjoyed any prominence in England, but there is more recent case law there which provides some support for the doctrine stated in Paterson v. Bowes: see Prescott v. Birmingham [[1955] Ch. 210]; and cf. Bradbury v. Enfield [[1967] 1 W.L.R. 1311]. There is also contrary authority in England: see Holden v. Bolton [(1887), 3 T.L.R. 676]; and in New Zealand: see Collins v. Lower Hutt City Corporation [[1961] N.Z.L.R. 25]. Professor de Smith rightly refers to the Prescott case as a weak authority because standing is approved there sub silentio and he says this on the subject (Judicial Review of Administrative Action (1968 2d ed.), at p. 479):

> The state of the law is now thoroughly confused, and it is to be hoped that the House of Lords will soon have an opportunity to pronounce upon these matters. The assumption that to proclaim the ratepayer's

> locus standi in positive terms would let loose a torrent of ratepayers' actions is in fact mere conjecture. But if restrictive principles are to be cast aside, they should be cast aside unequivocally.

In those cases where the restrictive principle of requiring carriage of the suit by the Attorney General and denying any suit if the Attorney General refuses to act, has been cast aside, the rationale of the ratepayer's action has been explained in various ways, dependent, it seems to me, on the factual situation in the particular case. In Smith v. Bromley, where a limited number of householders of a parish were subject to rates imposed for the management and cultivation of certain allotments of enclosed waste lands over which rights of common existed, it was held that it was open to a dissident group to seek to reclaim a sum illegally paid out of the collected rates by the treasurer, albeit so paid with the approval of the majority. Sir John Leach V.C. said, briefly,

> Where a matter is necessarily injurious to the common right the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit.
>
> The Attorney General may file an information in a case like this in respect of the public nature of the right; and the proceedings must be by the Attorney General when all persons interested are parties to the abuse; but where that is not the case, I am not aware of any principle or authority which makes it necessary that he should be before the Court.

Paterson v. Bowes spoke in terms of the interest of inhabitants (it was an inhabitants' class action rather than a ratepayers') to prevent a misapplication of funds which came from municipal rates, and it distinguished the case of the public nuisance. Analogy there to equity jurisdiction to hold a faithless agent to be trustee for his principal was based on the fact that the defendant mayor had obtained 10,000 pounds [Sterling] as a discount on the purchase for the city of debentures in the sum of 50,000 pounds [Sterling], and had retained the sum for his own use. The municipal council refused at first to act and it was only after the question of standing had been resolved in favour of the inhabitants who brought the action that the council agreed to be substituted as plaintiff. In Crampton v. Zabriskie, the Supreme Court of the United States said this of a taxpayer's suit against an illegal expenditure of money by a county:

> Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the taxpayers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property-holders. Certainly, in the absence of legislation restricting the right to interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual taxpayers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their process in such cases.

In the Smith case, as already noted, Duff J. regarded MacIlreith v. Hart as an exception from a general rule which did not rest upon any clearly defined principle. That was not the view of the Court, of which he was a member, which decided the case. He concurred in the reasons of Davies J. who founded himself on the principle of Paterson v. Bowes and who found reconciliation with English authority by concluding that ratepayers, who sue to vindicate a public right to have municipal money lawfully appropriated, suffer damage peculiar to themselves qua ratepayers in the increased rates they would have to pay by reason of illegal expenditures, even though the damage be small. Idington J. proceeded squarely on Paterson v. Bowes. So did Maclennan J. (with whom Fitzpatrick C.J. concurred) although he viewed that case as reflecting a trustee-beneficiary relationship between the municipality and its ratepayers. It is quite clear that obeisance to the special damage requirement was purely formal, and that at least equally important was the fact that ultra vires expenditures were involved which the municipal council was unwilling to reclaim.

If the Attorney General should also be unwilling to involve himself in a local municipal matter, that would end the affair unless standing was given to a ratepayer willing to bear the costs of an action to correct a wrong in municipal administration. This was the case in Bradford v. Municipality of Brisbane [[1901] Queensland L.J. 44], a judgment of

Griffith C.J., where the Attorney General refused to interfere and a ratepayer was denied standing to enjoin an allegedly illegal municipal expenditure. I am unable to appreciate how an argument of principle can be made that such a wrong, an illegality which is certainly justiciable, should go uncorrected at law, whatever may eventuate as political redress.

For myself, I do not think that it was necessary to restrict the doctrine of MacIlreith v. Hart in order to decide the Smith case as it was decided. Two entirely different situations were presented in those two cases. In the Smith case, a regulatory, even prohibitory, statute was in issue under which offences and penalties were prescribed; in MacIlreith v. Hart, there was a public right involved which had no punitive aspects for any particular ratepayer or class of ratepayers, and it would beget wonder that, in such a case, there should be no judicial means of recovering or controlling an illegal expenditure of public money.

Assuming for the moment that MacIlreith v. Hart approved a ratepayers' suit because of the communality of the relationship of persons in the city of Halifax (which had at the time a population of about 47,000) even though only $231 was involved, I do not see that the principle is any less valid in respect of a taxpayers' suit concerning Halifax in its present-day population of about 125,000, nor in respect of Metropolitan Toronto or Montreal, each of which has a population in excess of two million. The population of Metropolitan Toronto and of Montreal is greater than that of each of seven of the Provinces of Canada. If the principle of MacIlreith v. Hart is applicable to municipal ratepayers' actions, why not to a provincial taxpayers' action to challenge the constitutionality of legislation involving expenditure of public money where no other means of challenge is open?

There is, of course, this difference between an illegal expenditure by a municipality or a public corporation and an allegedly illegal expenditure by a Province or by the Dominion. Neither the Province nor the Dominion is limited in expenditure by the considerations that apply to a municipality or to a corporation. The issue here is not simply one (as it seemed to be in Frothingham v. Mellon [(1923), 262 U.S. 447], discussed below) where the challenge is merely to an Appropriation Act. The main challenge is to the Official Languages Act, but, because it has been implemented by the appointment of a Commissioner of Official Languages and other staff, there is the ancillary reference to allegedly illegal expenditures made in respect of an unconstitutional object.

In the United States, a taxpayer class action in respect of an allegedly unconstitutional State expenditure is now generally maintainable: see Douglas J., concurring in Flast v. Cohen [(1968), 392 U.S. 83], at p. 108; Everson v. Board of Education [(1947), 330 U.S. 1]; and Doremus v. Board of Education [(1952), 342 U.S. 429]. However, until recently federal taxpayer suits to challenge unconstitutional federal expenditures had been denied. Frothingham v. Mellon, already cited, decided less than a year before the Smith case, had laid down the governing rule. The reasons invoke the same concern as did the Smith case about multiplicity of actions, inconvenience, and the fact that public and not special individual interest is involved and, in addition, rely on the separation of powers doctrine which is a more explicit matter in the United States than it is here. In the course of his reasons for the Court, Sutherland J. said this:

> The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this Court. In cases where it was presented, the question has either been allowed to pass sub silentio or the determination of it expressly withheld....The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. Crampton v. Zabriskie, 101 U.S. 601, 609. Nevertheless, there are decisions to the contrary. See, for example, Miller v. Grandy, 13 Mich. 540, 550. The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. IV Dillon Municipal Corporations, 5th ed., s. 1580, et seq. But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury--partly realized from taxation and partly from other sources--is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

There has been a considerable modification of Frothingham v. Mellon in the recent decision of the Supreme Court of the United States in Flast v. Cohen. There that Court held that a federal taxpayer suit may be pursued to challenge the constitutionality of a federal expenditure pursuant to the federal taxing and spending power where the challenge is also based on a specific constitutional limitation on the exercise of that power. In so far as United States decisions turn on the need for showing a justiciable "case or controversy", within Article III, section 2 of the American Constitution, or otherwise require a constitutional base to support standing by a federal taxpayer, they have no application to Canada. I note, in any event, a recent recession there from the "case of controversy" requirement: see Sierra Club v. Morton [(1972), 405 U.S. 727].

In my opinion, standing of a federal taxpayer seeking to challenge the constitutionality of federal legislation is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process. Central to that discretion is the justiciability of the issue sought to be raised, a point that could be said to be involved (although the case was not decided on that basis) in Anderson v. Commonwealth [(1932), 47 C.L.R. 50], where the High Court of Australia denied standing to a member of the public to challenge the validity of an agreement between the Commonwealth and one of the States. Relevant as well is the nature of the legislation whose validity is challenged, according to whether it involves prohibitions or restrictions on any class or classes of persons who would thus be particularly affected by its terms beyond any effect upon the public at large. If it is legislation of that kind, the Court may decide, as it did in the Smith case, that a member of the public, and perhaps even one like Smith, is too remotely effected to be accorded standing. On the other hand, where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the Court must be able to say that as between allowing a taxpayers' action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on the merits.

In his reasons in the Smith case, Duff J. concluded his exposition on standing by the statement that "the question is an arguable one". I think that the argument for standing in the present case is fortified by analogy (which Duff J. thought was absent) to the cases on certiorari and prohibition which, even in a non-constitutional context, have admitted standing in a mere stranger to challenge jurisdictional excesses, although the granting of relief remains purely discretionary: see Wade, Administrative Law (3rd ed. 1971), at p. 138, pointing to the special public aspect of these remedies. Other analogies from English legal history depend on how far back in such history one is prepared to go. Lord Mansfield, for example, looked upon the writ of mandamus as a public remedy which "was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one": Rex v. Barker [(1762), 3 Burr. 1265, at p. 1267, 97 E.R. 823, at pp. 824-825]. The expansion of the declaratory action, now well-established, would to me be at odds with a consequent denial of its effectiveness if the law will recognize no one with standing to sue in relation to an issue which is justiciable and which strikes directly at constitutional authority.

I recognize that any attempt to place standing in a federal taxpayer suit on the likely tax burden or debt resulting from an illegal expenditure, by analogy to one of the reasons given for allowing municipal taxpayers' suits, is as unreal as it is in the municipal taxpayer cases. Certainly, a federal taxpayer's interest may be no less than that of a municipal taxpayer in that respect. It is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.

In the present case, I would, as a matter of discretion, hold that the appellant should be allowed to proceed to have his suit determined on the merits. Accordingly, I would allow the appeal, set aside the judgments below and dismiss the motion of the respondents under R.124. The appellant should have his costs throughout.

Appeal allowed with costs.

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Trendsetter Developments Ltd. v. Ottawa Financial Corp. (Ont. C.A.), [1989] O.J. No. 179

Ontario Judgments

Supreme Court of Ontario - Court of Appeal

Toronto, Ontario

Tarnopolsky, McKinlay and Catzman JJ.A.

Heard: January 31, 1989

Judgment: February 7, 1989

Action No. 743/87

[1989] O.J. No. 179 | 32 O.A.C. 327 | 33 C.P.C. (2d) 16 | 13 A.C.W.S. (3d) 397

Between Trendsetter Developments Limited, Assaly Capital Corporation, Plaintiffs (Appellants), and Ottawa Financial Corporation, In Trust, Defendant (Respondent)

Case Summary

Practice — Pleadings — Striking out — No reasonable cause of action — Appeals — No evidence to be considered — Facts pleaded deemed to be true — Ontario Rules of Civil Procedure, R. 21.01(1)(b).

This was an appeal by the plaintiffs against an order allowing the defendant's motion to strike out the statement of claim as disclosing no reasonable cause of action. The plaintiff mortgagor brought an action and a preliminary motion thereto seeking an interlocutory injunction to restrain the defendant mortgagee from selling the subject property. The defendant's motion to strike and the plaintiff's motion for the injunction were heard at the same time. The judge allowed the defendant's motion.
HELD: The appeal was allowed.

The motions judge erred in striking out the plaintiff's statement of claim based on the evidence lead in the interlocutory injunction motion. Rule 21.01(1)(b) of the Ontario Rules of Civil Procedure provided that no evidence was admissible in a motion to strike pleadings under that rule. Under that rule only the sufficiency in law of the pleading could be attacked. The plaintiff's pleadings did disclose a reasonable cause of action if the facts, as pleaded, were accepted as true.

Gordon F. Henderson, Q.C., and William L. Vanveen, for the Plaintiffs (Appellants). S.G. Fisher, Q.C., for the Defendant (Respondent).

The judgment of the Court was delivered by

CATZMAN J.A. (orally)

CATZMAN J.A. (orally):— This is an appeal by the plaintiffs from an order made by a weekly court judge in Ottawa granting a motion by the defendant pursuant to rule 21.01(1)(b) of the Rules of Civil Procedure to strike out the statement of claim in this action on the ground that it discloses no reasonable cause of action.

The motion was heard, and disposed of, contemporaneously with a motion by the plaintiffs for an interlocutory injunction restraining the sale of the property of which the plaintiffs were the owners and the defendant was the mortgagee.

From the recitals in the order under appeal and the reasons given in the endorsement of the weekly court judge, it appears that he struck out the statement of claim and dismissed the action by reference to his determination of issues which were raised before him on the interlocutory injunction motion and to the evidence which was before him in connection with that motion.

In our respectful view, he erred in so doing. Rule 21.01(2) (b) provides that no evidence is admissible on a motion to strike out a pleading under rule 21.01(1)(b). The reason why no evidence is admissible is that the only issue on such a motion is the sufficiency in law of the pleading attacked: Holmested and Watson, Ontario Civil Procedure, vol.1, para. 21, s. 3. Accordingly, it was not open to the weekly court judge to take into account, in disposing of the motion to strike out the statement of claim, his determination of issues on the interlocutory injunction motion and the evidence before him in connection with that motion.

The law is well established that, on a motion to strike out a statement of claim as disclosing no reasonable cause of action, all the facts pleaded in the statement of claim must be deemed to have been proven, and the court should make the order only in plain and obvious cases which it is satisfied to be beyond doubt. This is not such a case. In our view, it cannot be said on a reading of the statement of claim in this action that the facts alleged with respect to interest and the alleged contravention of statutory provisions regarding the stipulation of interest disclose no reasonable cause of action.

Accordingly, we would allow the appeal, set aside the order under appeal, and dismiss the defendant's motion to strike out the statement of claim. The costs of the appeal, of the defendant's unsuccessful motion to quash the appeal, and of the motion before the weekly court judge shall be costs in the cause.

CATZMAN J.A.
TARNOPOLSKY J.A.:— I agree.
McKINLAY J.A.:— I agree.

End of Document

Vancouver (City) v. Ward, [2010] 2 S.C.R. 28

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

Heard: January 18, 2010;

Judgment: July 23, 2010.

File No.: 33089.

[2010] 2 S.C.R. 28 | [2010] 2 R.C.S. 28 | [2010] S.C.J. No. 27 | [2010] A.C.S. no 27 | 2010 SCC 27

City of Vancouver, Appellant; v. Alan Cameron Ward, Respondent. And Her Majesty The Queen in Right of the Province of British Columbia, Appellant; v. Alan Cameron Ward, Respondent, and Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Aboriginal Legal Services of Toronto Inc., Association in Defence of the Wrongly Convicted, Canadian Civil Liberties Association, Canadian Association of Chiefs of Police, Criminal Lawyers' Association (Ontario), British Columbia Civil Liberties Association and David Asper Centre for Constitutional Rights, Interveners.

(80 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Enforcement — Damage award as remedy for breach of rights — Quantum — Claimant strip searched and his car seized in violation of his constitutional rights — Whether claimant entitled to damages as remedy under s. 24(1) of [page29] Canadian Charter of Rights and Freedoms — If so, how should quantum of damages be assessed.

Summary:

During a ceremony in Vancouver, the city police department received information that an unknown individual intended to throw a pie at the Prime Minister who was in attendance. Based on his appearance, police officers mistakenly identified W as the would-be pie-thrower, chased him down and handcuffed him. W, who loudly protested his detention and created a disturbance, was arrested for breach of the peace and taken to the police lockup. Upon his arrival, the corrections officers conducted a strip search. While W was at the lockup, police officers impounded his car for the purpose of searching it once a search warrant had been obtained. The detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge W for attempted assault. W was released approximately 4.5 hours after his arrest. He brought an action in tort and for breach of his rights guaranteed by the *Canadian Charter of Rights and Freedoms* against several parties, including the Province and the City. With respect to the strip search and the car seizure, the trial judge held that, although the Province and the City did not act in bad faith and were not liable in tort for either incident, the Province's strip search and the City's vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The trial judge assessed damages under s. 24(1) of the *Charter* at $100 for the seizure of the car and $5,000 for the strip search. The Court of Appeal, in a majority decision, upheld the trial judge's ruling.

Held: The appeal should be allowed in part.

The language of s. 24(1) is broad enough to include the remedy of constitutional damages for breach of a claimant's *Charter* rights if such remedy is found to be appropriate and just in the circumstances of a particular case. The first step in the inquiry is to establish that a *Charter* right has been breached; the second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches.

Once the claimant has established that damages are functionally justified, the state has the opportunity to demonstrate, at the third step, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. Countervailing considerations include the existence of alternative remedies. Claimants need not show that they have exhausted all other recourses. Rather, it is for the state to show that other remedies including private law remedies or another *Charter* remedy are available in the particular case that will sufficiently address the *Charter* breach. Concern for effective governance may also negate the appropriateness of s. 24(1) damages. In some situations, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity.

If the state fails to negate that the award is "appropriate and just", the final step is to assess the quantum of the damages. To be "appropriate and just", an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of s. 24(1) damages. Where the objective of compensation is engaged, the concern is to restore the claimant to the position he or she would have been in had the breach not been committed. With the objectives of vindication and deterrence, the appropriate determination is an exercise in rationality and proportionality. Generally, the more egregious the breach and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. In the end, s. 24(1) damages must be fair to both the claimant and the state. In considering what is fair to both, a court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests. Damages under s. 24(1) should also not duplicate damages awarded under private law causes of action, such as tort, where compensation of personal loss is at issue.

Here, damages were properly awarded for the strip search of W. This search violated his s. 8 *Charter* rights and compensation is required, in this case, to functionally fulfill the objects of constitutional damages. Strip searches are inherently humiliating and degrading and the *Charter* breach significantly impacted on W's person and rights. The correction officers' conduct which caused the breach was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Combined with the police conduct, the impingement on W also engages the objects of vindication of the right and deterrence of future breaches. The state did not establish countervailing factors and damages should be awarded for the breach. Considering the seriousness of the injury and the finding that the corrections officers' actions were not intentional, malicious, high-handed or oppressive, the trial judge's $5,000 damage award was appropriate.

With respect to the seizure of the car, W has not established that damages under s. 24(1) are appropriate and just from a functional perspective. The object of compensation is not engaged as W did not suffer any injury as a result of the seizure. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. A declaration under s. 24(1) that the vehicle seizure violated W's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

Cases Cited

Considered: *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405; **referred to:** *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429; *Fose [page32] v. Minister of Safety and Security*, 1997 (3) SA 786; *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328; *Smith v. Wade*, 461 U.S. 30 (1983); *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941; *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129; *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 S.C.R. 345; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.

Statutes and Regulations Cited

Act respecting industrial accidents and occupational diseases, R.S.Q., c. A-3.001.

Canadian Charter of Rights and Freedoms, ss. 8, 9, 24, 32.

Charter of human rights and freedoms, R.S.Q., c. C-12, ss. 49, 51.

Constitution Act, 1982, s. 52(1).

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Saunders and Low JJ.A.), 2009 BCCA 23, 89 B.C.L.R. (4) 217, 265 B.C.A.C. 174, 446 W.A.C. 174, 304 D.L.R. (4) 653, [2009] 6 W.W.R. 261, 63 C.C.L.T. (3d) 165, [2009] B.C.J. No. 91 (QL), 2009 CarswellBC 115, affirming a decision of Tysoe J., 2007 BCSC 3, 63 B.C.L.R. (4) 361, [2007] 4 W.W.R. 502, 45 C.C.L.T. (3d) 121, [2007] B.C.J. No. 9 (QL), 2007 CarswellBC 12, finding a breach of *Charter* rights and awarding damages. Appeal allowed in part.

Counsel

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[page33]

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Sean Dewart and *Tim Gleason*, for the intervener the Criminal Lawyers' Association (Ontario).

Kent Roach and *Grace Pastine*, for the interveners the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights.

The judgment of the Court was delivered by

McLACHLIN C.J.

I. Introduction

1 The *Canadian Charter of Rights and Freedoms* guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach. The first and most important remedy is the nullification of laws that violate the *Charter* under s. 52(1) of the *Constitution Act, 1982*. This is supplemented by s. 24(2), under which evidence obtained in breach of the *Charter* may be excluded if its admission would bring the administration of justice into disrepute, and s. 24(1) - the provision at issue in this case - under which the court is authorized to grant such remedies to individuals [page34] for infringement of *Charter* rights as it "considers appropriate and just in the circumstances".

2 The respondent Ward's *Charter* rights were violated by Vancouver and British Columbia officials who detained him, strip searched his person and seized his car without cause. The trial judge awarded Mr. Ward damages for the *Charter* breaches, and the majority of the Court of Appeal of British Columbia upheld that award.

3 This appeal raises the question of when damages may be awarded under s. 24(1) of the *Charter*, and what the amount of such damages should be. Although the *Charter* is 28 years old, authority on this question is sparse, inviting a comprehensive analysis of the object of damages for *Charter* breaches and the considerations that guide their award.

4 I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.

5 I conclude that damages were properly awarded for the strip search of Mr. Ward, but not justified for the seizure of his car. I would therefore allow the appeal in part.

[page35]

II. Facts

6 On August 1, 2002, Prime Minister Chrétien participated in a ceremony to mark the opening of a gate at the entrance to Vancouver's Chinatown. During the ceremony, the Vancouver Police Department ("VPD") received information that an unknown individual intended to throw a pie at the Prime Minister, an event that had occurred elsewhere two years earlier. The suspected individual was described as a white male, 30 to 35 years, 5' 9", with dark short hair, wearing a white golf shirt or T-shirt with some red on it.

7 Mr. Ward is a Vancouver lawyer who attended the August 1 ceremony. On the day, Mr. Ward, a white male, had grey, collar-length hair, was in his mid-40s and was wearing a grey T-shirt with some red on it. Based on his appearance, Mr. Ward was identified - mistakenly - as the would-be pie-thrower. When the VPD officers noticed him, Mr. Ward was running and appeared to be avoiding interception. The officers chased Mr. Ward down and handcuffed him. Mr. Ward loudly protested his detention and created a disturbance, drawing the attention of a local television camera crew. The television broadcast showed that Mr. Ward had a "very agitated look on his face", "appeared to be yelling for the benefit of the onlookers" and was "holding back" as he was being escorted down the street.

8 Mr. Ward was arrested for breach of the peace and taken to the police lockup in Vancouver, which was under the partial management of provincial corrections officers. Upon his arrival, the corrections officers instructed Mr. Ward to remove all his clothes in preparation for a strip search. Mr. Ward complied in part but refused to take off his underwear. The officers did not insist on complete removal and Mr. Ward was never touched during the search. After the search was completed, Mr. Ward was placed in a small cell where he spent several hours before being released.

[page36]

9 While Mr. Ward was at the lockup, VPD officers impounded his car for the purpose of searching it once a search warrant had been obtained. VPD detectives subsequently determined that they did not have grounds to obtain the required search warrant or evidence to charge Mr. Ward for attempted assault. Mr. Ward was released from the lockup approximately 4.5 hours after he was arrested and several hours after the Prime Minister had left Chinatown following the ceremony.

III. Judicial History

A. *Supreme Court of British Columbia, 2007 BCSC 3, 63 B.C.L.R. (4th) 361*

10 Mr. Ward brought an action in tort and for breach of his *Charter* rights against the City, the Province, and individual police and corrections officers for his arrest, detention, strip search, and car seizure. Justice Tysoe found Mr. Ward's arrest for breach of the peace to be lawful and dismissed the action against the individual police and corrections officers. However, Tysoe J. held that - although they did not act in bad faith and were not liable in tort for either incident - the Province's strip search and the City's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. In addition, Tysoe J. found that the City breached Mr. Ward's rights under s. 9 of the *Charter* and committed the tort of wrongful imprisonment by keeping Mr. Ward in the police lockup longer than necessary.

11 Tysoe J. assessed damages under s. 24(1) of the *Charter* at $100 for the seizure of the car and $5,000 for the strip search. He rejected the governments' argument that damages were an inappropriate remedy for *Charter* breaches absent bad faith, abuse of power, or tortious conduct. In addition, [page37] Tysoe J. awarded $5,000 in damages for the wrongful imprisonment. This award is not at issue on this appeal.

B. *British Columbia Court of Appeal, 2009 BCCA 23, 89 B.C.L.R. (4th) 217*

12 Justice Low, Finch C.J.B.C. concurring, upheld Tysoe J.'s ruling, agreeing with Mr. Ward that bad faith, abuse of power, or tortious conduct are not necessary requirements for the awarding of *Charter* damages.

13 Justice Saunders, dissenting, would have allowed the Province and City appeals, holding that damages cannot be awarded where the police did not act in bad faith and simply made a mistake as to the proper course of action.

IV. Constitutional Provisions

14 Section 24(1) of the *Charter* provides as follows:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

V. Issues

15 The issues are the following:

- A. When are damages under s. 24(1) available?
    - 1. The language of s. 24(1) and the nature of *Charter* damages;
    - 2. Step one: Proof of a *Charter* breach;
    - 3. Step two: Functional justification of damages;

    - 4. Step three: Countervailing factors;
    - 5. Step four: Quantum of s. 24(1) damages;
    - 6. Forum and procedure.
- B. Application to the Facts
    - 1. Damages for the strip search;
    - 2. Damages for the car seizure.

VI. Analysis

A. *When Are Damages Under Section 24(1) Available?*

(1) The Language of Section 24(1) and the Nature of *Charter* Damages

16 Section 24(1) empowers courts of competent jurisdiction to grant "appropriate and just" remedies for *Charter* breaches. This language invites a number of observations.

17 First, the language of the grant is broad. As McIntyre J. observed, "[i]t is difficult to imagine language which could give the court a wider and less fettered discretion": *Mills v. The Queen*, [1986] 1 S.C.R. 863, at p. 965. The judge of "competent jurisdiction" has broad discretion to determine what remedy is appropriate and just in the circumstances of a particular case.

18 Second, it is improper for courts to reduce this discretion by casting it in a strait-jacket of judicially prescribed conditions. To quote McIntyre J. in *Mills* once more, "[i]t is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion": *Mills*, at p. 965.

19 Third, the prohibition on cutting down the ambit of s. 24(1) does not preclude judicial clarification of when it may be "appropriate and just" to award damages. The phrase "appropriate and just" limits what remedies are available. The court's discretion, while broad, is not unfettered. What is appropriate and just will depend on the facts and circumstances of the particular case. Prior cases may offer guidance on what is appropriate and just in a particular situation.

20 The general considerations governing what constitutes an appropriate and just remedy under s. 24(1) were set out by Iacobucci and Arbour JJ. in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3. Briefly, an appropriate and just remedy will: (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made: *Doucet-Boudreau*, at paras. 55-58.

21 Damages for breach of a claimant's *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant's rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude that s. 24(1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24(1), and often other [page40] s. 24(1) remedies will be more responsive to the breach.

22 The term "damages" conveniently describes the remedy sought in this case. However, it should always be borne in mind that these are not private law damages, but the distinct remedy of constitutional damages. As Thomas J. notes in *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136, at para. 81, a case dealing with New Zealand's *Bill of Rights Act 1990*, an action for public law damages "is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable". In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context. The nature of the remedy is to require the state (or society writ large) to compensate an individual for breaches of the individual's constitutional rights. An action for public law damages - including constitutional damages - lies against the state and not against individual actors. Actions against individual actors should be pursued in accordance with existing causes of action. However, the underlying policy considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.

(2) Step One: Proof of a *Charter* Breach

23 Section 24(1) is remedial. The first step, therefore, is to establish a *Charter* breach. This is the wrong on which the claim for damages is based.

[page41]

(3) Step Two: Functional Justification of Damages

24 A functional approach to damages finds damages to be appropriate and just to the extent that they serve a useful function or purpose. This approach has been adopted in awarding non-pecuniary damages in personal injury cases (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229), and, in my view, a similar approach is appropriate in determining when damages are "appropriate and just" under s. 24(1) of the *Charter*.

25 I therefore turn to the purposes that an order for damages under s. 24(1) may serve. For damages to be awarded, they must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

26 These functions of s. 24(1) damages are supported by foreign constitutional jurisprudence and, by analogy, foreign jurisprudence arising in the statutory human rights context.

27 Compensation has been cited by Lord Woolf C.J. (speaking of the *European Convention of Human Rights*) as "fundamental". In most cases, it is the most prominent of the three functions that *Charter* damages may serve. The goal is to compensate the claimant for the loss caused by the *Charter* breach; "[t]he applicant should, in so far as this is possible, be placed in the same position as if his Convention rights had not been infringed": [page42] *Anufrijeva v. Southwark London Borough Council*, [2003] EWCA Civ 1406, [2004] Q.B. 1124, at para. 59, *per* Lord Woolf C.J. Compensation focuses on the claimant's personal loss: physical, psychological and pecuniary. To these types of loss must be added harm to the claimant's intangible interests. In the public law damages context, courts have variously recognized this harm as distress, humiliation, embarrassment, and anxiety: *Dunlea*; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429. Often the harm to intangible interests effected by a breach of rights will merge with psychological harm. But a resilient claimant whose intangible interests are harmed should not be precluded from recovering damages simply because she cannot prove a substantial psychological injury.

28 Vindication, in the sense of affirming constitutional values, has also been recognized as a valid object of damages in many jurisdictions: see *Fose v. Minister of Safety and Security*, 1997 (3) SA 786 (C.C.), at para. 55, for a summary of the international jurisprudence. Vindication focuses on the harm the infringement causes society. As Didcott J. observed in *Fose*, violations of constitutionally protected rights harm not only their particular victims, but society as a whole. This is because they "impair public confidence and diminish public faith in the efficacy of the [constitutional] protection": *Fose*, at para. 82. While one may speak of vindication as underlining the seriousness of the harm done to the claimant, vindication as an object of constitutional damages focuses on the harm the *Charter* breach causes to the state and to society.

[page43]

29 Finally, deterrence of future breaches of the right has also been widely recognized as a valid object of public law damages: e.g., *Attorney General of Trinidad and Tobago v. Ramanoop*, [2005] UKPC 15, [2006] 1 A.C. 328, at para. 19; *Taunoa*, at para. 259; *Fose*, at para. 96; *Smith v. Wade*, 461 U.S. 30 (1983), at p. 49. Deterrence, like vindication, has a societal purpose. Deterrence seeks to regulate government behaviour, generally, in order to achieve compliance with the Constitution. This purpose is similar to the criminal sentencing object of "general deterrence", which holds that the example provided by the punishment imposed on a particular offender will dissuade potential criminals from engaging in criminal activity. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity: *R. v. B.W.P.*, 2006 SCC 27, [2006] 1 S.C.R. 941. Similarly, deterrence as an object of *Charter* damages is not aimed at deterring the specific wrongdoer, but rather at influencing government behaviour in order to secure state compliance with the *Charter* in the future.

30 In most cases, all three objects will be present. Harm to the claimant will evoke the need for compensation. Vindication and deterrence will support the compensatory function and bolster the appropriateness of an award of damages. However, the fact that the claimant has not suffered personal loss does not preclude damages where the objectives of vindication or deterrence clearly call for an award. Indeed, the view that constitutional damages are available only for pecuniary or physical loss has been widely rejected in other constitutional democracies: see, e.g., *Anufrijeva*; *Fose*; *Taunoa*; *Smith*; and *Ramanoop*.

31 In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which [page44] may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s. 24(1) of the *Charter*.

(4) Step Three: Countervailing Factors

32 As discussed, the basic requirement for the award of damages to be "appropriate and just" is that the award must be functionally required to fulfill one or more of the objects of compensation, vindication of the right, or deterrence of future *Charter* breaches.

33 However, even if the claimant establishes that damages are functionally justified, the state may establish that other considerations render s. 24(1) damages inappropriate or unjust. A complete catalogue of countervailing considerations remains to be developed as the law in this area matures. At this point, however, two considerations are apparent: the existence of alternative remedies and concerns for good governance.

34 A functional approach to damages under s. 24(1) means that if other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24(1) would serve no function and would not be "appropriate and just". The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations [page45] under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.

35 The claimant must establish basic functionality having regard to the objects of constitutional damages. The evidentiary burden then shifts to the state to show that the engaged functions can be fulfilled through other remedies. The claimant need not show that she has exhausted all other recourses. Rather, it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach. For example, if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach. If that were the case, an award of *Charter* damages would be duplicative. In addition, it is conceivable that another *Charter* remedy may, in a particular case, fulfill the function of *Charter* damages.

36 The existence of a potential claim in tort does not therefore bar a claimant from obtaining damages under the *Charter*. Tort law and the *Charter* are distinct legal avenues. However, a concurrent action in tort, or other private law claim, bars s. 24(1) damages if the result would be double compensation: *Simpson v. Attorney-General*, [1994] 3 N.Z.L.R. 667 (C.A.), at p. 678.

37 Declarations of *Charter* breach may provide an adequate remedy for the *Charter* breach, particularly where the claimant has suffered no personal damage. Considering declarations in *Taunoa*, at para. 368, McGrath J. writes:

[page46]

> The court's finding of a breach of rights and a declaration to that effect will often not only be appropriate relief but may also in itself be a sufficient remedy in the circumstances to vindicate a plaintiff's right. That will often be the case where no damage has been suffered that would give rise to a claim under private causes of action and, in the circumstances, if there is no need to deter persons in the position of the public officials from behaving in a similar way in the future. If in all the circumstances the court's pronouncement that there has been a breach of rights is a sufficiently appropriate remedy to vindicate the right and afford redress then, subject to any questions of costs, that will be sufficient to meet the primary remedial objective.

38 Another consideration that may negate the appropriateness of s. 24(1) damages is concern for effective governance. Good governance concerns may take different forms. At one extreme, it may be argued that any award of s. 24(1) damages will always have a chilling effect on government conduct, and hence will impact negatively on good governance. The logical conclusion of this argument is that s. 24(1) damages would never be appropriate. Clearly, this is not what the Constitution intends. Moreover, insofar as s. 24(1) damages deter *Charter* breaches, they promote good governance. Compliance with *Charter* standards is a foundational principle of good governance.

39 In some situations, however, the state may establish that an award of *Charter* damages would interfere with good governance such that damages should not be awarded unless the state conduct meets a minimum threshold of gravity. This was the situation in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, where the claimant sought damages for state conduct pursuant to a valid statute. The Court held that the action must be struck on the ground that duly enacted laws should be enforced until declared invalid, unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power": [page47] para. 78. The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin*, at para. 81.

40 The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:

> The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. [para. 79]

41 The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least "clearly wrong", bars Mr. Ward's claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle - that duly enacted laws should be enforced until [page48] declared invalid - applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

42 State conduct pursuant to a valid statute may not be the only situation in which the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance, although no others have been established in this case. It may be that in the future other situations may be recognized where the appropriateness of s. 24(1) damages could be negated on grounds of effective governance.

43 Such concerns may find expression, as the law in this area matures, in various defences to s. 24(1) claims. *Mackin* established a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is "clearly wrong, in bad faith or an abuse of power" (para. 78). If and when other concerns under the rubric of effective governance emerge, these may be expected to give rise to analogous public law defences. By analogy to *Mackin* and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law. Malicious prosecution, for example, requires that "malice" be proven because of the highly discretionary and quasi-judicial role of prosecutors (*Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339), while negligent police investigation, which does not involve the same quasi-judicial decisions as to guilt or innocence or the evaluation of evidence according to legal standards, contemplates the lower "negligence" standard (*Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129). When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just". While [page49] the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law, the existing causes of action against state actors embody a certain amount of "practical wisdom" concerning the type of situation in which it is or is not appropriate to make an award of damages against the state. Similarly, it may be necessary for the court to consider the procedural requirements of alternative remedies. Procedural requirements associated with existing remedies are crafted to achieve a proper balance between public and private interests, and the underlying policy considerations of these requirements should not be negated by recourse to s. 24(1) of the *Charter*. As stated earlier, s. 24(1) operates concurrently with, and does not replace, the general law. These are complex matters which have not been explored on this appeal. I therefore leave the exact parameters of future defences to future cases.

44 I find it useful to add a comment on the judgment of our Court in *Béliveau St-Jacques v. Fédération des* *employées et employés de services publics inc*., [1996] 2 S.C.R. 345. *Béliveau St-Jacques* is not determinative of the availability of the public law remedy of damages under s. 24(1). The judgment raised specific issues concerning the interpretation of ss. 49 and 51 of the Quebec *Charter of human rights and freedoms*, R.S.Q., c. C-12, and its interaction with the statutory regime set up under the *Act respecting industrial accidents and occupational diseases*, R.S.Q., c. A-3.001.

45 If the claimant establishes breach of his *Charter* rights and shows that an award of damages under s. 24(1) of the *Charter* would serve a functional purpose, having regard to the objects of s. 24(1) damages, and the state fails to negate that [page50] the award is "appropriate and just", the final step is to determine the appropriate amount of the damages.

(5) Step Four: Quantum of Section 24(1) Damages

46 The watchword of s. 24(1) is that the remedy must be "appropriate and just". This applies to the amount, or quantum, of damages awarded as much as to the initial question of whether damages are a proper remedy.

47 As discussed earlier, damages may be awarded to compensate the claimant for his loss, to vindicate the right or to deter future violations of the right. These objects, the presence and force of which vary from case to case, determine not only whether damages are appropriate, but also the amount of damages awarded. Generally, compensation will be the most important object, and vindication and deterrence will play supporting roles. This is all the more so because other *Charter* remedies may not provide compensation for the claimant's personal injury resulting from the violation of his *Charter* rights. However, as discussed earlier, cases may arise where vindication or deterrence play a major and even exclusive role.

48 Where the objective of compensation is engaged, the concern is to restore the claimant to the position she would have been in had the breach not been committed, as discussed above. As in a tort action, any claim for compensatory damages must be supported by evidence of the loss suffered.

49 In some cases, the *Charter* breach may cause the claimant pecuniary loss. Injuries, physical and psychological, may require medical treatment, with attendant costs. Prolonged detention may result in [page51] loss of earnings. *Restitutio in integrum* requires compensation for such financial losses.

50 In other cases, like this one, the claimant's losses will be non-pecuniary. Non-pecuniary damages are harder to measure. Yet they are not by that reason to be rejected. Again, tort law provides assistance. Pain and suffering are compensable. Absent exceptional circumstances, compensation is fixed at a fairly modest conventional rate, subject to variation for the degree of suffering in the particular case. In extreme cases of catastrophic injury, a higher but still conventionally determined award is given on the basis that it serves the function purpose of providing substitute comforts and pleasures: *Andrews v. Grand & Toy*.

51 When we move from compensation to the objectives of vindication and deterrence, tort law is less useful. Making the appropriate determinations is an exercise in rationality and proportionality and will ultimately be guided by precedent as this important chapter of *Charter* jurisprudence is written by Canada's courts. That said, some initial observations may be made.

52 A principal guide to the determination of quantum is the seriousness of the breach, having regard to the objects of s. 24(1) damages. The seriousness of the breach must be evaluated with regard to the impact of the breach on the claimant and the seriousness of the state misconduct: see, in the context of s. 24(2), *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be.

53 Just as private law damages must be fair to both the plaintiff and the defendant, so s. 24(1) damages must be fair - or "appropriate and [page52] just" - to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

54 Courts in other jurisdictions where an award of damages for breach of rights is available have generally been careful to avoid unduly high damage awards. This may reflect the difficulty of assessing what is required to vindicate the right and deter future breaches, as well as the fact that it is society as a whole that is asked to compensate the claimant. Nevertheless, to be "appropriate and just", an award of damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding *Charter* values, and deterring future breaches. The private law measure of damages for similar wrongs will often be a useful guide. However, as Lord Nicholls warns in *Ramanoop*, at para. 18, "this measure is no more than a guide because ... the violation of the constitutional right will not always be coterminous with the cause of action at law".

55 In assessing s. 24(1) damages, the court must focus on the breach of *Charter* rights as an independent wrong, worthy of compensation in its own right. At the same time, damages under s. 24(1) should not duplicate damages awarded under [page53] private law causes of action, such as tort, where compensation of personal loss is at issue.

56 A final word on exemplary or punitive damages. In *Mackin*, Justice Gonthier speculated that "[i]n theory, a plaintiff could seek compensatory and punitive damages by way of 'appropriate and just' remedy under s. 24(1) of the *Charter*": para. 79. The reality is that public law damages, in serving the objects of vindication and deterrence, may assume a punitive aspect. Nevertheless, it is worth noting a general reluctance in the international community to award purely punitive damages: see *Taunoa*, at paras. 319-21.

57 To sum up, the amount of damages must reflect what is required to functionally serve the objects of compensation, vindication of the right and deterrence of future breaches, insofar as they are engaged in a particular case, having regard to the impact of the breach on the claimant and the seriousness of the state conduct. The award must be appropriate and just from the perspective of the claimant and the state.

(6) Forum and Procedure

58 For a tribunal to grant a *Charter* remedy under s. 24(1), it must have the power to decide questions of law and the remedy must be one that the tribunal is authorized to grant: *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. Generally, the appropriate forum for an award of damages under s. 24(1) is a court which has the power to consider *Charter* questions and which by statute or inherent jurisdiction has the power to award damages. Provincial criminal courts are not so empowered and thus do not have the power to award damages under s. 24(1).

[page54]

59 As was done here, the claimant may join a s. 24(1) claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of *Charter* damages, recourse to s. 24(1) will be unnecessary. This may add useful context and facilitate the s. 24(1) analysis. This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.

B. *Application to the Facts*

60 At trial, Justice Tysoe held that the provincial correction officers' strip search and the Vancouver Police Department's vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. There are thus two distinct claims to consider.

(1) Damages for the Strip Search

61 The first question is whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages. This requires him to show: (1) a breach of his *Charter* rights; and (2) that an award of damages would serve a functional purpose in the circumstances, having regard to the objects of s. 24(1) damages. If these are established, the burden shifts to the state (step 3) to show why, having regard to countervailing factors, an award of damages under

s. 24(1) of the *Charter* would be inappropriate. If the state fails to negate s. 24(1) damages, the inquiry moves to the final step, assessment of the appropriate amount of the damages.

62 Here the first step is met. Justice Tysoe found that the strip search violated Mr. Ward's personal rights under s. 8 of the *Charter*. This finding is [page55] not challenged on this appeal. Nor is it suggested that the British Columbia Supreme Court is not an appropriate forum for the action.

63 The second question is whether damages would serve a functional purpose by serving one or more of the objects of s. 24(1) damages - compensation, vindication and deterrence.

64 In this case, the need for compensation bulks large. Mr. Ward's injury was serious. He had a constitutional right to be free from unreasonable search and seizure, which was violated in an egregious fashion. Strip searches are inherently humiliating and degrading regardless of the manner in which they are carried out and thus constitute significant injury to an individual's intangible interests: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 90.

65 The corrections officers' conduct which caused the breach of Mr. Ward's *Charter* rights was also serious. Minimum sensitivity to *Charter* concerns within the context of the particular situation would have shown the search to be unnecessary and violative. Mr. Ward did not commit a serious offence, he was not charged with an offence associated with evidence being hidden on the body, no weapons were involved and he was not known to be violent or to carry weapons. Mr. Ward did not pose a risk of harm to himself or others, nor was there any suggestion that any of the officers believed that he did. In these circumstances, a reasonable person would understand that the indignity resulting from the search was disproportionate to any benefit which the search could have provided. In addition, without asking officers to be conversant with the details of court rulings, it is not too much to expect that police would be familiar with the settled law that routine strip searches are inappropriate where the individual is being held for a short time in police cells, is not mingling with the general prison population, and where the police have no legitimate concerns that the individual is [page56] concealing weapons that could be used to harm themselves or others: *Golden*, at para. 97.

66 In sum, the *Charter* breach significantly impacted on Mr. Ward's person and rights and the police conduct was serious. The impingement on Mr. Ward calls for compensation. Combined with the police conduct, it also engages the objects of vindication of the right and deterrence of future breaches. It follows that compensation is required in this case to functionally fulfill the objects of public law damages.

67 The next question is whether the state has established countervailing factors that would render s. 24(1) damages inappropriate or unjust.

68 The state has not established that alternative remedies are available to achieve the objects of compensation, vindication or deterrence with respect to the strip search. Mr. Ward sued the officers for assault, as well as the City and the Province for negligence. These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr. Ward's claim in tort, it did not change the fact that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated. No tort action was available for that violation and a declaration will not satisfy the need for compensation. Mr. Ward's only recourse is a claim for damages under s. 24(1) of the *Charter*. Nor has the state established that an award of s. 24(1) damages is negated by good governance considerations, such as those raised in *Mackin*.

[page57]

69 I conclude that damages for the strip search of Mr. Ward are required in this case to functionally fulfill the objects of public law damages, and therefore are *prima facie* "appropriate and just". The state has not negated this. It follows that damages should be awarded for this breach of Mr. Ward's *Charter* rights.

70 This brings us to the issue of quantum. As discussed earlier, the amount of damages must reflect what is required to functionally fulfill the relevant objects of s. 24(1) compensation, while remaining fair to both the claimant and the state.

71 The object of compensation focuses primarily on the claimant's personal loss: physical, psychological, pecuniary, and harm to intangible interests. The claimant should, in so far as possible, be placed in the same position as if his *Charter* rights had not been infringed. Strip searches are inherently humiliating and thus constitute a significant injury to an individual's intangible interests regardless of the manner in which they are carried out. That said, the present search was relatively brief and not extremely disrespectful, as strip searches go. It did not involve the removal of Mr. Ward's underwear or the exposure of his genitals. Mr. Ward was never touched during the search and there is no indication that he suffered any resulting physical or psychological injury. While Mr. Ward's injury was serious, it cannot be said to be at the high end of the spectrum. This suggests a moderate damages award.

72 The objects of vindication and deterrence engage the seriousness of the state conduct. The corrections officers' conduct was serious and reflected a lack of sensitivity to *Charter* concerns. That said, the officers' action was not intentional, [page58] in that it was not malicious, high-handed or oppressive. In these circumstances, the objects of vindication and deterrence do not require an award of substantial damages against the state.

73 Considering all the factors, including the appropriate degree of deference to be paid to the trial judge's exercise of remedial discretion, I conclude that the trial judge's $5,000 damage award was appropriate.

(2) Damages for the Car Seizure

74 As with the strip search, we must determine whether Mr. Ward has established entitlement to the s. 24(1) remedy of damages to compensate for the constitutional wrong he suffered due to the City's seizure of his vehicle. Again, this requires determining: (1) breach of *Charter* right; (2) whether an award of damages would serve a functional purpose, having regard to the objects of s. 24(1) damages; (3) whether the state has established countervailing factors negating an award of s. 24(1) damages; and (4) quantum, if the right to damages is established.

75 The trial judge found that the seizure of the car violated Mr. Ward's rights under s. 8 of the *Charter*. This finding is not contested and thus satisfies the first requirement.

76 The next question is whether Mr. Ward has established that damages under s. 24(1) for the car seizure are appropriate and just from a functional perspective.

77 The object of compensation is not engaged by the seizure of the car. The trial judge found that Mr. Ward did not suffer any injury as a result of the seizure. His car was never searched and, upon his [page59] release from lockup, Mr. Ward was driven to the police compound to pick up the vehicle. Nor are the objects of vindication of the right and deterrence of future breaches compelling. While the seizure was wrong, it was not of a serious nature. The police officers did not illegally search the car, but rather arranged for its towing under the impression that it would be searched once a warrant had been obtained. When the officers determined that they did not have grounds to obtain the required warrant, the vehicle was made available for pickup.

78 I conclude that a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter* adequately serves the need for vindication of the right and deterrence of future improper car seizures.

VII. Disposition

79 The appeal is allowed in part. The award against the City in the amount of $100 is set aside, substituted by a declaration under s. 24(1) that the vehicle seizure violated Mr. Ward's right to be free from unreasonable search and seizure under s. 8 of the *Charter*. The award of damages against the Province in the sum of $5,000 for breach of Mr. Ward's s. 8 *Charter* rights is confirmed.

80 We have been informed of a pre-existing agreement between Mr. Ward and the Province regarding costs and, as such, no cost order is made between Mr. Ward and the Province. No costs are awarded to or against the City.

Appeal allowed in part.

Solicitors:

Solicitor for the appellant the City of Vancouver: City of Vancouver, Vancouver.

Solicitor for the appellant Her Majesty the Queen in Right of the Province of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the respondent: Samuels & Company, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Saskatoon.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Ste-Foy.

Solicitors for the intervener the Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto; Falconer Charney, Toronto.

Solicitors for the intervener the Association in Defence of the Wrongly Convicted: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Torys, Toronto.

Solicitor for the intervener the Canadian Association of Chiefs of Police: Ottawa Police Service, Ottawa.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the British Columbia Civil Liberties Association and the David Asper Centre for Constitutional Rights: University of Toronto, Toronto.

End of Document

Al Omani v. Canada, [2017] F.C.J. No. 1050

Federal Court Judgments

Federal Court

Toronto, Ontario

Y. Roy J.

Heard: September 26, 2016.

Judgment: August 24, 2017.

Docket: T-1774-15

[2017] F.C.J. No. 1050 | [2017] A.C.F. no 1050 | 2017 FC 786

Between Emad Ibrahim Al Omani, Lina Housne Hamza Nahas, and Sultan Emad Al Omani (A Minor), Lulwa Emad Ibrahim Al Omani (A Minor), Haya Emad Ibrahim Al Omani (A Minor), by their Litigation Guardians, Emad Ibrahim Al Omani and Lina Housne Hamza Nahas, Plaintiffs, and Her Majesty the Queen, Defendant

(128 paras.)

Counsel

Rocco Galati, for the Plaintiffs.

Susan Gans, for the Defendant.

ORDER AND REASONS

Y. ROY J.

1 The Plaintiffs form a family from Saudi Arabia who applied for permanent residence in Canada under the Federal Skilled Worker Class. They submitted a statement of claim alleging a number of causes of action resulting in various heads of damages against the Defendant due to their treatment in the immigration system. They also seek, or give notice of intent to seek, declarations that certain provisions in the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] and the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] are unconstitutional. The Defendant moved to strike the statement of claim in its entirety. The Court must determine whether the Defendant has established that the statement of claim fails to meet the pleadings requirements set out in the *Federal Courts Rules*, SOR 98-106 [the Rules]. At the Plaintiffs' request, the Court must also determine whether to grant leave to amend any claims that are struck.

I. Facts as set out in the statement of claim

2 The principal Plaintiff, Emad Al Omani, first submitted an application for permanent residence in Canada under the Federal Skilled Worker Class pursuant to subsection 12(2) of the IRPA in September 2006. That application included his wife, Lina Housne Hamza Nahas, and their two children, Lulwa Ehmad Alomani and Sultan Emad Alomani, as accompanying dependents. Their third child, Haya Emad Ibrahim Al Omani, was later added to the application.

3 The Canadian High Commission in London dealt with the application and refused it in December 2009 because it fell two points short of the score of 67 needed for a positive decision. The Plaintiffs mainly contest the visa officer's award of 4/10 points for "adaptability" and 10/16 points for English proficiency, both of which are made by applying subsection 76(1) and related provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The principal Plaintiff maintains he should have received 5 adaptability points for his Canadian brother plus at least 3 adaptability points for his wife's university degree. On language proficiency, he argues the visa officer should have considered other evidence of his English language abilities:

> A/ with respect to adaptability, the ***Regulations*** and CIC's own website, sets out that the Plaintiff, Emad Al Omani, should have obtained, under "adaptability", 5 points, because he has a "sibling" (brother) who is a Canadian citizen and another 3 points because his spouse has a University degree, for a ***minimum*** of 8 out of 10 points for "adaptability", and these 8 out of 10 points, which are statutorily predetermined, are ***before*** even considering the other factors of adaptability, such as the fact that both the Plaintiff and his wife have university degrees from English instruction universities, have a net worth of $2.3 ***million*** (CDN), of which half is in liquid assets, have family in Canada, have a job offer in Canada, from the company run and owned by the Plaintiff's brother;
>
> B/ with respect to language (English) proficiency, the Plaintiff, Emad Al Omani, only received 10 out of 16 points, notwithstanding that the ***Regulations***, and CIC's representations, indicate that the prescribed English exam is ***not*** the only means by which to access English proficiency, and notwithstanding that the Applicant raised the issue of the need to write the exam, when he in fact graduated from an English-speaking University, has worked for English-speaking companies, in the English language, and was in the third year of a four year MBA programme, in English, which he had not yet completed due to work demands, and that the officer was in possession of confirmation of all of the above, and refused to exercise jurisdiction to assess his English proficiency, in the circumstances, within the context of his "ability to become economically established in Canada"
>
> (at para 20(b)(ii) of the statement of claim).

4 The decision was challenged in the Federal Court. In August 2010, the decision was set aside by the Federal Court and the matter was sent back for redetermination by a different visa officer.

5 As part of the process of redetermination, the principal Plaintiff submitted further documentation requested by the Defendant and was called for an interview in January 2014. It is asserted that the interview lasted some 15 minutes. The officer asked the principal Plaintiff to explain a change in his job description. Towards the end of the interview, the officer would have asked the principal Plaintiff suddenly whether he "belonged to, or was in any way associated with "any group or organization like Al Qaeda in Iraq"". The principal Plaintiff categorically replied, according to the statement of claim, that he did not belong to, nor associated with, such groups as Al Qaeda, nor Al Qaeda itself (statement of claim, para 26(b)). When the principal Plaintiff asked for more detail on the question, the officer refused due to "secrecy" concerns.

6 In March 2014, the redetermination of the Plaintiffs' permanent residence application resulted in a second negative decision. The refusal explained that "there are reasonable grounds to believe [the principal Plaintiff is] a member of the inadmissible class of persons described in 34(1)(f)" of the IRPA.

7 In September 2014, once again the Federal Court ordered that the second negative decision be set aside and the matter was sent back for redetermination. On the record as it stands, the Plaintiffs had not heard from the Crown with respect to this second redetermination. The Plaintiffs sued.

II. Arguments

8 Fundamentally, the Plaintiffs argue that they have been mistreated in Canada's immigration system to a degree that warrants compensation. They allege the Defendant is liable in tort for misfeasance in public office, abuse and excess of jurisdiction and authority, abuse of process, negligence and negligent investigation, conspiracy, and for breaches of the plaintiffs' section 7 and section 15 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] rights.

9 The Plaintiffs are seeking:

i. general damages in the amount of $200,000 per Plaintiff;

ii. aggravated damages in the amount of $50,000 per Plaintiff;

iii. punitive damages in the amount of $50,000 per Plaintiff;

iv. any and all economic loss damages pleaded, to be calculated at trial;

v. a declaration and/or finding that section 49 of the *Federal Courts Act*, barring jury trials in the Federal Court, is unconstitutional, and of no force and effect;

vi. a declaration and/or finding that the requirement to seek leave from an administrative decision, under the IRPA, to commence judicial review under section 18 of the *Federal Courts Act*, pursuant to section 72(1) of the IRPA, violates the constitutional right to judicial review and a fair and independent judiciary and is of no force and effect; and

vii. solicitor-client costs of this action and any other relief the Court deems just.

10 The Defendant contends in her motion to strike that the statement of claim fails to establish any of the alleged causes of action and does not properly plead damages. They further seek to strike the two named Ministers (Foreign Affairs and Citizenship and Immigration) from the action in favour of Her Majesty the Queen, as well as the Plaintiffs' constitutional arguments respecting the *Federal Courts Act* and the IRPA.

III. Law on a motion to strike

11 Is before the Court the motion to strike brought on behalf of the Defendant. Rule 221(1) permits the Court to strike a claim on certain grounds:

> **221(1)** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> **(a)** discloses no reasonable cause of action or defence, as the case may be,
>
> **(b)** is immaterial or redundant,
>
> **(c)** is scandalous, frivolous or vexatious,
>
> **(d)** may prejudice or delay the fair trial of the action,
>
> **(e)** constitutes a departure from a previous pleading, or
>
> **(f)** is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.

* * *

> **221(1)** À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
>
> **a)** qu'il ne révèle aucune cause d'action ou de défense valable;
>
> **b)** qu'il n'est pas pertinent ou qu'il est redondant;
>
> **c)** qu'il est scandaleux, frivole ou vexatoire;
>
> **d)** qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
>
> **e)** qu'il diverge d'un acte de procédure antérieur;
>
> **f)** qu'il constitue autrement un abus de procédure.
>
> Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

The Defendant primarily relies on Rule 221(1)(a), which allows a claim to be struck if it "discloses no reasonable cause of action.". Rule 221(1)(c) is also in play.

12 The test to strike a claim under Rule 221 sets a high bar. First, it is assumed that the facts stated in the statement of claim can be proven. The Court must be satisfied that it is plain and obvious that the pleading discloses no reasonable cause of action assuming the facts pleaded are true: *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*] at p 980. The Defendant bears the onus of meeting this test: *Sivak v Canada*, 2012 FC 272, 406 FTR 115 [*Sivak*] at para 25.

13 In *Hunt*, the Supreme Court sided with the articulation of the rule in England to the effect that "if there is a chance that the plaintiff may succeed, then the plaintiff should not be "driven from the judgment seat"" (p. 980). A high bar indeed to succeed on a motion to strike. Some chance of success will suffice or, as Justice Estey said in *Att. Gen. of Can. v Inuit Tapirisat et al*, [1980] 2 SCR 735, "(o)n a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt"" (p.740).

14 To show a plaintiff has a reasonable cause of action, the statement of claim must plead material facts satisfying every element of the alleged causes of action: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, 476 NR 219 [*Mancuso*] at para 19; *Benaissa v Canada (Attorney General)*, 2005 FC 1220 [*Benaissa*] at para 15. The plaintiff needs to explain the "who, when, where, how and what" giving rise to the Defendant's liability (*Mancuso*, para 19, *Baird v Canada*, 2006 FC 205 at paras 9-11, affirmed in 2007 FCA 48).

15 Thus, there appears to be a balance. On one hand, a chance of success is enough for the matter to proceed. On the other, the material facts must be pleaded in sufficient detail such that the cause of action may exist. The purpose of pleadings is to give notice to the opposing party and define the issues in such a way that it can understand how the facts support the various causes of action. As the Court of Appeal put it in *Mancuso*, "(i)t is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought" (para 16). The Plaintiffs note that pleadings can still proceed despite being "far from models of legal clarity" (*Manuge v Canada*, 2010 SCC 67, [2010] 3 SCR 672 at para 23). But it remains that adequate material facts must be pleaded. Parties cannot make broad allegations in their statement of claim in the hope of later going on a "fishing expedition" to discover the facts: *Kastner v Painblanc* (1994), 176 NR 68, 51 ACWS (3d) 428 (FCA) at p.2.

16 Rules 174 and 181 further define the minimum requirements for a statement of claim. Pursuant to Rule 174, every pleading must contain the material facts on which the party relies.

> **174** Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.

* * *

> **174** Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.

Rule 181 requires that a pleading contain particulars of any alleged state of mind of a person, malice, or fraudulent intention.

> **181(1)** A pleading shall contain particulars of every allegation contained therein, including
>
> **(a)** particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and
>
> **(b)** particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.

* * *

> **181(1)** L'acte de procédure contient des précisions sur chaque allégation, notamment :
>
> **a)** des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;

> **b)** des précisions sur toute allégation portant sur l'état mental d'une personne, tel un déséquilibre mental, une incapacité mentale ou une intention malicieuse ou frauduleuse.

17 But what are "material facts"? They cannot be conclusions or bald allegations: *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34; 321 DLR (4th) 301 [*Merchant*]; *Mancuso* at paras 17-18. You cannot plead bad faith as a material fact by merely stating phrases such as "deliberately or negligently" or "callous disregard:" *Zündel v Canada*, 2005 FC 1612 at para 16, affirmed in 2006 FCA 356. A modicum of story-telling is required. The statement of claim must contain enough facts for the Defendant to understand, for instance, what the bad faith allegation is based on.

18 The jurisprudence suggests that a pleading can fall into one of three categories along a spectrum. The pleading either shows *no scintilla* of a cause of action, in which case the motion to strike would succeed, shows **a scintilla** of a cause of action, in which case there may be leave to amend, or it shows a *reasonable* cause of action. The Federal Court of Appeal similarly described in *Mancuso* material facts and bald allegations as lying on a continuum:

> [18] There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

IV. Issue

19 Motions to strike can present short questions with lengthy answers. Based on the aforementioned law, we are concerned with two overarching issues in this case:

1. Is it plain and obvious that the statement of claim discloses no reasonable cause of action with respect to some or all of the claims?
2. Do some claims that could be struck nevertheless show a scintilla of a cause of action such that the Plaintiffs should be granted leave to amend those claims?

V. Analysis of each alleged cause of action

20 The Court must take the statement of claim as it is. It must be read as generously as possible, thereby avoiding to put weight on what may be drafting deficiencies. However, would not be drafting deficiencies what would amount to speculations, hoping to find facts on discovery to support the allegations made. In effect, the motions judge is looking for the facts, taken as proven at this stage that will satisfy all of the necessary elements of the cause of action.

A. *Material facts*

21 We find guidance in the binding decision of the Federal Court of Appeal in *Mancuso* on the requirements for a statement of claim to resist a motion to strike under rule 221.

22 The main theme in *Mancuso* is the requirement that there be sufficient material facts pleaded. The material facts that are pleaded must be sufficient to support the claim and the relief sought. That means therefore that the facts must be advanced so that the cause of action may be established, leading to an appropriate remedy. The Court of Appeal agreed with the judge in *Mancuso* that "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action" (para 16). The plaintiff must commit to more than merely stating some facts, a sort of narrative taken as proven, and then posit a series of alleged causes of action in order to prevail on a motion to strike.

23 A plaintiff will want to maximize her flexibility in a statement of claim. But she "must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability" (*Mancuso*, para 19). As is often the case, the principle behind the rule helps understand the scope of the requirement. Hence, we read at paragraph 17 of *Mancuso*:

> [17] The latter part of this requirement -- sufficient material facts -- is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

24 Thus, adequate pleadings are required up front; adequate material facts are mandatorily required. As put by the *Mancuso* Court at para 20, "(p)laintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112."

25 That translates into the requirement that tort claims be identified and then the material facts are set out such that the elements of the tort claim are satisfied. In my view, that is largely missing in this statement of claim, which has made the examination of the motion to strike quite cumbersome.

B. *How the statement of claim is organized*

26 The statement of claim is difficult to apprehend and somewhat unwieldy. It starts off with bald allegations of various infringements, be they abuse of process, excess of authority, public misfeasance, negligence, negligent investigation, contempt of two Federal Court Judgments, as well as violation of section 15 and 7 of the *Charter*. For good measure, there is also an allegation that section 49 of the *Federal Courts Act* (prohibition of jury trails) and 72 of the IRPA (requirement that leave be granted for judicial review) are unconstitutional and of no force and effect.

27 It then continues with a series of paragraphs that allege facts, what constitutes in fact a narrative. Follow a number of paragraphs which provide a series of heads of damages that allegedly would result from the facts as presented. The chapeau of para 30 simply states that damages were suffered as a result of "officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application."

28 Paragraphs 32 to 35 of the statement of claim that the Plaintiffs list causes of action. Thus, para 32 declares that there was:

* abuse and excess of jurisdiction and authority;

  * abuse of process at common law and section 7 of the *Charter*;

* public misfeasance.

The paragraph ends with a mere declaration, without any connection with the facts, that "tortious conduct has caused the damages". What particular facts constitute the alleged tortious conduct is nowhere to be found in the pleading.

29 Para 34 of the statement of claim seeks to be somewhat more precise in suggesting that the delay between various proceedings constitutes in itself abuse and excess of authority as well as public misfeasance, alleging bad faith at para 35.

30 The Plaintiffs chose to plead in the alternative that officials have been negligent and engaged in negligent investigation. As for these causes of action, the statement of claim does not state what facts are pled in support of its essential elements. Rather, it is simply stated that they are owed a duty of care "to competently and with due dispatch properly process an application ...as well as competently and diligently investigate any allegations of inadmissibility" (para 36).

31 In the further alternative, the Plaintiffs allege a conspiracy to deny their permanent residence. This time, the allegations are barely more precise in that the Plaintiffs allege "a contrived denial made in bad faith", delay and baseless association with Al Qaeda (para 37). I note that, again, the material facts that would give precision to the alleged conspiracy are not stated. In fact, there is a general allegation of conspiracy, but bad faith, delay and baseless association do not make a conspiracy, i.e. where there is proof of agreement and execution. The Defendant does not know who, when, where, how and what which would give rise to its liability.

C. *Amending pleadings*

32 It does not suffice for the Court to rule that a pleading is deficient. Rule 221 requires consideration of whether a pleading should be struck with or without leave to amend. The jurisprudence points to various considerations which come into play in making such determination.

33 The Plaintiffs have raised the possibility that if the statement of claim is struck in part or in whole, leave to amend the pleadings should be granted. As long as a pleading shows a scintilla of a cause of action, it will not be struck out if it can be cured by amendment: *Hunt* at pp 976-978; *Simon v Canada*, 2011 FCA 6 [*Simon*] at para 8; *Collins v Canada*, 2011 FCA 140 at para 30 [*Collins*]; *Sivak* at para 94; *Sweet v Canada* (1999), 249 NR 17 at para 21 (FCA) [*Sweet*]; *Larden v Canada*, (1998) 145 FTR 140 at para 26; *Kiely v Her Majesty the Queen*, (1987) 10 FTR 10 (FCTD) at p 2; *Waterside Ocean Navigation Co Inc v International Navigation Ltd*, [1977] 2 FC 257 at para 4.

34 The case law teaches that a pleading will not be struck out without leave to amend unless there is no scintilla of a cause of action (*McMillan v Canada*, (1996) 108 FTR 32 [*McMillan*] and *Sivak*). But there must be that scintilla. As Associate Chief Justice Jerome put it in *McMillan*, "(t)he burden on the applicant under R. 419 (1)(a) is heavy since portions of the pleadings will only be struck out if it is clear that the claim cannot be amended to show a proper cause of action" (para 39).

35 However, it is not for the Court to redraft the pleadings. In *Sweet*, the Court of Appeal commented that "(e)ach proceeding is to be assessed on its own merits, with consideration being given to, inter alia, the personal situation of the party, the issues and arguments raised, the manner and tone in which they are raised, the number and proportion of allegations that are defective and the readiness of the amendments needed" (my emphasis, para 21).

36 In fact, if a scintilla of a cause of action has been pleaded, this Court may be more reticent to strike claims without leave to amend in case it is the first version of the pleading, as in this case. In *Simon* and *Collins*, the Court of Appeal warned that failure to comply with the rules once the pleadings have been allowed to be amended would expose the pleadings to the risk of being struck out (*Simon* at para 17 and *Collins* at para 31).

D. *Alleged causes of action*

37 At the outset of the hearing, the parties agreed that the Defendant's list of claims was a satisfactory way to organize the discussion. I will proceed through each claim in this order and address the two issues identified above.

Claim 1: *Misfeasance in public office*

38 The statement of claim alleges the tort of misfeasance in public office. Because it constitutes the cause of action on which the Plaintiffs have chosen to rely the most heavily, I have attempted to gather the various paragraphs of the statement of claim which refer to misfeasance:

> 1. The Plaintiffs claim [...] all of which damages arise from: [...]
>
> (ii) the Defendants' servants and officers' actions, and lack of action and omissions, in not issuing the permanent resident visas, and not complying with the Federal Court orders, constitutes an abuse of process, abuse and excess of authority and jurisdiction, public misfeasance, as well as negligence,

> and negligent investigation, all compensable at common-law, under the ***Immigration and Refugee Protection Act ("IRPA")***, as well as s. 24(1) of the ***Charter***.
>
> [...]
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have, with knowledge and intent, abused process, abused and exceeded authority and jurisdiction, and engaged in public misfeasance of their office, in their refusal to lawfully abide by the Federal Court order and terms of the ***IRPA*** and ***Regulations***, and issue permanent residence visas, and in the refusal(s) to give any cogent and/or sober answers to the plaintiffs and their counsel, except stone silence and stone-walling and that the Defendants' servants and officials have: [...]
>
> (iii) engaged in public misfeasance as set out by the Supreme Court of Canada in ***Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263***, in that:
>
> A/ the officials engaged in deliberate, unlawful conduct in the exercise of their public functions;
>
> B/ the officials are aware that the conduct is unlawful and likely to injure the plaintiffs; and
>
> C/ the officials' tortious conduct is the legal cause of the plaintiffs' injuries pleaded herein;
>
> [...]
>
> 33. The Plaintiffs state that the Defendants' officials have a common-law duty, as well as a statutory duty under s. 3(1)(f) of the ***IRPA***, as interpreted and confirmed by this Court, in ***Dragan v Canada QL [2003] F.C.J. No. 260*** and ***Liang v Canada (M.C.I.) 2012 FC 758*** decisions to process applications consistently and promptly, which sub-section reads:
>
> > 3. (1) The objectives of this Act with respect to immigration are
> >
> > ...
> >
> > (f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces [...]
>
> 34. The Plaintiffs state that the Defendants' inexcusable, inordinate, and castigating delay, both between the time of the 1st judicial review and the 2nd negative decision, as well as the 2nd judicial review to the present, constitutes abuse and excess of authority, as well as public misfeasance, of public office, in that inexcusable delay has been determined to constitute public misfeasance in ***inter alia, McMaster v. Canada, [2009] F.C.J. No. 1071***, by this Court.
>
> 35. The Plaintiffs further state that the conduct of the officers, and nature and substance of both decisions to deny the Plaintiffs permanent residence, has been made in bad faith, and absence of good faith, and further constitutes public misfeasance as set out above in the within statement of claim.

39 As indicated earlier, the Plaintiffs must plead with sufficient detail the constituent elements of each cause of action. But that is not enough. The Plaintiffs must also plead material facts in sufficient detail. As already indicated earlier, the trial judge in *Mancuso* commented, and it was specifically approved by the Court of Appeal, that "opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action" (para 16). I am afraid this statement of fact suffers from that very deficiency. The elements of the tort of misfeasance are set out in *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at paras 22-23 [*Woodhouse*]. The tort may take two different forms, but each requires the elements which are common to both. These elements are "(f)irst, the public officer must have engaged in deliberate and unlawful conduct in her or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff" (para 23). The tort may be approached in two ways. The two elements can be independently established, requiring unlawful conduct and knowledge that conduct was likely to cause harm. Or, both elements can be satisfied by proving the public officer specifically intends to injure a person because such officers do not have the authority to exercise their powers for an improper purpose (*Woodhouse* at para 23).

40 The first element is focused on whether the alleged misconduct is deliberate and unlawful. This can arise from an act or omission that "arises[s] from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted for an improper purpose": *Three Rivers District Council v Bank of England (No. 3)*, [2000] 2 WLR 1220 at p 1269, cited in *Woodhouse* at para 24.

41 The second element establishes the nexus between the impugned public official and the plaintiff by requiring that defendants know that their conduct was unlawful and likely to harm. One can read at paragraph 29 of *Woodhouse*:

> The requirement that the defendant must have been aware that his or her unlawful conduct would harm the plaintiff further restricts the ambit of the tort. Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort.

The Court has further commented that this element requires the Defendant, at the very least, to have been "subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct" (*Woodhouse* at para 38).

42 The requirement that the Defendant must have known that the conduct was unlawful is essential to the tort of misfeasance in public office. A public official's decision may well be adverse to certain people's interests, and yet still be lawful:

> The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to the interest of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.
>
> (*Woodhouse*, para 28)

43 With that understanding of the tort, I will assess whether the statement of claim sufficiently pleads both tort elements for each of the Plaintiffs' misfeasance pleadings. The statement of claim seems to allege misfeasance on four grounds: (i) refusal to abide by Federal Court orders; (ii) refusal to issue permanent resident visas; (iii) refusal to provide "cogent and/or sober" answers to questions posed by the Plaintiffs; and (iv) delay in processing the Plaintiffs' permanent residence applications. For the first three grounds, the Plaintiffs allege that the actions were done "with knowledge and intent", but no similar claim is made with respect to the alleged processing delay.

(1) *Misfeasance claim 1: Contempt*

44 I see no potential for deliberate, unlawful conduct in the first allegation of contempt. The statement of claim says both Court orders sent the visa decision back for redetermination. There is no indication as to how the redetermination should proceed. No direction was given by the Court. The first redetermination resulted in a second negative decision, and the second redetermination is outstanding. The pleadings contain no facts, let alone material facts, showing that the orders were not followed. In fact, the exact opposite occurred. There was no refusal to abide by the court orders.

45 As a result, I cannot see a scintilla of a cause of action in the Plaintiffs' claim that the Defendant failed to abide by the orders in bad faith. I am striking the misfeasance claim respecting the "refusal to abide by Federal Court orders" without leave to amend.

(2) *Misfeasance claim 2: Refusal to issue permanent visas*

46 The second allegation is not, *prima facie*, unlawful. The act of refusing to issue permanent residence visas regularly occurs as a result of implementing IRPA. In this case, it is not completely clear on the record how the refusal to issue visas constitutes misfeasance.

47 The statement of claim offers that the first visa officer awarded the principal Plaintiff the wrong number of points under the IRPR in the face of evidence to the contrary and that the visas were denied "with knowledge and intent". The relevant provisions set precise point allocations for the adaptability criterion, leaving the visa officer little discretion in how to award points for a Canadian relative or a spouse's education.

48 It also states that the second visa officer deemed the principal Plaintiff inadmissible on the basis of wrong information. The relevant inadmissibility provisions of IRPA state that a foreign national is inadmissible for "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to [in above subsections]" (para 34(1)(f) of IRPA). The determination of whether that organization engages in the enumerated acts requires that the officer must have "reasonable grounds" to believe in order to make that decision. That leaves a measure of appreciation to the officer. Certainty beyond a reasonable ground is not required. The test does not contemplate either that the officer be satisfied on a balance of probabilities, the legal standard in civil matters (*Canada (Attorney General) v Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 SCR 720). Reasonable grounds to believe will suffice. The Plaintiffs, on the other hand, state that there is no basis for the inadmissibility finding.

49 The phrase "with knowledge and intent" is a bald conclusion; however, there are sufficient material facts alleged early in the statement of claim to appreciate that there is a basis for the claim that both actions were deliberate conduct. It appears to me that there is a scintilla of a cause of action pleaded however imperfectly. But more precision is needed. The material facts must be plainly identified and they must be connected to the elements of the tort asserted, including of course the required state of mind (*Mancuso*, para 26).

50 The second tort element is knowledge that the visa denials were unlawful and likely to harm the Plaintiffs. The statement of claim says that the visa officers denied the lawful visa issuance "with knowledge and intent" and "in bad faith". If the officers did award the wrong number of points and deem the principal Plaintiff inadmissible in the face of clearly contradictory evidence, this is sufficient to plead that the officers knew their conduct was unlawful. *Woodhouse* found that a similarly-worded pleading was sufficient to establish a reasonable cause of action in misfeasance:

> Insofar as the second requirement is concerned, the statement of claim alleges that the acts and omissions of the defendant officers "represented intentional breaches of their legal duties as police officers". This plainly satisfies the requirement that the officers were aware that the alleged failure to cooperate with the investigation was unlawful. The allegation is not simply that the officers failed to comply with s. 113(9) of the *Police Services Act*, but that the failure to comply was intentional and deliberate.
>
> (*Woodhouse*, para 36)

51 The only reference to knowledge that the unlawful conduct would likely harm the Plaintiffs is at paragraph 35, which states "that the conduct of the officers, and nature and substance of both decisions to deny the Plaintiffs permanent residence, has been made in bad faith" and the general assertion that the alleged misfeasance was done "with knowledge". Bald conclusions such as "in bad faith" do not qualify as material facts (*Merchant* at para 34). Moreover, Rule 181 requires that Plaintiffs provide particulars on the material facts they are pleading to support a tort's mental element. Here, the Plaintiffs seem to be pointing to several circumstantial facts to argue that the

Defendant intentionally misprocessed their permanent residence applications over a ten-year period to keep them out of Canada.

52 If someone applies for a permanent residence visa, they expect to have it properly processed because they want to live in Canada. It is not a stretch to infer that improper denial of such a visa would likely harm applicants wanting to come to Canada. Of course, the statement of claim should actually plead specifically the material facts necessary to make out this second tort element. That was not done. *Mancuso* requires the who, when, where, how and what. The issue must be defined with more precision in order to make the proceedings manageable and fair. The amended pleadings will have to provide the material facts such that the Defendant will know what it is defending against. At this stage, one has to speculate somewhat as to what facts constitute the cause of action. More and better precision is called for.

53 My role on a motion to strike is not to decide the Plaintiffs' chance of succeeding with this argument (*Minnes v Minnes* (1962), 39 WWR 112). Because I see a scintilla of a cause of action, barely, I am also granting leave to amend this particular misfeasance claim with respect to the second tort element (i.e. material facts underpinning the allegation that the public official "knew" that their act or omission would likely harm the Plaintiff).

(3) *Misfeasance claim 3: Refusal to provide answers*

54 The fact that the Defendant refused to answer the Plaintiffs' questions does not show unlawful conduct. This does not show a cause of action, let alone a reasonable one. Unlike the points calculation and the inadmissibility decision, the Plaintiffs failed to point to a statutory obligation that the visa officer(s) breached or show that the officer(s) acted unlawfully in the exercise of their public functions generally. As a result, I am striking the misfeasance allegation concerning the "refusal to provide "cogent and/or sober" answers to questions posed by the Plaintiffs" without leave to amend.

(4) *Misfeasance claim 4: Delay in processing visa applications*

55 For the fourth misfeasance allegation regarding processing delays, the Plaintiffs relied on *McMaster v Canada*, 2009 FC 937, 352 FTR 255 [*McMaster*] for the authority that delay can constitute unlawful conduct in a misfeasance action. *McMaster* concerned an inmate who was repeatedly denied properly-sized running shoes in the face of a statutory obligation to provide adequate footwear. The statutory obligation that the Plaintiffs rely on for delay in the immigration context is subsection 3(1)(f) of IRPA, as interpreted in *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at paragraph 25; 413 FTR 145 [*Liang*] and *Dragan v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 211 at paragraph 45, 227 FTR 272 [*Dragan*]. This subsection states:

> 3 (1) The objectives of this Act with respect to immigration are [...]
>
> (f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

Liang and *Dragan* found, on applications for *mandamus*, that unreasonable delay can amount to an implied refusal to perform the statutory duty to process visa applications under the IRPA. Justice Rennie, then of this Court, found in *Liang* that a *prima facie* case for delay was made out where applications requiring processing had been outstanding for 4.5 to 10 years.

56 The Defendant seeks to distinguish *Liang* and *Dragan* on the basis that they dealt with applications for *mandamus*, not private law actions. They argue that "even where delays are found to be unreasonable or inordinate, this does not give rise to a free-standing cause of action", citing *Farzam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1659, 284 FTR 158 [*Farzam*] at para 105; and *Haj Khalil v Canada*, 2007 FC 923, 317 FTR 32 [*Khalil*] at para 8 (affirmed in *Haj Khalil v Canada*, 2009 FCA 66) (at para 28 of their written representations). Both *Farzam* and *Khalil* dealt with actions in negligence, not misfeasance in public office.

57 The Plaintiffs' visa applications have been effectively outstanding for 10 years given they are still waiting for the outcome of their second redetermination. This falls at the outer end of Justice Rennie's suggested timelines for establishing *prima facie* unreasonable delay in the *mandamus* context. The Defendant has not presented an authority stating that unreasonable delay in processing visa applications cannot amount to unlawful conduct for the purposes of a misfeasance action. As a result, this appears to be an issue requiring discussion at trial and not on a motion to strike. The Supreme Court in *Hunt* commented that "(p)rovided that the plaintiff can present a "substantive" case, that case should be heard" (p 975). It is premature on a motion to strike to rule on the matter.

58 As noted above, unlike the first three misfeasance allegations, the Plaintiffs failed to specifically plead that the delay was "deliberate", but did plead that it was done "in bad faith", which implies a measure of deliberation. There are circumstantial facts that could support this tort element, namely the use of different grounds to refuse the visas in the first and second denial, but the statement of claim fails to plead clearly that the delays were deliberate. In *Woodhouse*, the Supreme Court struck allegations that lacked the words "deliberate" and "intentional", because inadvertence or negligence is insufficient to make out the intentional tort of misfeasance:

> 37 Although the allegation that the Chief deliberately failed to segregate the officers satisfies the requirement that the Chief intentionally breached his legal obligation to ensure compliance with the *Police Services Act*, the same cannot be said of his alleged failure to ensure that the defendant officers produced timely and complete notes, attended for interviews in a timely manner, and provided accurate and complete accounts of the incident. As above, inadvertence or negligence will not suffice; a mere failure to discharge the obligations of the office cannot constitute misfeasance in a public office. In light of the allegation that the Chief's failure to segregate the officers was deliberate, this is not a sufficient basis on which to strike the pleading. Suffice it to say, the failure to issue orders for the purpose of ensuring that the defendant officers cooperated with the investigation will only constitute misfeasance in a public office if the plaintiffs prove that the Chief deliberately failed to comply with the standard established by s. 41(1)(b) of the *Police Services Act*.
>
> [my emphasis]

Through the narrative offered as facts, I see however a scintilla of a cause of action on this first tort element, but the pleadings must properly set out the full cause of action. They will have to be significantly amended.

59 As with the second misfeasance claim, the pleadings on the second tort element--knowledge of unlawful conduct and likelihood of harming the Plaintiffs--are not explicit and are close to being bald, which fails to meet the requirements of Rules 174 and 181. With respect to the Defendant's knowledge that their delays were unlawful, the statement of claim fails to plead the material facts showing which public officials had this knowledge. Was the first officer aware of an unlawful delay that would likely cause harm in 2009, or only the second officer in 2014? Or was it other individuals that knew the delay was unlawful?

60 With respect to the Defendant's alleged knowledge that the delays were unlawful and likely to harm the Plaintiffs, I see a scintilla of a cause of action. It is reasonable to infer that an alleged 10-year delay in processing does not fulfill the IRPA objective of "prompt processing" and would likely cause harm to the waiting family. However, again, the statement of claim must plead sufficient material facts to qualify as a reasonable cause of action. I would not strike the pleadings without allowing an opportunity to amend in order to satisfy the requirements.

61 Accordingly, I am granting leave to amend this particular misfeasance claim with respect to the first tort element prerequisite that the unlawful conduct was deliberate, and with respect to the second tort element requirement that the public official "knew" that their act or omission was unlawful and likely to harm the Plaintiffs.

Claim 2: *Abuse and excess of jurisdiction and authority*

62 The Plaintiffs refer to "abuse and excess of jurisdiction and authority" at multiple points in their pleadings, often in concert with their claims respecting misfeasance in public office:

1. The Plaintiffs claim [...] all of which damages arise from: [...]

(ii) the Defendants' servants and officers' actions, and lack of action and omissions, in not issuing the permanent resident visas, and not complying with the Federal Court orders, constitutes an abuse of process, abuse and excess of authority and jurisdiction, public misfeasance, as well as negligence, and negligent investigation, all compensable at common-law, under the ***Immigration and Refugee Protection Act ("IRPA")***, as well as s. 24(1) of the ***Charter***.

[...]

32. The Plaintiffs state, and the fact is that:

(a) the Defendants' officials have, with knowledge and intent, abused process, abused and exceeded authority and jurisdiction, and engaged in public misfeasance of their office, in their refusal to lawfully abide by the Federal Court order and terms of the ***IRPA*** and ***Regulations***, and issue permanent residence visas, and in the refusal(s) to give any cogent and/or sober answers to the plaintiffs and their counsel, except stone silence and stone-walling and that the Defendants' servants and officials have: [...]

(i) engaged in abuse and excess of jurisdiction and authority as historically contemplated by the Supreme Court of Canada in ***Roncarelli v. Duplessis, [1959] S.C.R. 121, et seq*** [*Roncarelli*];

[...]

34. The Plaintiffs state that the Defendants' inexcusable, inordinate, and castigating delay, both between the time of the 1st judicial review and the 2nd negative decision, as well as the 2nd judicial review to the present, constitutes abuse and excess of authority, as well as public misfeasance, of public office, in that inexcusable delay has been determined to constitute public misfeasance in ***inter alia, McMaster v. Canada, [2009] F.C.J. No. 1071***, by this Court.

63 The Defendant argues that abuse and excess of authority and jurisdiction alleged by the Plaintiffs is encapsulated in the tort of misfeasance. I agree. The following discussion of the tort of misfeasance in public office in *Woodhouse* confirms that it covers the claim of abuse and excess of authority and jurisdiction as contemplated in *Roncarelli v Duplessis*, [1959] SCR 121:

> 18 The origins of the tort of misfeasance in a public office can be traced to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. Although the defendant possessed the power to deprive certain persons from participating in the election, he did not have the power to do so for an improper purpose. Although the original judgment suggests that he was simply applying the principle *ubi jus ibi remedium*, Holt C.J. produced a revised form of the judgment in which he stated that it was because fraud and malice were proven that the action lay: J. W. Smith, A *Selection of Leading Cases on Various Branches of the Law* (13th ed. 1929), at p. 282. Thus, in its earliest form it is arguable that misfeasance in a public office was limited to circumstances in which a public officer abused a power actually possessed.
>
> 19 Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121, this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the basis of the Quebec civil law of delictual responsibility, it is widely regarded as having established that misfeasance in a public office is a recognized tort in Canada. See for example *Powder Mountain Resorts Ltd. v. British Columbia* (2001), 94 B.C.L.R. (3d) 14, 2001 BCCA 619; and *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (2002), 220 D.L.R. (4th) 474, 2002 ABCA 283. In *Roncarelli*, the Premier was authorized to give advice to the Commission in respect of any legal questions that might arise, but had no authority to involve himself in a decision to revoke a particular licence. As Abbott J. observed, at p. 184, Mr. Duplessis "was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission". Martland J. made a similar observation, at p. 158, stating that Mr. Duplessis' conduct involved "the exercise of powers which, in law, he did not possess at all". From this, it is clear that the tort is not restricted to the abuse of a statutory or

> prerogative power actually held. If that were the case, there would have been no grounds on which to find Mr. Duplessis liable.

64 As a result, I am striking the reference to abuse and excess of jurisdiction and authority as a stand-alone cause of action. The matter ought to be dealt with under the misfeasance claims once properly amended.

Claim 3: *Abuse of process*

65 The statement of claim pleads the tort of abuse of process in the same paragraphs already referred to above for misfeasance in public office and quoted at length at paragraph 38 of these reasons.

66 The Defendant contends that abuse of process "involves the misuse of the process of the courts to coerce someone in a way that is outside the ambit of the legal claim upon which the court is asked adjudicate": para 33 of the Defendant's written representations citing *Levi Strauss & Co v Roadrunner Apparel Inc*, (1997), 76 CPR (3d) 129 (FCA) at p 3.

67 The Supreme Court of Canada authority provided by the Plaintiffs, *United States of America v Cobb*, 2001 SCC 19, [2001] 1 SCR 587 [*Cobb*], also defines abuse of process in terms of abusing the court process:

> 37 Canadian courts have an inherent and residual discretion at common law to control their own process and prevent its abuse. The remedy fashioned by the courts in the case of an abuse of process, and the circumstances when recourse to it is appropriate were described by this Court in *R. v. Keyowski*, [1988] 1 S.C.R. 657, at pp. 658-59:
>
>> The availability of a stay of proceedings to remedy an abuse of process was confirmed by this Court in *R. v. Jewitt*, [1985] 2 S.C.R. 128. On that occasion the Court stated that the test for abuse of process was that initially formulated by the Ontario Court of Appeal in *R. v. Young* (1984), 40 C.R. (3d) 289. A stay should be granted where "compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency", or where the proceedings are "oppressive or vexatious" ([1985] 2 S.C.R. 128, at pp. 136-37). The Court in *Jewitt* also adopted "the caveat added by the Court in *Young* that this is a power which can be exercised only in the 'clearest of cases'" (p. 137).

68 In a similar decision on a motion to strike, Prothonotary Aalto also concluded that *Cobb* relates to abuse of the court process and that the plaintiff failed to plead facts making out this tort:

> [64] On the tort of abuse of process, I agree with the Crown's submissions that *Cobb* does not support the Plaintiff's submission that this tort exists on these facts. In *Cobb*, the Supreme Court explicitly defined abuse of process as abuse of the Court's own process and that definition did not include a public official's abuse of any process in a vacuum. The Plaintiff neither pleads facts relating to an abuse of a Court process nor did he provide any case-law that expands the tort of abuse of process beyond the abuse of the Court's process as conceptualized in *Cobb*.
>
>> (*Almacén v Her Majesty the Queen*, 2015 FC 957, upheld at 2016 FC 300 and subsequently upheld at 2016 FCA 296)

69 Moreover, the Plaintiffs pleaded no material facts going to the elements of this tort in their statement of claim (i.e. how or when a court process was abused). Actually, when discussions of immigration officials came before this Court, twice they were returned for a new determination. It is difficult to see how seizing the Court on judicial review by the Plaintiffs can be an abuse of process of the Court by the Defendant. Therefore, I am striking this claim without leave to amend.

Claim 4: *Negligence and negligent investigation*

70 The statement of claim pleaded negligence and negligent investigation as follows:

> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that:
>
> (i) the Defendants' officials owe a common-law, statutory, and constitutional, duty of care to competently and with due dispatch properly process an application sent back by judicial order pursuant to an application for judicial review under the statutory scheme pursuant to the ***IRPA*** as well as competently and diligently investigate any allegations of inadmissibility;
>
> (ii) the Defendants' officials breached this duty of care; and
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***;
>
> A/ the mental suffering and distress of separation between the plaintiffs and their family in Canada, also protected by s.7 of the ***Charter***;
>
> B/ irreparable loss of companionship, of the Plaintiffs, particularly that involving the children;
>
> C/ economic loss, to be quantified at trial, in being deprived of, inter alia;
>
> > (i) the benefit of the Plaintiff, Emad Al Omani, to exercise his proper place and activity in the joint business interests of his brother in Canada;
> >
> > (ii) the incursion of legal costs incurred to date, to be determined at trial;
>
> D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;
>
> E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the *Charter*, and loss of their dignity to the extent of unequal treatment under the law.

71 The Defendant argues that the Plaintiffs have failed to plead material facts pertaining to each element of a negligence action, particularly duty of care and breach of the standard of care. I agree. The pleadings are declaratory, without any connection of material facts with the elements of the tort.

72 When a duty of care is not clearly established in the case law, the *Anns* test is used to determine if a duty exists, as per *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537 at paragraph 30. The Defendant summarized the test at paragraph 36 of her written representations:

> (a) Does the relationship between the parties in the circumstances disclose the reasonably foreseeable harm and proximity sufficient to establish a *prima facie* duty of care; and
>
> (b) Notwithstanding the existence of a *prima facie* duty of care, are there residual policy considerations that should negative the imposition of a duty of care?

73 The only allegations that the Plaintiffs pleaded with respect to duty of care is to allege that the Defendant owes a duty of care to (i) "competently and with due dispatch properly process an application sent back by judicial order pursuant to an application for judicial review under the statutory scheme pursuant to the IRPA" and to (ii) "competently and diligently investigate any allegations of inadmissibility" (at para 36 of the statement of claim). They pleaded no facts whatsoever going to either element of the *Anns* test (*Anns v Merton London Borough Council*, [1978] AC 728 (HL)).

74 The Plaintiffs also pleaded scarce facts as to the breach of this alleged duty of care. Repeating the points above, they allege the Defendant did not properly process an application sent back by judicial review and did not properly investigate allegations of inadmissibility. In my view, this is less than thin.

75 The Plaintiffs stated that there exists a duty of care without even alleging how that can be. What is the duty of care that was owed by immigration officers? The English Court of Appeal in *W. v Home Office*, [1997] E.W.J. No. 3289 (QL) [*W. v Home Office*] found twenty years ago that there is no proximity such that a duty of care exists between a plaintiff and immigration officers. One can read at para 28:

> The process whereby the decision making body gathers information and comes to its decision cannot be the subject of an action in negligence. It suffices to rely on the absence of the required proximity. In gathering information, and taking it into account, the Defendants are acting pursuant to their statutory powers and within that area of their discretion where only deliberate abuse would provide a private remedy. For them to owe a duty of care to immigrants would be inconsistent with the proper performance of their responsibilities as immigration officers. In conducting their inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, and making decisions in relation to immigrants, including whether they should be detained pending those inquiries, they are acting in that capacity of public servant to which the considerations outlined above apply.

That is the view taken by this Court in *Premakumaran v Canada*, [2005] F.C.J. No. 1388 [*Premakumaran*].

76 In that case, finding support in *A. O. Farms Inc v Canada*, [2000] F.C.J. no 1771, 28 Admin LR (3d) 315 (FCA), the Court found that the immigration officers as agents of the government owe "a duty of care to the public as a whole and not to the individual Plaintiffs. The Plaintiffs cannot be considered a "neighbour" for these purposes and no such relationship should be created between the Defendant and individual members of the public" (*Premakumaran*, at para 25). The Federal Court of Appeal agreed. It found that "(i)n this case, however, no duty of care arises. As the Motions Judge correctly found, no special relationship of proximity and reliance is present on the facts of this case" (*Premakumaran v Canada*, 2006 FCA 213, [2007] 2 FCR 191, at para 24). It is one thing to allege that the performance in office constitutes a misfeasance. It is quite another to base one's claim on a duty of care leading to a claim in negligence. Misfeasance and negligence are completely different and target different states of mind.

77 The *W. v Home Office* case found an echo in this Court in *Benaissa*. There, the Court found that the process of the gathering of information by the decision-making body leading to a decision cannot be the subject of an action in negligence. There may be, in my view, circumstances in which a degree of proximity will be sufficient. However, the bare assertion that unidentified immigration officers deliberately failed to process the application for permanent residence in a timely fashion does not plead the duty of care that would distinguish this case and the facts that could disclose the factual basis for the allegation of negligence. This does not disclose a reasonable cause of action. I cannot see a scintilla of a cause of action. There is not even the beginning of something that could be amended.

78 Justice Russell faced a similar statement of claim in *Sivak*. He struck the negligence claim for failing to plead material facts going to the essential elements of the tort of negligence:

> [45] I also agree with the Defendants that the Plaintiffs have not pled, or factually substantiated, the essential elements of the tort of negligence.
>
> [46] As the Defendants point out, to support a cause of action in negligence, a statement of claim must include sufficient facts to support the essential elements of the tort. These include establishing a duty of care, providing details of the breach of that duty, explaining the causal connection between the breach of duty and the injury, and setting out the actual loss. Such a claim requires a factual basis that identifies each wrongful act as well as negligence, such as the "when, what, by whom and to whom of the relevant circumstances." See *Benaissa v Canada (Attorney General)*, 2005 FC 1220, at paragraph 24.
>
> [47] The Plaintiffs make a bald allegation at paragraph 28(b) of the Claim that the "Defendants' officials have been negligent in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs" and that these duties arose in the context of the processing of their refugee claims pursuant to

> the *Immigration and Refugee Protection Act*. This is followed by unsubstantiated statements that the "Defendants' officials breached this duty of care" and that this caused the Plaintiffs' losses.
>
> [48] I agree with the Defendants that such allegations are nothing more than conclusions and are not sufficient to support a cause of action in negligence. No details have been provided to identify the "Defendants' officials," to explain their roles and responsibilities in relation to the Plaintiffs, or to establish their connection to any of the parties. Similarly, the Claim is silent as to the "Defendants' officials" particular acts or omissions that the Plaintiffs' claim were negligent and no facts are included to support the specific "common-law, statutory and constitutional duties" that were allegedly breached. It seems to me that the general requirements for establishing liability in tort have not been met and it would be impossible to conduct the necessary analysis to determine whether liability could be established. As the Defendants point out, this is particularly difficult where the defendant is a government actor. Issues arise as to whether public law discretionary powers establish private law duties owed to particular individuals or whether the decisions in question were policy decisions or operational decisions. These questions are very complex and detailed factual pleadings are required in order to properly determine whether a cause of action exists.
>
> [my emphasis]

79 In my view, the claim as pled does not disclose a reasonable cause of action; indeed, there is not even a scintilla of a cause of action. The pleadings are nothing other than general allegations and conclusions without providing the material facts required or even what the duty of care may be. Bare assertions of conclusions are not allegations of material facts. The Plaintiffs only declare that there exists some duty of care. The Court in *Sivak*, relying on *Kisikawpimootewin v Canada*, 2004 FC 1426 [*Kisikawpimootewin*] and *Murray v Canada* (1978), 21 NR 230 (FCA) found that "a claim that does not sufficiently reveal the facts upon which a cause of action is based, such that it is not possible for the defendant to answer or the Court to regulate the action, is a vexatious action" (para 30). The Plaintiffs have asserted the claim as an alternative. In so doing, they have failed to provide any material fact relevant to a negligence claim that could support what is at any rate a vague claim based on bald assertions and conclusions.

80 The tort of negligent investigation requires the Plaintiffs to plead facts pertaining to the conduct of the investigation into the inadmissibility finding to make out a reasonable cause of action (*Hill v Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para 68). The Defendant argues that "[i]n the few cases where the standard of care has been held to have been breached, the conduct of investigators has involved egregious and overzealous behaviour" (at para 45 of the Defendant's written representations). Examples of such conduct include "ignoring exculpatory or other material evidence" and "making decisions based primarily on assumptions or stereotypes" (*Safa Almalki v Canada*, 2012 ONSC 3023 at para 17). There is nothing of the sort that is even alleged by the Plaintiffs in this lawsuit.

81 The Supreme Court also noted in *Woodhouse* that citizens are not entitled to a certain level of thoroughness in an investigation, nor are they entitled to a certain outcome:

> 40 ... Individual citizens might desire a thorough investigation, or even that the investigation result in a certain outcome, but they are not entitled to compensation in the absence of a thorough investigation or if the desired outcome fails to materialize...

82 The statement of claim recounts only the principal Plaintiff's 15-minute interview where he was asked about Al Qaeda and states that the officer refused to explain the reason for the question; it pleads that these allegations have no basis:

> 24. On January 13th, 2014 the Plaintiff, Emad Al Omani was called in for a ***very brief*** interview with respect to his application re-determination.
>
> 25. On March 17th, 2014 the Plaintiff was, Emad Al Omani was sent a second negative decision, which stated and concluded, without any reasons whatsoever, that;
>
> "In particular, there are reasonable grounds to believe that you are a member of the inadmissible class of persons described in 34(1)(f) of the Immigration and Refugee Protection Act." [...]

> 26. The Plaintiff, Emad Al Omani, advises that at ***no time*** was he either:
>
> (a) given notice of these outrageous and untrue conclusions and allegations; nor
>
> (b) shown any evidence nor any information, to address these false allegations and conclusions.
>
> During the interview, the Plaintiff was asked an unfocused, nebulous, and non-contextual question about Al Qaeda. In fact, during the fifteen (15) minute interview, the Plaintiff, Emad Al Omani, was only asked two questions, namely:
>
> (a) to explain the change in his job description [...]
>
> (b) the officer asked the Plaintiff if the Plaintiff belonged to, or was in any way associated with "any group or organization like Al Qaeda in Iraq", to which the Plaintiff categorically replied that he did ***not*** belong to, ***nor*** associated with such groups as Al Qaeda, nor Al Qaeda itself.
>
> The Plaintiff then asked the officer to be more specific with respect to why he would even ask such a question, but the immigration officer refused, citing "secrecy" barring him from divulging any Canadian government information.
>
> 27. The earlier application, which had been denied, had no such allegations nor conclusions for denial. It was denied based on the fact that some documents relating to Emad Al Omani, were missing, and a miscalculation and blatant error(s) in applying the selection criteria, for which it was sent back for reconsideration by Federal Court order.

83 Apart from these statements, no material facts are given. There is nothing on the conduct of the investigation that led to the inadmissibility finding. I agree with the Defendant that the statement of claim fails to plead facts, let alone sufficient material facts to establish the tort of negligent investigation other than suggesting that the Plaintiffs are unhappy with the conclusion reached that they are inadmissible. The pleadings do not even begin to give any indication to support a general allegation that the investigation may have been negligent. I see no scintilla of an argument and am striking this claim without leave to amend. There is not even the faintest allegation of the who, when, where, how and what giving rise to liability. It is plain and obvious that the claim cannot succeed. The Plaintiffs throw up in the air an accusation with nothing to support it. There is nothing to amend. Actually, the Plaintiffs did not even attempt to specify how the claim could be amended (*Ward v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 568, para 30). The fact of the matter is that there is no cause of action given the material facts pleaded. It is not so much that there are deficiencies which may be cured by amendment. There is no cause of action pleaded.

Claim 5: *Conspiracy*

84 In what appears to be the further alternative, the Plaintiffs allege that the Defendant is engaged in a conspiracy at paragraph 37 of their statement of claim:

> 37. The Plaintiffs further state that the Defendant's officials have:
>
> (a) (i) engaged, and are engaging in a conspiracy, through their conduct and communications, to deny the Plaintiff's statutory, constitutional, as well as international treaty rights, to deny their permanent residence under Canadian law, as well as a fair and impartial assessment of their application, a conspiracy as outlined, ***inter alia***, by the Supreme Court of Canada in the test set out in ***Hunt v. Carey*** and jurisprudence cited therein, namely to;
>
> A/ engage in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiff; and/or

> > B/ to engage, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiff, is to cause injury to the Plaintiff, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiff, is likely to, and does result;
>
> The details and particulars of which conspiracy(ies) are as follows:
>
> (b) that the first denial was a contrived denial made in bad faith, and absence of good faith, entirely designed and engineered to deny, contrary to law, the Plaintiffs' application;
>
> (c) that the inordinate, inexcusable, and castigating delay between the 1st judicial review determination, and second denial, as well as the inordinate, inexcusable and castigating delay since the 2nd judicial review, to the present, are all designed to stone-wall and deny the Plaintiffs' procedural and substantive rights to have their applications possessed [*sic*];
>
> (d) that the baseless, false, and wholly contrived allegations of inadmissibility for association with Al Qaeda, or such groups, have been designed and engineered to simply deny the Plaintiffs their procedural and substantive right to have their application(s) processed under the ***IRPA***.
>
> The Plaintiffs state that all known (and unknown) officers to the Plaintiffs involved in the investigation, processing, and denial of the Plaintiffs' application have conspired with the goal of denying the Plaintiffs, by any and all means necessary, and therefore liable in conspiracy as set out by the Supreme Court of Canada, in ***Hunt v. Carey*** as follows [repeats test as set out above].
>
> 38. The Plaintiff states, and the fact is, that as a direct result of the Defendant's officials illegal actions, and tortious conduct, the Plaintiffs have, and will, suffer damages which he claims as set out the within statement of claim.

85 As the Plaintiffs outlined, *Hunt* explains that the tort of conspiracy can be established on two grounds: (i) the plaintiff can claim a conspiracy to injure in that two or more people work together in agreement using lawful or unlawful means for the predominant purpose of injuring the plaintiff, who is in fact injured; or (ii) the plaintiff can claim a conspiracy of unlawful acts where two or more people work together in agreement to engage in unlawful conduct directed toward the plaintiff that they ought to know is likely to cause injury to said plaintiff, who is in fact injured.

86 The Defendant referred to *Normart Management Ltd v West Hill Redevelopment Co Ltd*, (1998), 37 OR (3d) 97 (ONCA), for a list of the elements that need to be pleaded to establish a cause of action in conspiracy. The Ontario Court of Appeal writes at paragraph 21:

> [21] In *H.A. Imports of Canada Ltd. v. General Mills Inc.* (1983), 42 O.R. (2d) 645, 150 D.L.R. (3d) 574 (H.C.J.), O'Brien J., dealing with the civil action of conspiracy as pleaded, quoted from Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed. (London: Sweet & Maxwell, 1975), as follows at pp. 646-47:
>
> > The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

87 The statement of claim under review speaks of denials to grant permanent residence based on flimsy reasons followed by long periods without any action on the part of the government; however it identifies those involved in the alleged grand conspiracy as "all known (and unknown) officers to the Plaintiffs involved in the investigation, processing, and denial of the Plaintiffs' application" (at para 37). This obviously does not constitute an identification by name. It is not either by group or job positions. The Plaintiffs identify officers based on their allegation that those who dealt with the matter, given that permanent residence was denied, have conspired together. The statement of claim does not describe the alleged conspirators' relationship with each other apart from implying that they are those who worked on the Plaintiffs' application at some point. It is as if the Plaintiffs seek to derive some conspiracy against them based on two denials and the periods of time between events.

88 The statement of claim fails to describe the agreement(s) between the alleged conspirators. It pleads their alleged overall approach--denying the processing of the Plaintiffs' permanent residence application "by any and all means necessary"--but does not plead material facts precisely describing the purpose of the agreement between the known and unknown officers. It is fine to have a conspiracy theory, but it must be spelled out. Crying "conspiracy" is not enough to disclose a reasonable cause of action.

89 Reading the pleadings as generously as can be, there is no way to decipher what the agreement may be, who the conspirators are, whether the alleged conspiracy has the predominant purpose to injure the Plaintiffs, as opposed to pursuing some other purpose, whether the alleged conspiracy is to use lawful or unlawful means. In other words, we are left with a bald and bold allegation without even attempting to define the essential elements of the tort alleged, and obviously, offering any fact, material or not, to substantiate an allegation.

90 Instead of identifying the branch of the tort of conspiracy the Plaintiffs wish to rely on in order to state material facts on which they actually rely, they make a completely generic assertion, without more. There is not even anything about how there can be a conspiracy, as opposed to, for instance mere knowledge or approval of a cause of conduct. Proof of agreement and execution is required. Nothing of the sort is alleged with material facts in support.

91 All that is known is that the Plaintiffs were denied permanent residence twice. The pleadings, in my view, amount to a complete absence of definition of the tort and its elements. It is plain and obvious that there is no reasonable cause of action. It is as if the Plaintiffs were suggesting that, given they were denied twice and there were delays, there must be somehow a conspiracy. It is not pleading conspiracy to merely allege these facts and, without more, suggest an agreement the purpose of which is unknown. Put a different way, the Plaintiffs seem to allege their experience with immigration authorities is such that there must be some conspiracy hatched somewhere.

92 The pleadings are also so deficient in factual material that the Defendant would be incapable to know how to answer. They are bare assertions that are unfounded; not only they do not disclose a reasonable cause of action they could be struck as frivolous or vexatious (*Senechal v Muskoka (District Municipality)*, [2003] OJ No 885; *Kisikawpimootewin supra*).

93 In terms of overt acts, which would tend to show that some agreement to work together exists and could be opposed to the co-conspirators, the statement of claim simply references the first visa denial, the delay between the first judicial review and the second visa denial, the delay since the second judicial review, and the inadmissibility allegations. There is no trace of any agreement, just some discrete events. The Plaintiffs pleaded a series of independent events, and did not present anything tending to show that the conspirators agreed to undertake these acts to further the conspiracy; rather, they rely on their overarching statement that the Defendant aimed to deny the Plaintiffs' application processing, without more.

94 The nature of a conspiracy requires that there be participants, some known and others unknown, who agree to do something that will cause injury (*Cement LaFarge v B.C. Lightweight Aggregate*, [1983] 1 SCR 452). Here, the material facts allowing to conclude to some agreement are absent. The date, the object and the purpose of an agreement between unknown participants is not even pled. No overt act by the participants in furtherance of the conspiracy is offered in the pleadings. These are bald allegations involving undefined persons without even a hint of the agreement which is central to a claim of conspiracy. As found in Sivak at para 55, this constitutes a pleading that is vexatious (see also *Kisikawpimootewin*). It is not possible, on the basis of these pleadings, for the Defendant to know how to answer. The pleading is "so defective that it cannot be cured by simple amendment" (*Krause v Canada*, [1999] 2 FCR 476 (FCA)). The Plaintiffs never indicated how they could amend their pleadings on this front such that there could be some assessment of "the readiness of the amendments needed", in the words of the Federal Court of Appeal in *Sweet*.

95 I agree with the Defendant that the Plaintiffs have failed to plead all the elements of the tort of conspiracy. It may be argued that none were pleaded. It is entirely deficient with respect to pleading the essential elements of the tort. Given the complete lack of detail on the alleged agreement, I see no scintilla of an argument. As a result, I am striking this claim without leave to amend.

Claim 6: *Breach of Plaintiffs' section 7 and 15 Charter rights*

96 The Plaintiffs allege both section 7 and section 15 *Charter* breaches at various points in their statement of claim. They note that decisions under the IRPA must be applied in a manner that is consistent with the *Charter*:

> 33. The Plaintiffs state that the Defendants' officials have a common-law duty, as well as a statutory duty under s. 3(1)(f) of the ***IRPA***, as interpreted and confirmed by this Court, in ***Dragan v Canada QL [2003] F.C.J. No. 260*** and ***Liang v Canada (M.C.I.) 2012 FC 758*** decisions to process applications consistently and promptly [...] and that such decisions must be ***Charter***-compliant, as dictated by s. 3(3)(d) of the ***IRPA*** which states:
>
> **(3)** This Act is to be construed and applied in a manner that...
>
> (d) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada

97 The section 7 allegations appear at paragraphs 30, 32, and 36:

> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages:
>
> (a) with respect to Emad Al-Omani his wife and children, the dire danger, indelible stigma, and mental distress and suffering knowing that the High Commission is making false and unfounded allegations that he is associated with Al Qaeda, or such groups, as well as the mental suffering of not being able to join his brothers and families in Canada and the financial damages in not being able to engage with his brothers in their business in Canada, of which he has a financial interest;
>
> (b) the mental stress and anxiety, and endangerment of their lives, knowing that false allegations of association with Al Qaeda, or such groups, have been made which places their lives at risk in Saudi Arabia
>
> [...]
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have [...]
>
> (iv) breached the plaintiffs constitutional right(s) to the Rule of Law and Constitutionalism, as well as their s. 7 and 15 ***Charter*** Rights;
>
> which tortious conduct has caused the damages set out in paragraph 30 in the statement of claim herein.
>
> [...]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that [...]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***;
>
> A/ the mental suffering and distress of separation between the Plaintiffs and their family in Canada, also protected by s.7 [...]

> D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;

98 The section 15 allegations at paragraphs 1, 30, 32, 36 centre on the allegation that the Plaintiffs were treated unequally on the grounds of race and national origin because they are Saudi Arabs:

> 1. The Plaintiffs claim: [...]
>
> iii) the actions and omissions of the visa office at the Canadian High Commission in London, England, constitutes a [...] breach of the Plaintiffs' right to the Rule of Law, Constitutionalism, as well as equal treatment, both under the underlying imperatives to the constitution as well as s. 15 of the ***Charter***;
>
> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages: [...]
>
> (c) loss of dignity in being treated unequally contrary to s. 3(3)(d) of the ***IRPA***, the unwritten principles of the constitution, and s. 15 of the ***Charter***, based on race and national origin, to wit: as Saudi Arabs.
>
> 32. The Plaintiffs state, and the fact is that:
>
> (a) the Defendants' officials have [...]
>
> (iv) breached the plaintiffs constitutional right(s) to the Rule of Law and Constitutionalism, as well as their s. 7 and 15 ***Charter*** Rights;
>
> which tortious conduct has caused the damages set out in paragraph 30 in the statement of claim herein. [...]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent, and engaged in negligent investigation, in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs in that [...]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, ***inter alia***; [...]
>
> E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the *Charter*, and loss of their dignity to the extent of unequal treatment under the law.

99 A preliminary issue with the Plaintiffs' claim is whether the Plaintiffs hold sections 7 and 15 *Charter* rights that can be breached. The Plaintiffs are referred to as "Saudi nationals" in the statement of claim and it appears that the principal Plaintiff only interacted with immigration officers at the Canadian High Commission in London, United Kingdom. The Plaintiffs pleaded damages on the basis that they have not been able to join their family in Canada. They are not Canadian, nor is it clear they were in Canada when the alleged *Charter* violations occurred.

100 The Defendant did not raise this as a ground to strike the statement of claim, so I will not consider it in my decision on this motion. However, given the fundamental nature of this threshold issue I think it is worth summarizing recent law on the topic.

101 In *Tabingo v Canada (Citizenship and Immigration)*, 2013 FC 377; [2014] 4 FCR 150, Justice Rennie questioned whether foreign nationals hold *Charter* rights and summarized the jurisprudence applicable to this issue at paragraphs 61-79. He found that the case law generally does not extend *Charter* rights to non-Canadians or those outside of Canada, but since the parties did not contest the issue, he did not draw his own conclusion:

> [75] Other recent decisions of this Court have found that non-citizens outside of Canada generally do not hold *Charter* rights: *Zeng v Camada (Attorney General)*, 2013 FC 104, paras 70-72; *Kinsel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1515, paras 45-47; *Toronto Coalition to Stop the War v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 957, paras 81-82. These three decisions followed Justice Blanchard's determination that a *Charter* claim may only be advanced by an

> individual who is present in Canada, subject to criminal proceedings in Canada, or possessing Canadian citizenship.
>
> [76] This limitation on the application of the *Charter* is not a recent development. Even prior to *Slahi*, [2009] F.C.J. No. 141, the Federal Court and the Federal Court of Appeal had interpreted Singh as barring Charter claims from non-citizens outside Canada: *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 534 (CA) (aff'd on other grounds [1992] 1 SCR 236); *Ruparel v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 615; *Lee v Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No 242; *Deol v Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No 1034 (aff'd on other grounds 2002 FCA 271).
>
> [77] The only exception counsel identified involved an applicant claiming the right to citizenship, rather than the privilege of immigration: *Crease v Canada*, [1994] 3 FC 480. In that case the applicant had applied for citizenship from within Canada and had a Canadian mother.
>
> [78] The respondent does not dispute either the applicants' standing or the application of the *Charter*. The parties appear to coalesce around the proposition that the FSW applications establish a sufficient nexus with Canada to extend the reach of sections 7 and 15. The jurisprudence does not support this concession. What is in issue involves the repercussions abroad of domestic legislation. In this case, there is no question of the extra-territorial application of the *Charter* as an adjunct of the actions of Canadian officials abroad, nor is there, as I conclude on the evidence, non-compliant administration of the legislation. The issue framed by this case is whether the protections provided by sections 7 and 15 reach foreign nationals, when residing outside of or beyond Canadian territory.
>
> [79] Despite my reservations as to the correctness of the concession, given that there is no lis between the parties on the issue, I will not determine the point. *Charter* jurisprudence should develop incrementally through the interface of opposing positions and interests. In any event, it is unnecessary to determine the point, as I find that the claims of infringement fail on their merits.

102 On appeal to the Federal Court of Appeal (*Tabingo v Canada*, 2014 FCA 191; [2015] 3 FCR 346 [*Tabingo*]), Justice Sharlow acknowledged Justice Rennie's remarks in *Tabingo*, but also found that she did not need to draw a conclusion on the issue:

> [53] In this Court, the Minister argues that the applicants do not have rights under section 7 or subsection 15(1) of the Charter. However, for reasons that will become apparent from the discussion below, I do not consider it necessary to express an opinion on that point.

103 Putting aside this preliminary issue and turning to the causes of action as pleaded, statements of claim must plead material facts pertaining to each element of an alleged *Charter* violation. Once again, *Mancuso* provides useful guidance, at paragraph 21:

> [21] There are no separate rules of pleadings for Charter cases. The requirement of material facts applies to pleadings of Charter infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each Charter right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues": *Mackay v Manitoba*, [1989] 2 S.C.R. 357 at p. 361.

104 The section 7 of constitutional right requires that it be established that the right to life, liberty or security has been violated. The pleadings are silent as to what right would have been violated. As it has been established, more than 30 years ago, the three interests protected by section 7 are distinct (*Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177; *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486). There is no indication to be found in the pleadings of what interest is involved where a permanent resident visa has been denied to a foreigner.

105 Not only the interests are not identified such that could be identified the elements that need to be proven given the ambit of each interest, but the pleadings don't give any indication as to how the interest might be engaged. To put it another way, there are no material facts pleaded. What are the facts to support an allegation of interference with the life, the liberty or the security of a person that is not allowed to immigrate to Canada, a privilege that has not been elevated to the level of a right (*Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539). At best, the pleadings speak in terms of mental stress and anxiety generated by governor action. It may be worth noting that the Supreme Court discussed that matter in *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*] and found that stress, stigma and anxiety did not deprive of the right to life, liberty and security of the person:

> 97 To summarize, the stress, stigma and anxiety suffered by the respondent did not deprive him of his right to liberty or security of the person. The framers of the *Charter* chose to employ the words, "life, liberty and security of the person", thus limiting s. 7 rights to these three interests. While notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves. Freedom from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right.

If the Plaintiffs wish to make the case, especially in spite of Blencoe, they have to plead the material facts, which they have not done. They are essential (*Mackay v Manitoba*, [1989] 2 SCR. 357 [*Mackay*]) even more so perhaps where the Supreme Court has already found that stress, stigma and anxiety for someone living in this country did not rise to a constitutionally protected right. I do not wish to suggest that it cannot be done in an appropriate case; it is just that it is especially important that facts be pled such that there can be a reasonable cause of action. Otherwise, "the defendant would be left guessing as to the scope of the case it has to meet to respond to the section 7 infringement" (*Mancuso*, para 23).

106 I am comforted in my conclusion by the similar finding made in *Sivak* where the Court stated that the Plaintiffs "have failed to indicate how one or more of their protected interests have been infringed, and they have also failed to identify the circumstances or context in which the breaches allegedly occurred. I have to agree with the Defendants that the allegations in this regard are stated in the form of conclusions without factual basis." (para 73). To quote from *Mackay* at p 362, "*Charter* decisions cannot be based upon unsupported hypothesis of enthusiastic counsel."

107 The statement of claim also references mental suffering and financial damages resulting from the visa denials, neither of which are sufficient to ground a *Charter* claim in the absence of additional material facts as set out by the Federal Court of Appeal in *Tabingo*:

> [97] The appellants are foreign nationals who reside outside Canada. Their only connection to Canada is that they have applied under a Canadian statute for the right to become permanent residents. They have no legal right to that status, and no right to enter or remain in Canada unless they attain that status. They had the right to seek permanent resident status under the IRPA, and when they did so they had the right to have their applications considered under the IRPA. However, neither of those rights is a right to life, liberty or security of the person. When their applications were terminated by subsection 87.4(1), they were not deprived of any right that is protected by section 7 of the Charter.
>
> [98] The appellants argue that if their applications had been accepted they would have acquired the right to enter and remain in Canada, which means necessarily that they would also have acquired all Charter rights except those given only to citizens of Canada. They argue that, because of the importance of their objective of becoming permanent residents of Canada, the loss of their right to have their permanent resident visa applications considered is such a blow to their psychological and physical integrity that it should be construed as the loss of a right that is within the scope of section 7 of the Charter.
>
> [99] I do not accept this argument. I have no doubt that the termination of the appellants' permanent resident visa applications caused them financial loss, but financial loss alone does not implicate the rights to life, liberty and security of the person. The termination of their applications could have been profoundly disappointing to the appellants and perhaps for some psychologically damaging, but the evidence does not establish the high threshold of psychological harm necessary to establish a deprivation of the right to security of the person: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307.

108 The Plaintiffs also failed to plead facts pertaining to the section 7 internal analysis regarding the principles of fundamental justice. Being deprived of the right to life, liberty or security of the person in accordance with the principles of fundamental justice is not violation of section 7. It simply does not suffice to make a general allegation that section 7 *Charter* rights have been violated

109 With respect to the section 15 claims, they suffer from the same deficiencies. The Defendant argues that the Plaintiffs must show that there has been a distinction on an enumerated or analogous ground and that this distinction creates a disadvantage by perpetuating prejudice or stereotyping to properly plead a section 15 claim: *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 [*Kapp*] at para 17; *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 at paras 30-31. They argue that even if there are enough facts to show adverse impact on an enumerated ground, the statement of claim does not plead facts showing how the treatment amounts to discrimination. Such analysis includes various factors such as:

> [...] (1) pre-existing disadvantage, if any, of the claimant group; (2) degree of correspondence between the differential treatment and the claimant group's reality; (3) whether the law or program has an ameliorative purpose or effect; and (4) the nature of the interest affected.
>
> *Kapp* at para 19

110 I agree with the Defendant that the Plaintiffs have not provided any material facts establishing how they were discriminated against.

111 The statement of claim fails to plead the basic elements of either *Charter* claim. These pleadings are once again so defective that they cannot be cured by simple amendment. There is not a reasonable cause of action disclosed. Since I see no scintilla of a cause of action to be cured, I have to strike both, without leave to amend.

Claim 7: Damages

112 The Defendant argues that the Plaintiffs' damages should be struck for lacking particularity. Damages are primarily pleaded at paragraphs 1, 30 and 36 of the statement of claim:

> 1. The Plaintiffs claim:
>
> (a) general damages in the amount of $200,000 per Plaintiff;
>
> (b) aggravated damages in the amount of $50,000 per Plaintiff;
>
> (c) punitive damages in the amount of $50,000 per Plaintiff;
>
> (d) any and all economic loss damages pleaded, to be calculated at trial;
>
> [...]
>
> 30. As a result of the Defendants' officials' inexcusable delay, false and unfounded allegations, and breach of duty to process the main Plaintiffs' application, the Plaintiffs have suffered the following damages: [...]
>
> (a) with respect to Emad Al-Omani his wife and children, the dire danger, indelible stigma, and mental distress and suffering knowing that the High Commission is making false and unfounded allegations that he is associated with Al Qaeda, or such groups, as well as the mental suffering of not being able to join his brothers and families in Canada and the financial damages in not being able to engage with his brothers in their business in Canada, of which he has a financial interest;
>
> (b) the mental stress and anxiety, and endangerment of their lives, knowing that false allegations of association with Al Qaeda, or such groups, have been made which places their lives at risk in Saudi Arabia [...]

> (c) loss of dignity in being treated unequally contrary to s. 3(3)(d) of the ***IRPA***, the unwritten principles of the constitution, and s. 15 of the ***Charter***, based on race and national origin, to wit: as Saudi Arabs.
>
> [...]
>
> 36. In the alternative the Plaintiffs state that, the Defendants' officials have been negligent [...]
>
> (iii) as a result of this breach the Plaintiffs have suffered loss and damages which includes, *inter alia*;
>
> A/ the mental suffering and distress of separation between the plaintiffs and their family in Canada, also protected by s.7 of the ***Charter***;
>
> B/ irreparable loss of companionship, of the Plaintiffs, particularly that involving the children;
>
> C/ economic loss, to be quantified at trial, in being deprived of, inter alia;
>
> (i) the benefit of the Plaintiff, Emad Al Omani, to exercise his proper place and activity in the joint business interests of his brother in Canada;
>
> (ii) the incursion of legal costs incurred to date, to be determined at trial;
>
> D/ the mental stress and anguish of falsely being branded as associated with Al Qaeda, or such groups, which further endangers their very lives;
>
> E/ their right to equal treatment and protection under the law, as required by s. 3(3)(d) of the ***IRPA***, the structural imperatives of the Constitution, as well as s. 15 of the Charter, and loss of their dignity to the extent of unequal treatment under the law.

113 The Plaintiffs argue that damages do not need to be precisely calculated at this stage. There is some support for this position in *Woodhouse*:

> 41 Although courts have been cautious in protecting an individual's right to psychiatric well-being, compensation for damages of this kind is not foreign to tort law. As the law currently stands, that the appellant has suffered grief or emotional distress is insufficient. Nevertheless, it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers from a "visible and provable illness" or "recognizable physical or psychopathological harm": see for example *Guay v. Sun Publishing Co.*, [1953] 2 S.C.R. 216, and *Frame v. Smith*, [1987] 2 S.C.R. 99. Consequently, even if the plaintiffs could prove that they had suffered psychiatric damage, in the form of anxiety or depression, they still would have to prove both that it was caused by the alleged misconduct and that it was of sufficient magnitude to warrant compensation. But the causation and magnitude of psychiatric damage are matters to be determined at trial. At the pleadings stage, it is sufficient that the statement of claim alleges that the plaintiffs have suffered mental distress, anger, depression and anxiety as a consequence of the alleged misconduct.
>
> [...]
>
> 74 As discussed in the context of the actions for misfeasance in a public office, courts have been cautious in protecting an individual's right to psychiatric well-being, but it is well established that compensation for psychiatric damages is available in instances in which the plaintiff suffers a "visible and provable illness" or "recognizable physical or psychopathological harm". At the pleadings stage, it is sufficient that the statement of claim alleges mental distress, anger, depression and anxiety as a consequence of the defendant's negligence. Causation and the magnitude of psychiatric damage are matters to be determined at trial.
>
> [my emphasis]

114 The same rule applies to other categories of damages. Other than damages alleged to result from the *Charter* violations that have been struck out, I agree with the Plaintiffs that the Defendant has not discharged her burden to show why the alleged damages should be struck. Whether they will be able to show that they have suffered damages, including that their psychiatric well-being has been affected beyond grief or emotional disturbance or distress, remains to be shown. However the test is not likelihood of success, but rather reasonable cause of action. I am allowing the damages to proceed as pleaded.

Claim 8: Whether Ministers should be named in the statement of claim

115 The statement of claim provides the following description of the named Defendants:

> 3. (a) the Defendant, Her Majesty the Queen is statutorily and vicariously liable for the acts and omissions of her servants pursuant to s. 17(1)(5) of the ***Federal Courts Act*** as well as ss. 24(1) and 52 of the ***Constitution Act***, 1867, and in particular, any purported Crown prerogative, if any exists post the Patriation of the ***Constitution Act, 1982***, and ***Canada Act, 1982***, by the Defendants', the Minister of Foreign Affairs, and/or Citizenship and Immigration, employees of the Canadian High Commission in London, England;
>
> (b) The Defendant, the Minister of Foreign Affairs is statutorily and constitutionally responsible for maintaining and staffing Canada's visa posts abroad; and
>
> (c) The Defendant, the Minister of Citizenship and Immigration is statutorily and constitutionally responsible for administering the ***IRPA*** and its ***Regulations***.

116 The defendants seek to strike the two named Ministers (Foreign Affairs and Citizenship and Immigration) in favour of a single defendant, Her Majesty the Queen who then becomes the Defendant. The defendants note that the named Ministers are not themselves liable for the damages claimed in this case (*Federation of Newfoundland Indians v Canada*, 2003 FCT 383 at para 30). In *Cairns v Farm Credit Corp.*, [1992] 2 FC 115; 49 FTR 308, Justice Denault wrote:

> [6] The plaintiffs have named the Honourable William McKnight as a defendant in this action. A Minister of the Crown cannot be sued in his representative capacity, nor can he be sued in his personal capacity unless the allegations against him relate to acts done in his personal capacity (*Re Air India* (1987), 62 O.R. (2d) 130, (sub nom. *Air India Flight 182 Disaster Claimants v. Air India*) 44 D.L.R. (4th) 317 (H.C.)). As the plaintiffs have made no claims against the Minister relating to actions done in his personal capacity, the Honourable William McKnight must be struck as a party to the action.

Similar comments are found in *Mancuso v Canada (National Health and Welfare)*, at para 180. At the hearing of the case, counsel for the Plaintiffs all but conceded the point. At any rate, that appears to be the state of the law (*Sibomana v Canada*, 2016 FC 943 at paras 32-33).

117 I see no reason to name these two Ministers in the present case; therefore I am striking them from the statement of claim in favour of Her Majesty the Queen as the sole Defendant.

Claim 9: Constitutionality arguments regarding jury trials under the Federal Courts Act and leave for judicial review under the IRPA

118 The Plaintiffs indicated that they plan to constitutionally challenge section 49 of the *Federal Courts Act*, which bars jury trials, on the basis that it violates "the constitutional imperatives of Rule and Law and Constitutionalism, as well as the right to a jury trial, grounded in the *Magna Carta*, and continued in s. 11(f) of the *Charter* in the criminal context, as well as the residual clause of s. 7 of the *Charter* in the civil context [...]" (statement of claim, para 39).

119 The Plaintiffs also seek a declaration that subsection 72(1) of the IRPA is unconstitutional on the basis that the Defendant's officials "can perpetually deny a meritorious application whereby, sooner or later, a leave application will be denied" and a leave application is not, in itself, judicial review (at paras 40(a) and (c) of the statement of claim).

120 The Defendant argues that both arguments should be struck because they are wholly immaterial to the present action.

121 In *Mancuso*, the Federal Court of Appeal encountered a similar issue on a motion to strike seeking declarations on the constitutionality of other legislation. It concluded that while free-standing declarations of constitutionality are available, they require a factual grounding:

> [32] [...] Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the Constitution Act, 1867 be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.
>
> [33] The Supreme Court of Canada in Canada *(Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.
>
> [34] Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation -- in other words, a failure to meet the second Khadr requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's *vires*. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.
>
> [35] This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.
>
> [my emphasis]

122 With respect to the section 49 claim, I note that the Plaintiffs, in their memorandum of fact and law at paragraph 18, explain that this is not an argument, but rather a notice of relief to be sought. There is nothing else. Justice Zinn struck the same section 49 argument in *Cabral v Canada (Citizenship and Immigration)*, 2016 FC 1040 as immaterial to the present action. I agree. If it is no more than a notice that something will follow, it is useless; furthermore, the said notice does not even contemplate section 26 of the *Crown Liability and Proceedings Act*, RSC, 1985, c C-50. It is a different matter of a procedural nature which does not accord with a statement of claim. It shall be struck from the statement of claim. In so doing I do not wish to suggest that the constitutionality of section 49 cannot be attacked in these proceedings.

123 With respect to the Plaintiffs' claim respecting subsection 72(1) of the IRPA, I agree with the Defendant that this pleading is immaterial at this point. The Plaintiffs have had two visa decisions quashed and sent back for judicial review. Each time leave was evidently granted. The statement of claim references a hypothetical future refusal to grant leave. That cannot be the basis of a challenge to the legislation in this case. This is no more than a theoretically question, certainly not a real question on the facts of this case. As a result, the Plaintiffs' complete lack of factual basis on which to bring this claim, I am striking this claim without leave to amend.

VI. Conclusion

124 If there is compensation to be awarded, it is not through the law of conspiracy or negligence, but rather through the law of misfeasance in public office, once properly pleaded. There is simply nothing to suggest in the statement of claim that the essential elements of the tort have even been considered. It is simply not enough to say "negligence" or "conspiracy". More is needed to have a scintilla of a cause of action. The essential elements of one cause of action are not the same as another cause of action. Misfeasance is not negligence, and negligence is not conspiracy. The material facts for each will vary. The approach taken was in effect to tell the story generally without connecting the facts to the causes of action alleged later in the document. At the end of the day, we are left with a narrative that supports a cause of action in misfeasance, which requires to be pled with more precision, but is dearly missing with respect to the alternative causes of action in negligence and conspiracy. In my view, there is a scintilla of cause of action in misfeasance pleaded such that with appropriate amendments in order to allege the material facts required, the matter could proceed further.

125 Some of the claims are therefore struck out, without leave to amend:

1. misfeasance in public office -- refusal to abide by court order
2. misfeasance in public office -- refusal to answer questions
3. abuse and excess of jurisdiction and authority
4. abuse of process
5. negligence and negligent investigation
6. conspiracy
7. sections 7 and 15 of the *Charter* violations
8. constitutional arguments concerning section 49 of the *Federal Courts Act* and section 72 of the *Immigration and Refugee Protection Act*.

126 Some claims are struck with leave to amend:

1. misfeasance in public office -- refusal to issue visas and delay in issuing visas
2. misfeasance in public office -- delay in issuing visas
3. damages -- *Charter* violations.

127 Finally, the named ministers are struck in favour of Her Majesty the Queen.

128 Given the split success on the motion, there will not be an award of costs.

ORDER in T-1774-15

THIS COURT ORDERS that for the reasons given, the following causes of action are struck out from the statement of claim, without leave to amend, pursuant to Rule 221(1) of the *Federal Courts Rules*:

1. misfeasance in public office -- refusal to abide by court order
2. misfeasance in public office -- refusal to answer questions
3. abuse and excess of jurisdiction and authority
4. abuse of process
5. negligence and negligent investigation
6. conspiracy
7. sections 7 and 15 of the *Charter* violations

8. constitutional arguments concerning section 49 of the *Federal Courts Act* and section 72 of the *Immigration and Refugee Protection Act*.

For the reasons given, the following sections are struck from the statement of claim, with leave to amend, pursuant to Rule 221(1) of the *Federal Courts Rules*:

1. misfeasance in public office -- refusal to issue visas and delay in issuing visas
2. misfeasance in public office -- delay in issuing visas
3. damages -- *Charter* violations.

In view of the fact that the success is split on this motion to strike, no costs will be awarded.

On the consent of both parties, the Plaintiffs will have 60 days from the date of this Order to file an amended statement of claim and the Defendant will have 30 days to file a Statement of Defence from the date of service of the amended statement of claim.

Y. ROY J.

End of Document

Almacén v. Canada, [2016] F.C.J. No. 273

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: January 20, 2016.

Judgment: March 9, 2016.

Docket: T-1508-14

[2016] F.C.J. No. 273 | [2016] A.C.F. no 273 | 2016 FC 300 | 264 A.C.W.S. (3d) 354 | 39 Imm. L.R. (4th) 231 | 2016 CarswellNat 621

Between Danilo Maala Almacén, Plaintiff (Appellant), and Her Majesty the Queen, Defendant (Respondent)

(57 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Motion by plaintiff for order setting aside order striking amended statement of claim dismissed — Appellant, who was married, commenced same sex relationship with Canadian male overseas — Appellant later moved to Canada and lived with male partner, who supported him — After appellant's claim for permanent residence on H&C considerations was denied, he commenced tort claim — Claim was attempt to re-litigate reasonableness of H&C decision and, as such, was an abuse of process — Claim did not disclose reasonable cause of action as no material facts to support causes of action claimed were pleaded.

Tort law — Practice and procedure — Pleadings — Amendment — Adding or striking out claim — Motion by plaintiff for order setting aside order striking amended statement of claim dismissed — Appellant, who was married, commenced same sex relationship with Canadian male overseas — Appellant later moved to Canada and lived with male partner, who supported him — After appellant's claim for permanent residence on H&C considerations was denied, he commenced tort claim — Claim was attempt to re-litigate reasonableness of H&C decision and, as such, was an abuse of process — Claim did not disclose reasonable cause of action as no material facts to support causes of action claimed were pleaded.

Motion by the plaintiff for an order setting aside an order striking his amended statement of claim. The appellant was a male Filipino national who was married to a woman in the Philippines. In 2005, while residing in Qatar, the appellant met and entered into a romantic relationship with a Canadian male. He returned to the Philippines to run and internet cafe. At some point, he moved to Canada to work as an assistant manager in a Chinese restaurant as arranged by his male partner. In 2013, the appellant moved in with his male partner, who had supported him since that time. The appellant applied to remain in Canada on humanitarian and compassionate grounds based on his homosexual relationship and his ineligibility to be sponsored as a common law spouse. The appellant's H&C application was denied, as was his application for leave and judicial review. The appellant commenced a tort action against the Crown asserting several causes of action against the officer who decided the negative H&C decision alleging, among other things, that he knowingly misapplied the law with respect to s. 25 of the IRPA, deliberately made misstatements of fact, chose not to give articulated reasons, discriminated against him and his partner and ignored s. 3(1)(d) of the IRPA. The claim also alleged that the officer exceeded her authority, engaged in an abuse of process, breached the appellant's constitutional rights. He claimed damages for lost wages, mental suffering and

distress for Charter breaches, the tort of abuse of process and excess of authority, misfeasance of public office and negligence. The respondent brought a motion to strike the claim as disclosing no reasonable cause of action and for being an abuse of the Court process. The prothonotary allowed the motion and struck the claim in its entirety with no leave to amend. The prothonotary found that the torts of abuse of process, abuse and excess of authority and the Charter arguments were unsupported and unsubstantiated and were bald conclusions with no material facts. As such, they were struck. With respect to the tort of misfeasance in public office, the prothonotary held that, even if all allegations made were true, there were no material facts pleaded that suggested that the officer acted outside the scope of her authority and that could give rise to a cause of action. With respect to the allegations of negligence, the prothonotary found that there were no material facts to support a private law duty of care. He further found that even if a duty of care existed between the appellant and the Crown, the cause of action for negligence would fail for policy considerations. Finally, the prothonotary concluded that the claim would also fail on the basis of being a collateral attack. On appeal, the appellant argued that the prothonotary misapplied the test on a motion to strike and usurped the function of the trial judge by rendering judgment on the merits without trial and that he erred in striking the claim.
HELD: Motion dismissed.

The claim was simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court had already dealt with the reasonableness of that decision. As such, it was an abuse of process. Furthermore, the claim did not disclose a reasonable cause of action. There were no facts pleaded in the claim to support the causes of action alleged.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 11(f), s. 15

Federal Court Rules, SOR/98-106, Rule 51, Rule 221

Federal Courts Act, RSC 1985, c. F-7, s. 17, s. 18, s. 49

Immigration and Refugee Protection Act, SC 2001, c. 27, s. 3(1) (d), s. 25, s. 25(1)

Privacy Act, RSC 1985, c. P-21,

Counsel

Rocco Galati, for the Appellant.

Rachel Hepburn-Craig, for the Respondent.

ORDER AND REASONS

RUSSELL J.

I. INTRODUCTION

1 This is a motion brought by the Appellant (Plaintiff), pursuant to Rule 51 of the *Federal Court Rules*, SOR/98-106 [Rules], for an order setting aside the Order and Reasons of Prothonotary Aalto, dated August 10, 2015 [Decision], which struck the Appellant's Amended Statement of Claim of September 23, 2014 [Claim].

II. BACKGROUND

2 The Appellant is a male Filipino national who is married to a woman in the Philippines. In 2005, the Appellant resided in Doha, Qatar where he worked at a clothing store. That same year, he met and entered into a romantic relationship with Mr. Tim Leahy.

3 In August 2009, the Appellant returned from Qatar to the Philippines to run an internet café that he had opened in January 2009 alongside his business partner, who he subsequently bought out in April 2010. At some point after this, Mr. Leahy arranged for the Appellant to move to Edmonton to work as an assistant manager in a Chinese Restaurant. The Appellant sold his business in the Philippines and moved to Canada.

4 Following the closure of the Chinese restaurant in Edmonton, the Appellant moved to Toronto in January 2013 to live with Mr. Leahy who has supported him since that time.

5 In October 2013, the Appellant applied on humanitarian and compassionate [H&C] grounds, based on his homosexual relationship, to remain in Canada, pursuant to s 25 of the *Immigration and Refugee Protection Act*, SC 2011, c 27 [IRPA]. The Appellant alleges that an H&C application was the only option available to him as he was not eligible, given his marriage in the Philippines and the duration of his relationship with Mr. Leahy, to be sponsored as a common-law spouse.

6 On February 10, 2014, the Appellant's H&C application was denied. On October 28, 2014, Justice Shore denied leave and judicial review of the H&C decision (IMM-883-13). A subsequent motion for reconsideration of this dismissal was dismissed on January 27, 2015.

A. *The Claim*

7 The Appellant commenced a contemporaneous tort action against the Crown asserting several causes of action against the officer who decided the negative H&C decision [Officer], including claims that the Officer committed the following acts in order to generate a negative decision:

(1) Knowingly misapplied the law with respect to s 25 of *IRPA*;

(2) Deliberately made the following misstatements of fact:

  (a) The [Appellant] was in Canada without lawful status;

  (b) The [Appellant] had not resided in the Philippines for the last 3 1/2 years; and

  (c) Mr. Leahy could sponsor the [Appellant] to immigrate to Canada (which is untrue as the Plaintiff is married to a woman in the Philippines and divorce is not legal in the Philippines).

(3) Knowingly chose not to give articulated reasons addressing the [Appellant's] factors and application;

(4) Knowingly chose not to make the only reasonable decision in the circumstances, a positive decision, in order to generate a negative decision;

(5) Discriminated against the [Appellant] and his partner based on sexual orientation in order to generate a negative decision;

(6) Knowingly ignored section 3(1)(d) of the *IRPA* in order to generate a negative decision.

8 The Claim also pleads that the Officer further abused and exceeded her authority by notifying Canadian Border Services Agency [CBSA] of her negative decision for the purposes of preparing the Appellant for removal from Canada, which is beyond her scope and authority and which breaches the *Privacy Act*, RSC 1985, c P-21.

9 Additional allegations in the Claim include that the Officer:

- Engaged in abuse and excess of jurisdiction and authority as historically contemplated and set out by the Supreme Court of Canada in *Roncarelli v Duplessis*, [1959] SCR 121;

- Engaged in abuse of process at common law and s 7 of the *Charter* as enunciated *inter alia*, by the Supreme Court in *USA v Cobb*, [2001] 1 SCR 587;
- Breached the [Appellant's] constitutional right to the Rule of Law and Constitutionalism as well as his s 7 and s 15 *Charter* rights by placing his very life, liberty and security of person under threat of deportation, based on sexual orientation; which tortious conduct has caused the damages set out in the Claim.

10 The Appellant claimed damages for lost wages, mental suffering, and distress arising from the following causes of action:

(1) The Crown's breach of sections 7 and 15 of the *Charter*;

(2) The tort of abuse and excess of authority;

(3) The tort of abuse of process;

(4) Misfeasance in public office; and

(5) Negligence.

11 The Claim concludes by stating that the Appellant will bring a constitutional challenge by way of application to strike s 49 of the *Federal Courts Act*, RSC, 1985, c F-7, which bars jury trials and thus violates the constitutional imperatives of the rule of law, constitutionalism and the right of the jury trial grounded in the *Magna Carta*, and continued in ss 11(f) and 7 of the *Charter*, as well as the residual clause of s 7 of the *Charter* in the civil context.

12 In response, the Respondent brought a motion to strike the Claim as disclosing no reasonable cause of action and for being an abuse of the Court process.

III. DECISION UNDER REVIEW

13 On August 10, 2015, Prothonotary Aalto granted the Respondent's motion and struck the Claim in its entirety, with no leave to amend.

14 The Decision applied the following legal tests, respectively, when considering the issues of striking a pleading under Rule 221 of the Rules, misfeasance in public office, and whether there is a duty of care owed by the Crown to a Plaintiff under the tort of negligence: (1) whether it is plain and obvious on the material facts pleaded that the action cannot succeed: *Sivak v Canada*, 2012 FC 272 [*Sivak*]; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 [*Imperial Tobacco*]; (2) whether the cause of action requires deliberate and unlawful conduct which would likely harm the Plaintiff: *Odhavji v Woodhouse*, [2003] 3 S.C.R. 263 [*Odhavji*]; and (3) whether the facts as pleaded disclose a proximate relationship between the Plaintiff and Defendant wherein failure to take reasonable care might foreseeably cause loss or harm to the Plaintiff; and if yes, whether there are policy considerations which exist that outweigh recognizing a duty of care: *Cooper v Hobart*, 2001 SCC 79.

15 The Decision engaged in a thorough overview of both the Appellant and Respondent's submissions on the motion before proceeding to analyze the misfeasance, negligence and other miscellaneous torts alleged by the Appellant to have been committed by the Officer.

16 The miscellaneous torts alleged by the Appellant included the torts of abuse of process, abuse and excess of authority, and arguments related to the *Charter*. Prothonotary Aalto noted that the Appellant spent little time substantiating these arguments and agreed with the Respondent that the Claim disclosed no reasonable cause of action related to them. Specifically, as regards the tort of abuse of process, the Prothonotary found that *USA v Cobb*, [2001] 1 SCR 587 [*Cobb*] did not support the Appellant's submission that the tort exists. Looking next to the tort of abuse and excess of authority, the Prothonotary took guidance from *Odhavji,* above, and *Roncarelli v Duplessis*, [1959] SCR 121 [*Roncarelli*]. Finally, in terms of the Appellant's *Charter* arguments, the Prothonotary noted that such claims should not be made in a "factual vacuum": *MacKay v Manitoba*, [1989] 2 SCR 357 (SCC).

The Prothonotary found each of these three tortious allegations to be unsupported and unsubstantiated; they were bald conclusions with no material facts. As such, they were struck.

17 The Prothonotary next considered the law relating to misfeasance in public office, noting that as per *Odjavji*, above, there were two fundamental elements to make out the tort: (1) did an officer of the Crown engage in deliberate and unlawful conduct as a public officer; and (2) was the public officer aware that the conduct was unlawful and likely to cause harm to the plaintiff? The Prothonotary held that, even if all allegations made were true, there were no material facts pleaded that suggest that the Officer acted outside the scope of her authority and that could give rise to a cause of action. The Prothonotary pointed out that there is no entitlement to a positive H&C determination. It remains inherently discretionary. Therefore, the Claim's submissions respecting this tort were also struck.

18 Finally, as regards the allegations of negligence, the Prothonotary found that there were no material facts to support a private law duty of care. The *Anns* test, as articulated by the Supreme Court of Canada, requires a relationship of sufficient proximity between the Crown and the Plaintiff that discloses reasonably foreseeable harm to establish a *prima facie* duty of care:*Imperial Tobacco*, above, at para 49; *Anns v Merton London Borough Council,* [1978] AC 728 [*Anns*]. The Prothonotary concluded that even if such a duty existed, the cause of action for negligence would fail for residual policy considerations. Prothonotary Aalto indicated that imposing a duty of care for the failure to make a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. The Claim's submissions pertaining to negligence were also stuck.

19 The Prothonotary then went on to find that if his analysis pertaining to misfeasance and negligence are incorrect, the Claim still fails on the basis of being a collateral attack on the decision of Justice Shore in IMM-883-14, and an abuse of process of the Court. The Claim is a disguised attempt to re-litigate the reasonableness of the H&C decision for the fourth time when the matter has already been decided at the immigration stage in the denial of the application for leave and judicial review, as well as in the denial of further reconsideration.

IV. STATUTORY PROVISIONS

20 The following provisions of *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA] are applicable in this proceeding:

> **Objectives -- immigration**
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> 3 (1) The objectives of this Act with respect to immigration are
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> ...
>
> (d) to see that families are reunited in Canada;
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> **Humanitarian and compassionate considerations**
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> 25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible -- other than under section 34, 35 or 37 -- or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada -- other than a foreign national who is inadmissible under section 34, 35 or 37 -- who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

* * *

> **Objet en matière d'immigration**
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> 3 (1) En matière d'immigration, la présente loi a pour objet :
>
> ...

(d) de veiller à la réunification des familles au Canada;

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire -- sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 --, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada -- sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 -- qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

21 The following provisions of the Rules are applicable in this proceeding:

Appeal

51 (1) An order of a prothonotary may be appealed by a motion to a judge of the Federal Court.

Motion to strike

221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant,

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

* * *

Appel

51 (1) L'ordonnance du protonotaire peut être portée en appel par voie de requête présentée à un juge de la Cour fédérale.

Requête en radiation

221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

(a) qu'il ne révèle aucune cause d'action ou de défense valable;

(b) qu'il n'est pas pertinent ou qu'il est redondant;

(c) qu'il est scandaleux, frivole ou vexatoire;

(d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

(e) qu'il diverge d'un acte de procédure antérieur;

(f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

V. ISSUES

22 The Appellant submits that the following are at issue in this proceeding:

1. Whether the Prothonotary misapplied the test on a motion to strike and usurped the function of the trial judge by rendering judgment on the merits without a trial; and
2. Whether the Prothonotary erred in law in striking his Claim.

VI. ARGUMENT

A. *Appellant*

(1) Motion to Strike

23 The test on a motion to strike is high in that such an occurrence should only take place where the pleading is "bad beyond argument." The Appellant submits that the Prothonotary misapplied the test on a motion to strike: *Nelles v Ontario (1989)*, 60 DLR (4th) 609 (SCC); *Dumont v Canada (Attorney General)* [1990], 1 SCR 279; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959. The Appellant points to the jurisprudence for further guiding principles, emphasizing that a statement of claim should not be struck simply because it is novel (*Nash v Ontario* (1995), 27 OR (3d) 1 (CA)), and that the Respondent must produce a case directly on point from the same jurisdiction (*Dalex Co v Schawartz Levitsky Feldman* (1994), 19 OR (3d) 463 (Gen Div)), and that the Court should be generous and allow an amendment before striking (*Grant v Cormier* (2001), 56 OR (3d) 215 (Ont CA)).

24 The Appellant submits that the Decision failed to apply the test or jurisprudence applicable on a motion to strike. Instead, it decided the case on the pleadings, without a trial, usurping the function of the trial judge. The Prothonotary ignored the facts pleaded and/or reconfigured other facts pleaded as bald statements in order to dismiss the facts, on their substance, rather than take them as proven, as is required by the jurisprudence: *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735.

(2) Errors of Law

25 The Appellant further argues that the Prothonotary blatantly erred when ruling that the Claim failed as a collateral attack. "Collateral attack" can only be used as a defence at trial and is not a basis to call into question jurisdiction or to strike a claim. The Appellant says that the Supreme Court has, on numerous occasions, made it clear that, whether or not judicial review has been brought, a plaintiff maintains a right to commence an action without bringing into question the jurisdictional issue of collateral attack: *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*]; *Canada (Attorney General) v McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 [*Parrish*].

26 As regards the torts of excess of authority and public misfeasance, the Appellant points to paragraphs 12, 13 and 15 of the Decision, and says that the Prothonotary erred in finding that the relevant material facts were not pleaded. Further, the Appellant alleges that jurisdiction was exceeded when the Prothonotary made factual findings in a vacuum, and by holding that the determination of an H&C application is inherently discretionary: *Rudder v Canada*, 2009 FC 689 at para 37 [*Rudder*]; *Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 38 [*Lemus*].

27 As regards negligence, the Appellant argues that, contrary to the findings of the Prothonotary, there is a duty owed by the Crown to an applicant to process applications: *Liang v Canada (Citizenship and Immigration)*, 2012 FC 758 at para 25; *Dragan v Canada*, [2003] F.C.J. No 260 at para 45.

28 The Appellant also argues that the Prothonotary erred further by ruling that "imposing a duty of care for the failure to obtain a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. H&C applications are discretionary and fact based."

29 The Appellant submits that jurisdiction was further exceeded by the Prothonotary's over-generalizing his Claim by stating that he was pleading that all H&C applications had a right to a positive decision. The Appellant says that this is not the case, and that on the facts pleaded: he has a right to a positive decision; that jurisprudence exists that such a conclusion can be drawn with respect to temporary visas (*Rudder*, above); and that *mandamus* lies to compel a positive decision under s 25 of IRPA: *Lemus*, above.

30 The Appellant says that the Prothonotary also overstepped his jurisdiction by acting as a "hybrid applications/trial judge" rather than deciding a motion to strike. He seeks an order setting aside the Decision, an order granting the relief that he alleges should have been granted by Prothonotary Aalto, costs of both the motion before Prothonotary Aalto and the within appeal, as well as any such further order or direction the Court deems just.

B. *Respondent*

31 The Claim was struck by Prothonotary Aalto for two reasons: it was an attempt to re-litigate an issue already decided by the Court and it did not plead material facts to support the causes of action claimed. The Respondent submits that the Appellant has not shown that either of these reasons warrant an appeal.

32 The Respondent says that the Appellant has failed to demonstrate that the decision-maker gave insufficient weight to relevant factors or proceeded on a wrong principle of law.

33 The Appellant claims that the Respondent is liable for abuse of process, excess of jurisdiction and damages for breaches of the *Charter*. However, the Respondent submits that the Appellant has failed to raise any factual or legal argument to challenge Prothonotary Aalto's findings in regards to these claims. Therefore in this regard, the Decision should not be disturbed.

34 The Respondent further argues that the Appellant has confused the Court's reasonable finding that the Claim was an attempt to re-litigate an issue already decided (the reasonableness of the H&C decision), and therefore an abuse of process, with the concept of a "collateral attack" as explained by the Supreme Court in *TeleZone*, above. However, this was not the basis for striking the Claim. Prothonotary Aalto found that the Claim was an impermissible attack on the Court's upholding of the reasonableness of the decision on judicial review. The Respondent says that while both the decision that was under appeal and *TeleZone* use the language of "collateral attack," the term has a different meaning in the two contexts, as an attack on the decision of the Court is distinct from an attack on an administrative decision by way of action. While the latter is permissible, the former may be an abuse of process.

35 The Respondent also says that the Appellant has not shown that the Court's alternative finding, that the Claim disclosed no reasonable cause of action, was in error.

36 As regards the claim of misfeasance, the Respondent says no material facts were pleaded to establish that the Officer acted outside the scope of her authority, and even if she did, nothing was submitted to establish a causal connection to damages by way of entitlement to a positive H&C decision. The Appellant's reliance on the decisions in *Rudder* and *Lemus*, both above, do not help him. In *Rudder*, the Court exercised its discretion to grant *mandamus* on the judicial review of a temporary resident visa. This does not establish that the Appellant is somehow entitled to a positive H&C decision or that a negative decision somehow gives rise to a cause of action. Similarly, the decision in *Lemus* does not change the fact that a discretionary decision is not stripped of its discretionary nature by judicial review.

37 In terms of the claim of negligence, the Respondent submits that Prothonotary Aalto reasonably found that there was no duty of care between the Respondent and the Appellant based on the facts pleaded and a correct application of the law. The jurisprudence has established that the relationship between the government and the governed is not one of individual proximity and nothing claimed by the Appellant supports a departure from this principle: *Premakumaran v Canada*, 2006 FCA 213 at para 22 [*Premakumaran*]; *Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para 35 [*Benaissa*]. The Respondent says that unlike the circumstances in the jurisprudence upon which the Appellant relies, here there has been no refusal to process his application nor any undue delay in processing his application.

38 The Appellant has misunderstood the second branch of the *Anns* test. The question is not whether the decision to reject the H&C application was a policy decision, but whether there are policy reasons that weigh against the finding of a duty of care. Prothonotary Aalto cited such policy reasons as weighing against the finding of a duty of care, including a concern over indeterminate liability for all H&C applications that are denied. The Respondent argues that the finding of no duty of care was correct in law and the striking of the claim in negligence ought not to be disturbed as a result.

VII. ANALYSIS

39 In accordance with *Merck & Co v Apotex Inc*, [2004] 2 FCR 459, a discretionary order of a prothonotary should only be reviewed *de novo* if the questions raised in the motion are vital to the final issue in the case, or the order is clearly wrong in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misrepresentation of the facts.

40 In the present motion, the questions raised are vital to the final issue in this case. Hence, I will review the Decision of Prothonotary Aalto on a *de novo* basis.

41 As Prothonotary Aalto pointed out in his reasons, I summarized the jurisprudence for striking a pleading for disclosing no reasonable cause of action and for being scandalous and vexatious in *Sivak*, above:

> [15] The test in Canada to strike out a pleading under Rule 221 of the Rules is whether it is plain and obvious on the facts pleaded that the action cannot succeed. In this regard, the Supreme Court of Canada has noted that the power to strike out a statement of claim is a "valuable housekeeping measure essential to effective and a fair litigation." See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and *R v Imperial Tobacco Canada Ltd.* 2011 SCC 42, at paragraphs 17 and 19.
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> [16] In determining whether a cause of action exists, the following principles are to be considered:
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> a. The material facts pled are to be taken as proven, unless the alleged facts are based on assumptive or speculative conclusions which are incapable of proof;
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> b. If the facts, taken as proven, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and
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> c. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.
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> See *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441.
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> ...
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> [25] *Edell v Canada (Revenue Agency)*, [2010] GSTC 9, 2010 FCA 26, reaffirms the fundamental rule that in a motion to strike the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved. The defendant who seeks summary dismissal bears the evidentiary burden of showing the lack of a genuine issue.
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> [26] The fundamental rule, however, must take into account that no cause of action can exist where no material facts are alleged against the defendant. See *Chavali v Canada* 2002 FCA 209.
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> ...
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> [31] There are many cases that hold that an action cannot be brought on speculation in the hope that sufficient facts may be gleaned on discovery to support the allegations made in the pleadings. See, for example, *AstraZeneca Canada Inc. v Novopharm Ltd.* 2009 FC 1209; appeal dismissed 2010 FCA 112.
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> [32] In fact, it is an abuse of process for a plaintiff to start proceedings in the hope that something will turn up. A plaintiff should not be permitted to discover the defendant to pursue such an action. See *Kastner*, [1994] F.C.J. No. 1671, above.

> [33] I think it is also well-established that the rule that material facts in a statement of claim must be taken as true in determining whether a reasonable cause of action is disclosed does not require that allegations based upon assumptions and speculation be taken as true. See *Operation Dismantle*, above.
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> ...
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> [89] In *George v Harris*, [2000] OJ No 1762, at paragraph 20, Justice Epstein, then of the Ontario Superior Court of Justice, provided examples of what constitutes a "scandalous," "frivolous" or "vexatious" document:
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> i. A document that demonstrates a complete absence of material facts;
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> ii. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations;
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> iii. A document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation;
>
> iv. Documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters.
>
> [90] A statement of claim containing bare assertions but no facts on which to base those assertions discloses no reasonable cause of action and may also be struck as an abuse of process. Furthermore, as indicated above, a claimant is not entitled to rely on the possibility that new facts may arise as the case progresses. On the contrary, the facts must be pled in the initial claim. The question of whether those facts can be proven is a separate issue, but they must be pled nonetheless.
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> [91] The authorities cited above also show that when a particular cause of action is pled, the claim must contain pleadings of fact that satisfy all of the necessary elements of that cause of action. Otherwise, it will be plain and obvious that the claim discloses no reasonable cause of action.
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> [92] A statement of claim will also be struck on the grounds that it is so unruly that the scope of the proceedings is unclear. As stated by this Court in *Ceminchuk v Canada*, [1995] F.C.J. No 914, at paragraph 10
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> > A scandalous, vexatious or frivolous action may not only be one in which the claimant can present no rational argument, based upon the evidence or law, in support of the claim, but also may be an action in which the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings. It is an action without reasonable cause, which will not lead to a practical result.

A. *Abuse of Process*

42 Prothonotary Aalto struck the Claim as being an abuse of process because it was simply a disguised attempt to re-litigate the issues that had already been litigated and decided in the immigrations context:

> [74] Even if I am wrong on both misfeasance in public office and negligence, in my view the Claim fails on the basis of being a collateral attack on the decisions of Justice Shore in IMM-883-14. No serious or arguable issue was raised on the application for leave and judicial review. Justice Shore's discretion was exercised in accordance with the jurisprudence [see, for example, *Krishnapillai*, *supra* at para. 10]. The Claim, on a plain reading, is simply a disguised attempt to re-litigate the reasonableness of the H&C decision, an already decided issue both at the immigration stage and the application for leave and judicial review to this Court and the further re-consideration. The Plaintiff has had three chances, each of which were denied. This [is] a fourth attempt to re-litigate the same issue. This action constitutes a collateral attack on those decisions and amounts to an abuse of process. To again litigate his matter is a waste of judicial resources on a claim that is bound to fail or is bereft of any chance of success [see, for example, *Hunt v Carey*, [1990] 2 SCR 959].

43 Before me, the Appellant argues, based upon the *TeleZone*, above, line of cases that whether or not judicial review has been brought, or whether or not judicial review has been successful or unsuccessful, the Appellant still has a right to bring an action "without bringing into question the jurisdictional issue of collateral attack, *albeit* the Crown is free to raise collateral attack, *as a defence*, *at trial*" [emphasis in original].

44 The Appellant also says the Prothonotary erred because "we are not dealing with judicial review proper, on its merits, but a leave application, without reasons." The Appellant cites no authority to support this assertion.

45 Justice Shore's decisions refusing leave are final decisions of the Court based upon a review of the merits put forward by the Appellant in his application for leave and judicial review. Those decisions indicate, in accordance with established jurisprudence, that the application for leave evinced no arguable case. See *Bains v Canada (Employment and Immigration)*, [1990] F.C.J. No 457; *Sivagurunathan v Canada (Citizenship and Immigration)*, 2013 FC 233 at para 9. In order to reach that conclusion, Justice Shore, like any leave judge, was obliged to review the merits on both sides of the application and decide whether the Appellant had raised any issues that could reasonably be argued. Justice Shore decided that the Appellant had raised no such issue so that there was no case to go to a judicial review hearing. Hence, the Court has already decided that no argument can be made that the H&C decision contains a reviewable error, and the Federal Court of Appeal in *Krishnapillai v R*, 2001 FCA 378 [*Krishnapillai*], has ruled that commencing an action where leave is denied can be an abuse of the process of the Court:

> [18] The constitutional issue was raised, as is mandated by section 82.1 of the Act, through the only process contemplated by Parliament to challenge the Minister's decision: an application for leave to seek judicial review. The issue was raised, one must assume, with the other issues that could be raised in order to challenge the decision of the Minister. Section 82.1 of the Act provides that there is no appeal from a judgment denying leave. The intent of Parliament was clearly to put an end to the challenge of a decision made under the *Immigration Act* at an early stage, i.e. as soon as leave was denied. Where leave is denied, the commencement of an action raising an issue that was or could have been raised in the leave application is an indirect attempt to circumvent the intent of Parliament and a collateral attack on the judgment denying leave. This is an abuse of the process of the Court.
>
> [19] This conclusion disposes of the issue raised with respect to the constitutional validity of subsection 53(1). It could dispose, also, of the better part of the issues raised with respect to the constitutional validity of the leave requirement because, apart from the issue relating to the absence of reasons in denying leave which obviously could not have been raised prior to the decision denying leave, these issues could and should have been raised at the first opportunity, i.e. in the leave application. However, the argument was not made on that basis, and I shall treat the whole issue of the validity of the leave requirement under the following heading, as was done by the parties.
>
> ...
>
> [36] The attack on the constitutionality of the leave requirement prescribed by section 82.1 of the *Immigration Act* has no chance of success.
>
> [37] The statement of claim was properly struck out in its entirety as it was on the one hand an abuse of the process of the Court and as it did not, on the other hand, raise any reasonable cause of action.

46 As Prothonotary Aalto found, the Claim in the present case is simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court has already dealt with the reasonableness of that decision. *TeleZone*, above, and other cases cited by the Appellant do not assist him. In *Parrish*, above, for example, the Supreme Court of Canada ruled that there is nothing in ss 17 and 18 of the *Federal Courts Act*, RSC, 1985, c F-7 that requires a plaintiff to be successful on judicial review before bringing a claim for damages against the Crown. That is not the issue here. In the present case, the Appellant's judicial review application had been dealt with by Justice Shore who, in order to refuse leave, had to conclude that there was nothing unreasonable or otherwise legally objectionable about the H&C decision that could be fairly argued on judicial review. The test for leave is fairly low; in order to dismiss leave Justice Shore had to decide that there was just no reasonable argument that could be made. The allegations in the claims -- knowingly misapplying the law; knowingly mistaking facts; knowingly failing to articulate reasons; discrimination; ignoring s 3(1)(a) of the IRPA -- were either raised or could have been raised in the leave application. The Federal Court of Appeal has said that this can be an abuse of the process of the Court, and it seems to me on the facts of this case that it is. Asking for damages as opposed to asking for the H&C decision to be quashed does not mean that the merits have not already been dealt with by the Court. This is not a collateral attack strictly speaking, or *res judicata*; it is an abuse of process.

47 The Court has a discretionary right to strike where it determines that its own processes are being abused. The Appellant invites the Court to read the jurisprudence as saying that he has a right to commence an action irrespective of whether the result on judicial review is positive or negative. Even if I accept this interpretation, I do not read the cases as saying that following a negative decision on judicial review the Court cannot decide whether any action commenced is an abuse of process. This is an entirely different issue and is governed by its own jurisprudence. The Appellant has pursued judicial review and has obtained a final decision of the Court that there is no fairly arguable case for reviewable error. He is now attempting to litigate the H&C decision by way of action. I see no way around the conclusion that this is an indirect attempt to circumvent the intent of Parliament and a collateral attack on Justice Shore's judgment denying leave and therefore is an abuse of the process of the Court. On these grounds alone, the Claim has to be struck, and the Appellant has made no suggestion as to how it could be amended to make it otherwise.

48 The Appellant has also drawn the Court's attention to the Supreme Court of Canada jurisprudence to the effect that a failure to grant leave does not necessarily mean that a judgment is confirmed. In *Des Champs v Conseil des écoles*, [1999] 3 SCR 281 at para 31, the Supreme Court said that "refusal of leave is not to be taken to indicate any view by members of this Court of the merits of the decision." The jurisprudence cited by the Appellant deals with leave to appeal to the Supreme Court which is not the issue here. "Leave" does not mean the same thing in every context. In the context of immigration review, a denial of leave means that there is no fairly arguable case on the merits.

B. *No Reasonable Cause of Action*

49 In the alternative, Prothonotary Aalto struck the Claim for disclosing no reasonable cause of action. Following my own *de novo* review, I see no way to avoid the same conclusion.

50 The *mandamus* cases cited by the Appellant to support his misfeasance claims do not assist. In the present case, there are no facts pleaded in the Claim that would establish any kind of right to a positive H&C decision. Even if reviewable errors occurred in reaching a negative decision, this does not mean that the Appellant would be entitled to a positive H&C, and Justice Shore has already decided that there is no arguable case for reviewable error. No facts are pleaded to establish that the Officer acted outside her authority or that the Appellant is entitled to H&C relief. The Appellant's claim to misfeasance in public office is not supported by any material facts and he simply asks the Court to assume that he is entitled to a positive H&C decision. In addition, there are no facts pleaded to support that any damages suffered were caused by the Officer's alleged wrongdoing.

51 The Appellant refers the Court to Justice Zinn's decision in *Cabral et al v MCI et al* (Docket no. T-2425-14) at para 17. In that case, Justice Zinn decided, on the pleadings before him, that there were sufficient facts to support allegations that the Minister had acted dishonestly. In the present case, paragrap? 12 of the Claim remains a series of assertions without facts to support them.

52 For much the same reason as given by Prothonotary Aalto, my own review of the pleadings leads me to conclude that the negligence claims must be struck as revealing no possible cause of action. The Appellant has not satisfied either branch of the *Anns* test. He has not pleaded facts to support a duty of care. He seeks to rely upon judicial review cases that say there is a statutory duty to process an application. In this case, the Appellant's H&C application has been processed but, in any event, the statutory duty to process a claim does not establish a duty of care under *Anns*.

53 The Appellant does not fully address the second *Anns* issue. He appears to think that the question is whether the decision to reject the H&C application was a policy decision. The issue is whether there are policy reasons in this case that weigh against finding that there is a duty of care. Prothonotary Aalto identified and addressed those policy considerations in his own reasons:

> [72] Even if such a *prima facie* duty existed, the cause of action fails on the second part of the *Anns* test in any event: the existence of residual policy considerations that justify denying liability. The jurisprudence teaches that policy considerations "are not concerned with the relationships between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally" (*Benaissa v Canada (Attorney General)*, 2005 FC 1220 at para. 33). In my view, imposing a duty of care for the failure to obtain a positive H&C decision has the potential to create an indeterminate liability for all H&C applications which are denied. H&C applications are discretionary and fact based. This H&C was also subjected to an application for leave and judicial review and re-consideration both of which were denied.

54 The Appellant argues that the Court should not be making a decision at this stage and that whether a duty of care exists is a matter for the trial judge. But the Appellant pleads no material facts that could support a duty of care. The Courts have found that no duty of care arises in some immigration contexts. See *Premakumaran*, above, at para 22; *Szebenyi v Canada*, 2006 FC 602 at para 91; *Khalil v Canada,* [2007] FC 923 at para 155. I also note that in *Benaissa*, above, Prothonotary Lafrenière struck a claim for the very reasons that arise in this case:

> [35] Even if foreseeability has been adequately pleaded by the Plaintiff, some further ingredient would be needed to establish the requisite proximity of relationship between the Plaintiff and the Crown: Hill v. Chief Constable of West Yorkshire, [1989] A.C. 53 (H.L.). In Cooper, the Supreme Court of Canada directed that an examination of the policy of the statute under which the officers of the Crown are appointed must be conducted to decide whether there exists the required proximity of relationship to create a statutory duty of care. If such a duty of care to the Plaintiff exists, it must be found in the statute, namely the Immigration and Refugee Protection Act.
>
> ...
>
> [38] Even if the Plaintiff could establish a *prima facie* duty of care, it is plain and obvious that he cannot succeed at the second stage of the analysis set out in *Cooper* based on the facts pleaded. The question at the second stage is whether there exist residual policy considerations which justify denying liability. These policy considerations are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.
>
> [39] In my view, it would not be just, fair and reasonable for the law to impose a duty of care on those responsible for the administrative implementation of immigration decisions of the kind which have been made in the case of the Plaintiff, absent evidence of bad faith, gross negligence, or undue delay.

55 These considerations against finding a duty of care seem entirely appropriate to me. I would only add that finding a duty of care in this case would, to quote the Federal Court of Appeal in *Krishnapillai*, above, at para 18, allow "an indirect attempt to circumvent the intent of Parliament" to clearly "put an end to the challenge of a decision made under the *Immigration Act* at an early stage, i.e. as soon as leave was denied."

56 These seem to me to be the only issues of substance that the Appellant has raised in this appeal.

57 As the Prothonotary points out, the Claim is the Appellant's second attempt to define meritorious causes of action. In addition, there is no way to cure what is simply a collateral attack and an abuse of process on the decision of Justice Shore denying leave. It would, therefore, be inappropriate to grant leave to amend in a situation where the claim cannot possibly succeed and there is no scintilla of a cause of action. See *Spatling v Canada (Solicitor General)*, 2003 CarswellNat 1013. The problems with this Claim are not curable by amendment.

ORDER

THIS COURT ORDERS that

1. The Plaintiff's (Appellant's) motion is dismissed and the decision of Prothonotary Aalto is upheld;

2. The Defendant (Respondent) is awarded costs of this motion to appeal and costs of the motion heard by Prothonotary Aalto.

RUSSELL J.

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Almacén v. Canada, [2016] F.C.J. No. 1304

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

D.W. Stratas, W.W. Webb and J.M. Woods JJ.A.

Heard: November 22, 2016.

Oral judgment: November 22, 2016.

Docket: A-108-16

[2016] F.C.J. No. 1304 | 2016 FCA 296 | 273 A.C.W.S. (3d) 62 | 48 Imm. L.R. (4th) 13 | 2016 CarswellNat 6003

Between Danilo Maala Almacén, Appellant, and Her Majesty the Queen, Respondent

(7 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defense — False, frivolous, vexatious or abuse of process — Appeal by AlmacÚn from dismissal of motion to set aside order striking out statement of claim dismissed — Appellant commenced claim alleging misfeasance in public office, negligence and Charter breaches after his application to remain in Canada on humanitarian and compassionate grounds was denied — Claim was abuse of process as it was attempt to re-litigate reasonableness of H&C decision and it disclosed no cause of action.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982,

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25

Appeal From:

Appeal from a judgment of the Honourable Mr. Justice Russell of the Federal Court dated March 9, 2016, Docket No. T-1508-14.

Counsel

Rocco Galati, for the Appellant.

Rachel Hepburn Craig, Marina Stefanovic, for the Respondent.

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

W.W. WEBB J.A. (orally)

1 The Appellant's Amended Statement of Claim dated September 23, 2014 was struck by an Order of the Prothonotary dated August 10, 2015 (2015 FC 957) without leave to amend. The Appellant then brought a motion before the Federal Court to set aside this Order. This motion was dismissed by Order and reasons of Russell J. dated March 9, 2016 (2016 FC 300). This appeal is from this Order of Russell J.

2 The Appellant commenced the action in the Federal Court following the denial of the Appellant's application to remain in Canada on Humanitarian and Compassionate grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the H&C Decision). The claim alleged various causes of action including misfeasance in public office, negligence, and breaches of the *Canadian Charter of Rights and Freedoms*. The Appellant also filed an application for leave and judicial review of the H&C Decision. This application for leave was denied by Shore J. and a subsequent motion for reconsideration of this decision was dismissed. The test before Shore J. was whether there were fairly arguable issues in relation to the H&C Decision. Since leave was denied and the motion for reconsideration dismissed, the conclusion is that there were no fairly arguable issues.

3 The Prothonotary struck the Appellant's Amended Statement of Claim on the basis that, based on the facts as pled, this Statement of Claim did not disclose a reasonable cause of action. The Prothonotary also stated that, in the alternative, he would have struck this Statement of Claim as an abuse of process since, in his view, this was an attempt to re-litigate the decision of Shore J. to dismiss the application for leave in relation to the H&C Decision.

4 Russell J. reviewed the decision of the Prothonotary on a *de novo* basis and dismissed the Appellant's motion to set aside the Order of the Prothonotary on the basis that it was an abuse of process as it "is simply an attempt to re-litigate the reasonableness of the H&C decision, and the Court has already dealt with the reasonableness of that decision" (paragraph 46 of his reasons). Russell J. also found that he would dismiss the motion on the basis that, based on the facts as alleged in this Statement of Claim, no reasonable cause of action was disclosed.

5 In this Court, the Appellant submitted that, at the time of the issuance of the Statement of Claim, the application for leave had not been decided. This changes nothing: once the leave application was decided, none of the issues against the validity of the decision were fairly arguable. In these circumstances an action based on the validity of the decision cannot succeed and, in our view, the foundation of his claim is the unreasonableness of the H&C Decision.

6 The Appellant submits that the Supreme Court holdings in *Attorney General of Canada v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 (*TeleZone)* and five related cases support his position in this appeal. We disagree. None of the six cases involved a prior related proceeding that was determined by a court to be not fairly arguable. In the *TeleZone* cases the Supreme Court did not repeal the doctrine against re-litigation -- that doctrine applies here.

7 In this appeal, we have not been persuaded that Russell J. committed any reviewable error in dismissing the Appellant's motion and therefore, the appeal will be dismissed, with costs.

W.W. WEBB J.A.

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Cabral v. Canada (Minister of Citizenship and Immigration), [2016] F.C.J. No. 1250

Federal Court Judgments

Federal Court
Toronto, Ontario
R.W. Zinn J.
Heard: June 8, 2016.
Judgment: September 14, 2016.
Docket: T-2425-14

[2016] F.C.J. No. 1250 | [2016] A.C.F. no 1250 | 2016 FC 1040

Between Juvenal Da Silva Cabral, Pedro Manuel Gomes Silva, Robert Zlotsz, Roberto Carlos Oliveira Silva, Rogerio De Jesus Marques Figo, Joao Gomes Carvalho, Andresz Tomasz Myrda, Antonio Joaquim Oliveira Martins, Carlos Alberto Lima Araujo, Fernando Medeiros Cordeiro, Filipe Jose Laranjeiro Henriques, Isaac Manuel Leituga Pereira, Jose Filipe Cunha Casanova, Plaintiffs, and Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness and Her Majesty the Queen, Defendants

(103 paras.)

Case Summary

Immigration law — Immigrants — Application for immigrant visa — Units of assessment/Point system — Language — Motion by defendants for summary judgment dismissing plaintiffs' claims allowed — Plaintiffs' applications for permanent residence under Federal Skilled Trade Class were refused because they failed to meet language requirement — Claims advanced by nine plaintiffs were dismissed on basis that applications were filed without one of NOC identified or were incomplete or provided stale-dated information — No evidence language test required high proficiency in English or was culturally biased — Even if remaining plaintiffs had established test was biased, they failed to mitigate by taking alternative test — Immigration and Refugee Protection Regulations, ss. 87.2(3), 87.2(4).

Motion by the defendants for summary judgment dismissing the plaintiffs' claims. The plaintiffs' applications for permanent residence under the Federal Skilled Trade Class were refused because they failed to meet the language requirement by failing the International English Language Testing System (IELTS). The plaintiffs alleged the IELTS was culturally biased towards British English and unfairly required a high proficiency in English. Immigration officers refused to consider the plaintiffs' requests for substituted evaluations because the language requirement was not met. The Minister of Citizenship and Immigration had issued an instruction not to process applications that failed to meet the language threshold.
HELD: Motion allowed.

The claims advanced by nine plaintiffs were dismissed on the basis that their applications were filed without one of the NOC identified or were incomplete or provided stale-dated information. There was an absence of evidence demonstrating the IELTS required a high proficiency in English or was culturally biased. There was no genuine issue for trial regarding the Minister's instruction. Even if the remaining plaintiffs had established the IELTS was biased, they failed to mitigate their damages by taking the alternative test.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 15

Federal Court Rules, SOR/98-106, Rule 81(1), Rule 213, Rule 215(1), Rule 219, Rule 334.39, Rule 334.39(1), Rule 334.39(1) (a), Rule 334.39(1)(c)

Immigration and Refugee Protection Act, SC 2001, c. 27, s. 3(1) (f), s. 12(2), s. 87.3(3)

Immigration and Refugee Protection Regulations, SOR/2002-227, s. 74(2), s. 74(3), s. 87.2, s. 87.2(1), s. 87.2(3), s. 87.2(3) (a), s. 87.2(3)(d)(ii), s. 87.2(3)(d)(v), s. 87.2(4)

Counsel

Rocco Galati, for the Plaintiffs.

Angela Marinos, Meva Motwani, for the Defendants.

ORDER AND REASONS

R.W. ZINN J.

Introduction

1 The Defendants move for summary judgment. They ask the Court to dismiss the action, with costs.

2 The essentials of the Plaintiffs' claim, as reflected in the Amended Statement of Claim is as follows:

(a) Each of the Plaintiffs applied for permanent resident status pursuant to subsection 12(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 and section 87.2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as part of the Federal Skilled Trade Class [FSTC];

(b) Despite meeting all of the other requirements for permanent residence required by the FSTC, each was refused because he failed to meet the language requirement by failing the International English Language Testing System [IELTS], adopted by the Minister of Citizenship and Immigration;

(c) The Plaintiffs allege that the IELTS is culturally biased towards "British English" rather than "Canadian English" and unfairly requires a high proficiency in English;

(d) The Plaintiffs further allege that the Minister administers the FSTC in a manner that favours persons from English-speaking countries and discriminates against those, like the Plaintiffs, who are from non-English speaking countries;

(e) Each Plaintiff, having failed to meet the threshold requirements under the IELTS, requested that the officer perform a substitute evaluation of his ability to become economically established in Canada, as provided by subsection 87.2(4) of the Regulations;

(f) The Plaintiffs allege that the officer refused to consider their applications on the merits because of a Ministerial Instruction stipulating that no FTSC application was to be examined by an officer unless the language requirement was met;

(g) The Plaintiffs allege that the Ministerial Instruction is contrary to the Regulations and is *ultra vires*;

(h) The Plaintiffs allege that the conduct of the Defendants amounts to breach of statute, public misfeasance and abuse, excess of jurisdiction and authority, abuse of process, bad faith, and breach of section 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11; and

(i) The Plaintiffs suffered damages as a result of the Defendants' wrongful conduct.

3 The Defence filed by the Defendants may be summarized as the following:

(a) Only three Plaintiffs, Mr. Henriques, Mr. Cabral and Mr. Casanova, have standing to bring the action as framed as they applied for permanent residence under the FSTP program and were denied for failing the language test;

(b) The other Plaintiffs either applied under a different program, did not submit an eligible occupation, did not submit other requirements documents, did not have a valid work permit, or submitted expired language test results;

(c) None of the applications were eligible for substituted evaluation because substituted evaluation only comes into play when an application has been reviewed for completeness and eligible for processing, and none of the applications were complete;

(d) The IELTS is not biased and does not require a high proficiency in English;

(e) The Plaintiffs have the choice between two different language tests and if they fail their chosen test, they may retake it as many times as they wish, or take the other approved test; and

(f) The Ministerial Instruction is delegated legislation, enacted pursuant to subsection 87.3(3) of the Act which gives the Minister the ability to issue instructions with respect to the processing of applications such as FSTC applications.

Evidence Filed

4 The Defendants filed three affidavits and their attached exhibits in support of the motion. As a preliminary matter, the Plaintiffs submit that none of these affidavits are admissible. Each affiant was cross-examined by counsel for the Plaintiffs and the transcripts put before the Court.

5 The Plaintiffs object to these affidavits because they "are sworn without any personal knowledge of the applications of the Plaintiffs or other facts in issue in the within action," they "were not the decision-makers who decided not to process the Plaintiffs' applications," and they "did not issue the reasons or letters for the decision(s) in respect of the Plaintiffs' applications, if reasons exist." The Plaintiffs complain that by putting evidence forward through these witnesses, they have been denied the right to cross-examine the relevant individual decision-makers, that there is no evidence put before the Court by the Minister, and lastly they submit that the affidavits at issue "largely consist of opinions on the law, which is the purview of the Court."

6 The starting point is Rule 81(1) of the *Federal Courts Rules*, SOR/98-106: "Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included."

7 The Defendants' first affiant, Ms. Williams, is a Program Support Officer at the Department of Immigration, Refugee and Citizenship Canada, (formerly Citizenship and Immigration Canada) where her main duties include reviewing and assessing applications for permanent residence under the economic class under the provincial nominee program. She previously reviewed and assessed a number of different types of applications for eligibility under the economic class under the federal skilled worker program, Canadian experience class, and FSTC.

8 At paragraph 5 of her affidavit she attests that her affidavit is "directed towards setting out the operation of the FSTP [Federal Skilled Trades Program], the processing of applications submitted as part of the FSTP, and information regarding the Plaintiffs' applications." I find that to be an accurate summary of her evidence.

9 I accept, given her position and background, that she has personal knowledge of the FSTP and the processing of applications under it. Her knowledge of the Plaintiffs' applications (paragraphs 36-78 of her affidavit) is based on her review of the Global Case Management System [GCMS] notes. She attests that GCMS is an electronic file system used by Immigration, Refugees and Citizenship Canada for the processing of applications for admission to Canada.

10 I find that, given her position, she can speak to the creation of the GCMS notes and the fact that they reflect various officers' assessments and decisions involving the applications at issue. The GCMS notes are business records of the Minister and his officials and an exception to the hearsay rule. It was not necessary, as the Plaintiffs submit, that each of the officers making the various decisions tender an affidavit. On the other hand, Ms. Williams has no direct knowledge of the applications or the officers' decisions, other than as is reflected in the GCMS notes. Accordingly, her evidence, and the evidence from the GCMS notes may be contradicted by direct evidence tendered by the Plaintiffs. I note that the cover letters returning the FSTC applications, without exception, reflect the description for rejection in the GCMS notes.

11 Ms. Williams attests in many instances that there were reasons for rejecting a Plaintiff's application other than those outlined in the GCMS notes and cover letter, such as failure to have a work permit. On cross-examination, she admitted that she could not challenge any statement made by Richard Boraks, the Plaintiffs' affiant, when he contradicts her, because she had no personal knowledge of the applications. Mr. Boraks is the lawyer who prepared 26 of the 27 applications under the FSTP for the 13 Plaintiffs. I accept that he has personal knowledge of the applications and the determinations made by the Minister's officials as were reported to him. Given this admission, and the fact that Mr. Boraks does have personal knowledge of the applications because he prepared them, his evidence is preferred. In the summary of the applications set out below, I have excluded from consideration any statement made by Ms. Williams that is contradicted by Mr. Boraks.

12 I do not find that Ms. Williams' affidavit speaks to the law, as alleged by the Plaintiffs. Her references to subsection 87.2(3) of the Regulations are incidental, and do not seek to interpret the meaning of the provision. I therefore conclude that her affidavit is admissible.

13 I apply the same reasoning to Ms. Tyler's affidavit. Ms. Tyler is the Assistant Director of the Economic Policy and Programs Division at the Department of Immigration, Refugee and Citizenship Canada. She supervises a team of analysts responsible for developing the FSTC and the language testing policies for economic immigration. In her affidavit, she attests to the creation of the FSTC, the legislative requirements of the FSTC, the language requirements of the FSTC and the content of the Ministerial instructions on the FSTC. She did not engage in the interpretation of the law, but simply listed the legislative requirements as they appear in the legislation. I therefore conclude that her affidavit is also admissible.

14 Alana Homeward is a paralegal in the Ontario Office of the Department of Justice assisting counsel for the Defendants in this matter. The majority of her affidavit speaks to Minister Kenney's trips to England and Ireland between 2012 and 2014 to announce and promote the FSTP and to invite workers to come to Canada. She attaches a number of exhibits consisting of news releases, the Minister's speaking notes and talking points, news articles, and the like. She admitted on cross-examination that she could not speak to the truth of the contents of any of these exhibits. I accept that she can attest that these documents were generated as they purport to have been; however, the probative value of the documents she attaches to her affidavit is slight, given her admission.

15 The Plaintiffs' affiant, Mr. Boraks, attaches the first page of each application but not the full contents "given their inordinate volume." Given the nature of the motion and the obligation that each party puts its best case forward, he ought to have included the entire application, regardless of volume. He also attaches as exhibits the acknowledgement of receipt and in some instances, the details for the rejection of the application.

16 His affidavit speaks to a number of matters and allegations that go well outside the pleading in this action. These include issues such as the funding of the FSTP by the government, the refusal to process applications that were incomplete in only minor respects, refusing applicants to correct minor incompleteness concerns, and the language abilities of the Plaintiffs as evidenced by the fact that they had worked in Canada for many years and had satisfied union and provincial requirements in this regard.

Federal Skilled Trades Class Application Requirements

17 There are a number of programs in Canada under which persons may immigrate to and seek permanent residence in Canada. This action deals only with the FSTC program.

18 The FSTC application is restricted to those who work in and make an application with respect to one of the skilled trade occupations listed in the National Occupational Classification [NOC] identified in subsection 87.2(1) of the Regulations.

19 Subsection 87.2(3) of the Regulations, attached as Appendix A, sets out the other requirements that must be met for an applicant to be a member of the FSTC. They may be briefly summarized, as follows. An applicant must:

(a) Meet the minimum language proficiency set by the Minister under subsection 74(3) of the Regulations in reading, writing, listening, and speaking;

(b) Have acquired at least two years of full-time experience (or the part-time equivalent) in the skilled trade during the five years preceding the application, after becoming qualified to independently practice in the occupation;

(c) Have met the relevant employment requirements of their skilled trade as specified in the NOC, except for the requirement to obtain a provincial certificate of qualification; and

(d) Have a certificate of qualification issued by a competent provincial authority in the applicant's skilled trade, or a work permit or offer of employment as described in paragraphs 87.2(3)(d)(ii) - (v) of the Regulations.

20 As noted, each Plaintiff alleges that his FSTC application was denied only because of failing to meet the language requirement set out in (a) above. Subsection 87.2(4) of the Regulations provides for the possibility of a substituted evaluation where the requirements detailed in subsection 87.2(3) of the Regulations are not sufficient indicators of whether an applicant will be able to become economically established in Canada. It provides:

> If the requirements referred to in subsection (3), whether or not they are met, are not sufficient indicators of whether the foreign national will become economically established in Canada, an officer may substitute their evaluation for the requirements. This decision requires the concurrence of another officer.

21 Each of the Plaintiffs in his application asked the officer to conduct a substitute evaluation regarding the language requirement. No substitute evaluation was conducted for any of the Plaintiffs where their application failed to meet the language requirements.

22 There are three other matters related to the language requirement relevant to this action.

23 First, the Defendants have designated two agencies, which administer two different tests, for English-language testing under paragraph 87.2(3)(a) of the Regulations: (1) Paragon Testing Enterprises Inc. which administers the Canadian English Proficiency Index Program-General test [CELPIP], and (2) Cambridge ESOL, IDP Australia, and the British Council, which administer the International English Language Testing System [IELTS]. Each of the Plaintiffs who submitted test results were tested using the IELTS test.

24 Second, Ministerial Instruction 6 [MI6] dated December 29, 2012, and Ministerial Instruction 12 [MI12] dated April 26, 2014, both provide that "test results must be less than two years old on the date on which the application is received."

25 Third, the two Ministerial Instructions directed that only those FSTC applicants who had met the language requirements would be processed. By virtue of this direction, an applicant who met all of the other requirements under the FSTC would not have his application processed, or a substituted evaluation considered, if he did not meet the minimum language thresholds that had been established.

26 This requirement was outlined in two Ministerial Instructions. MI6, which came into force coincident with the creation of the FSTC on January 2, 2013, set a cap of FSTC applications to be processed yearly and within that set a cap for certain identified occupations. MI6 provided that applicants, who met the language threshold and did not exceed the identified cap, would be placed into processing if they met certain specified requirements. It stated that those applications that did not meet these criteria were to be returned as they did not qualify for processing:

> Complete applications from skilled tradespersons received by the Centralized Intake Office in Sydney, Nova Scotia, on or after January 2, 2013, whose applicants meet the language threshold for the Federal Skilled Trades Class as set by the Minister pursuant to subsection 74(1) of the *Immigration and Refugee Protection Regulations*, in each of the four language abilities (speaking, reading, writing and oral comprehension), and that do not exceed the identified caps, shall be placed into processing if they,
>
> (1) as per the 2011 version of the National Occupational Classification (NOC), show evidence of at least two years (24 months) of full-time or equivalent part-time paid work experience, acquired in the last five years, in one of the eligible skilled trade occupations (see footnote 2) in either Group A or B, set out below:
>
> ... [emphasis added and footnotes omitted]

27 MI12, which came into force on May 1, 2014, contained similar language to MI6 in that it too provided that applications, whose applicants met the language threshold for the FSTC and did not exceed the cap, would be placed into processing. Those that did not would be returned to the applicant with the advice that their application did not qualify for processing.

Evidence Regarding Each Plaintiff's FSTC Application(s)

28 The record before the Court on this motion shows the following with respect to each Plaintiff. Some made more than one FSTC application.

Juvenal Da Silva Cabral

29 Mr. Da Silva Cabral submitted three FSTC applications.

30 Mr. Da Silva Cabral's first application was submitted on March 15, 2013 [FSTC Application 01]. The GCMS notes indicate that it was returned because Mr. Da Silva Cabral's English language test was older than two years, and he did not meet the language requirements for writing, speaking and listening.

31 Mr. Da Silva Cabral's second application was submitted November 29, 2013 [FSTC Application 02]. The GCMS notes indicate that it was returned because Mr. Da Silva Cabral did not meet the language test results for listening and writing.

32 Mr. Da Silva Cabral's third application was submitted December 29, 2014 [FSTC Application 03]. The GCMS notes and cover letter indicate that it was returned because Mr. Da Silva Cabral did not meet the language test results for listening and writing, the incorrect fee was received as a previously dependent child was no longer a dependent, and the additional family forms he submitted were outdated as they were signed and dated in 2013.

Pedro Manuel Gomes Silva

33 Mr. Gomes Silva submitted two FSTC applications.

34 Mr. Gomes Silva's first application was submitted on August 12, 2013 [FSTC Application 04]. The GCMS notes and the cover letter indicate that it was returned because Mr. Gomes Silva's English language test was older than two years, and he did not meet the language requirements for speaking and listening.

35 Mr. Gomes Silva's second application was submitted December 25, 2015 [FSTC Application 05]. The GCMS notes and cover letter indicate that it was returned because Mr. Gomes Silva's language test was older than two years. The GCMS notes also indicate that he did not meet the language requirements for speaking and listening.

Robert Zlotsz

36 Mr. Zlostz submitted two FSTC applications.

37 Mr. Zlostz's first application was submitted on September 17, 2013 [FSTC Application 06]. The GCMS notes and the cover letter indicate that it was returned because Mr. Zlostz applied under an ineligible NOC.

38 Mr. Zlostz's second application was submitted December 29, 2014 [FSTC Application 07]. The GCMS notes and cover letter indicate that it was returned because Mr. Zlostz's language test was older than two years.

Roberto Carlos Oliveira Silva

39 Mr. Oliveira Silva submitted two FSTC applications.

40 Mr. Oliveira Silva's first application was submitted on September 3, 2013 [FSTC Application 08]. The GCMS notes and the cover letter indicate that it was returned because Mr. Oliveira Silva did not meet the language requirements for writing and speaking. The cover letter also indicates that he failed to include the appropriate NOC code for his specified work experience.

41 Mr. Oliveira Silva's second application was submitted on July 25, 2014 [FSTC Application 09]. The GSMS notes indicate that it was approved and Mr. Oliveira Silva was granted permanent residence status on April 12, 2015. Mr. Boraks attests that this application was not made under the FSTC program but under the Canadian Experience Class program. Either way, this application is irrelevant. Either it was approved under the FSTC or it was not under the FSTC. Under either scenario, it is not relevant to this action as framed.

Rogerio De Jesus Marques Figo

42 Mr. Marques Figo submitted two FSTC applications.

43 Mr. Marques Figo's first application was submitted on December 29, 2014 [FSTC Application 10]. The GCMS notes and the cover letter indicate that it was returned because Mr. Marques Figo did not meet the language requirements for reading, writing, speaking, and listening and because the attached Schedule 11 and family information forms were signed over one year prior to the application.

44 Mr. Marques Figo's second application was submitted on March 7, 2016 [FSTC Application 11]. The GCMS notes and cover letter indicate that it was returned because of a moratorium on the twelfth set of Ministerial Instructions as of January 1, 2015. As a result applications under FSTC were to be sent through Express Entry. The GCMS notes do not indicate that he ever made an application under the Express Entry.

Joao Gomes Carvalho

45 Mr. Gomes Carvalho submitted two FTSC applications.

46 Mr. Gomes Carvalho's first application was submitted on October 14, 2014 [FSTC Application 12]. The GCMS notes and the cover letter indicate that it was returned because Mr. Gomes Carvalho did not meet the language requirements for reading, writing, speaking, and listening.

47 Mr. Gomes Carvalho's second application was submitted on December 29, 2014 [FSTC Application 13]. The GCMS notes and cover letter indicate that it was returned because Mr. Gomes Carvalho did not meet the language requirements for reading, writing, speaking, and listening.

Andresz Tomasz Myrda

48 Mr. Mydra submitted three FSTC applications.

49 Mr. Mydra's first application was submitted on August 29, 2013[FSTC Application 14]. The GCMS notes and the cover letter indicate that it was returned because Mr. Mydra submitted it under an inapplicable NOC code. Mr. Boraks disputes this.

50 Mr. Mydra's second application was submitted on January 3, 2014 [FSTC Application 15]. The GCMS notes indicate that it was returned because Mr. Mydra's language test was older than two years.

51 Mr. Mydra's third application was submitted on December 29, 2014 [FSTC Application 16]. The GCMS notes and cover letter indicate that it was returned because Mr. Mydra's language test was older than two years and he did not submit a supplementary travel form for himself and his wife. Mr. Boraks attests that the travel forms were submitted.

Antonio Joaquim Oliveira Martins

52 Mr. Oliveira Martins submitted two FSTC applications.

53 Mr. Oliveira Martins' first application was submitted on January 14, 2014 [FSTC Application 17]. The GCMS notes and the cover letter indicate that it was returned because Mr. Oliveira Martins did not submit language test results, proof of studies or fees for one of his children, a Schedule A for another child, and did not include the NOC code. Mr. Boraks attests that he did submit "the child dependant information referred to in Ms. Williams' affidavit."

54 Mr. Oliveira Martins' second application was submitted on December 29, 2014 [FSTC Application 18]. The GCMS notes indicate that it was returned because Mr. Oliveira Martin did not submit language test results and he was listed as a dependant person older than 19.

Carlos Alberto Lima Araujo

55 Mr. Lima Araujo submitted one FSTC application.

56 Mr. Lima Araujo's application was submitted on December 29, 2014 [FSTC Application 19]. The GCMS notes and the cover letter indicate that it was returned because Mr. Lima Araujo submitted language test results that were older than two years, and did not submit birth certificates for himself, his spouse and his two dependents. Mr. Boraks attests that the birth certificates were included with the application.

Fernando Medeiros Cordeiro

57 Mr. Medeiros Cordeiro submitted two FSTC applications.

58 Mr. Medeiros Cordeiro's first application was submitted on May 21, 2013 [FSTC Application 20]. The GCMS notes indicate that it was returned because it was significantly incomplete.

59 Mr. Medeiros Cordeiro's second application was submitted on December 29, 2014 [FSTC Application 21]. The GCMS notes and cover letter indicate that it was returned because Mr. Medeiros Cordeiro did not submit language test results, an offer of employment or if employed a labour market opinion, a work permit, or a certificate of qualification.

Filipe Jose Laranjeiro Henriques

60 Mr. Laranjeiro Henriques submitted two FSTC applications.

61 Mr. Laranjeiro Henriques' first application was submitted on November 25, 2013 [FSTC Application 22]. The GCMS notes and the cover letter indicate that it was returned because Mr. Laranjeiro Henriques did not meet the language test results for listening.

62 Mr. Laranjeiro Henriques' second application was submitted on December 24, 2014 [FSTC Application 23]. The GCMS notes and cover letter indicate that it was returned because Mr. Laranjeiro Henriques did not meet the language test result for reading and listening. He was also asked to update Schedules A and 11 as they were stale-dated.

Isaac Manuel Leituga Pereira

63 Mr. Leituga Pereira submitted one FSTC application.

64 Mr. Leituga Pereira's application was submitted on December 29, 2014 [FSTC Application 24]. The GCMS notes and the cover letter indicate that it was returned because Mr. Leituga Pereira did not meet the language requirements in reading, writing, speaking, and listening and he was required to submit additional family information on his spouse.

Jose Filipe Cunha Casanova

65 Mr. Cunha Casanova submitted three FSTC applications.

66 Mr. Cunha Casanova's first application was submitted on November 29, 2013 [FSTC Application 25]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening.

67 Mr. Cunha Casanova's second application was submitted on May 15, 2014 [FSTC Application 26]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening.

68 Mr. Cunha Casanova's third application was submitted on December 29, 2014 [FSTC Application 27]. The GCMS notes and the cover letter indicate that it was returned because Mr. Cunha Casanova did not meet the language requirements in reading, writing, speaking, and listening, and his language test results were older than two years.

Summary Judgment

69 Rules 213-219 of the *Federal Courts Rules* govern summary judgment. Rule 215(1) provides that if on motion "the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly." This Court has held that in determining whether there is a genuine issue for trial the judge is entitled to assume that that parties have put their best foot forward, and that if the action were to go to trial, no additional evidence would be presented: *The Rude Native Inc v Tyrone T Resto Lounge*, 2010 FC 1278 at para 16, 195 ACWS (3d) 1128. The Rules impose a burden on the moving party to establish on the balance of probabilities that there is no genuine issue for trial, but they also impose a burden on the responding party to set out specific facts and adduce evidence showing that there is a genuine issue for trial.

Analysis of Issues for Trial

70 At the commencement of the oral hearing, counsel for the Plaintiffs objected to tying his clients' case to the pleadings, rather than the evidence. If by this he meant that it was open to this Court when determining this motion to assess whether there was evidence of a triable dispute beyond the pleading, I disagree. The test on a summary judgment motion is whether there is a genuine issue for trial, and the issues to be examined are those framed by the pleadings. It is not for the Court to make a party's case nor to seek triable issues outside the four corners of the pleadings the parties have filed.

Refused Only Because of the Language Test Result

71 It is fundamental to the Plaintiffs' claim that each had his application refused only because he failed to meet the minimum language test requirements, but had met all other requirements under the FSTC program. Accordingly, as the Defendants submit, if an application did not meet all of the other requirements, it cannot found a basis for the claim.

72 There can be no genuine issue for trial with respect to any FSTC application that was not filed with respect to one of the NOC identified in subsection 87.2 of the Regulations. Failure to meet this fundamental requirement would mean that the application could not succeed, even if all of the other requirements were met. FSTC Applications 06, 08, and 17 were returned and failed to identify any NOC code or identified one that was not part of the FSTC program. Accordingly, no genuine issue for trial can be shown with respect to any of these applications.

73 There can be no genuine issue for trial with respect to any FSTC application that was incomplete or provided stale-dated information, except for language test requirements, because any such application would necessarily have to be rejected. FSTC Applications 03, 10, 18, 20, 21, 23, and 24 were either incomplete or contained stale-dated information and would have been rejected even if the language test results were acceptable. Accordingly, no genuine issue for trial can be shown with respect to any of these applications.

74 There can be no genuine issue for trial with respect to any FSTC application that was submitted after January 1, 2015, when a moratorium was put in place and applications had to be sent through Express Entry. FSTC Application 11 fell into this category. Accordingly, no genuine issue for trial can be shown with respect to that application.

75 The Plaintiffs challenge the validity of the Ministerial Instruction that requires that an applicant must meet the language thresholds thus making no substituted evaluation possible with respect to this criterion. They have not challenged the aspect of the instruction that requires that the test results be current within the previous two years. FSTC Applications 01, 04, 05, 07, 15, 16, 19, and 27 each included stale test results and accordingly would have been returned in any event. Accordingly, no genuine issue for trial can be shown with respect to these applications.

76 The remaining applications, FSTC Applications 02, 12, 13, 14, 22, 25, and 26 were rejected because each applicant failed to meet the threshold language requirements. *Prima facie*, a genuine issue for trial can be shown for these applications because they were rejected only on the basis of the language requirement.

77 These remaining applications, exclude the following Plaintiffs: Mr. Pedro Gomes Silva, Mr. Robert Zlostz, Mr. Roberto Oliveira Silva, Mr. Rogerio Marques Figo, Mr. Andresz Mydra, Mr. Antonio Oliveira Martins, Mr. Carlos Lima Araujo, Mr. Fernando Medeiros Cordeiro, and Mr. Isaac Leituga Pereira. There is no genuine issue for trial with respect to the claims advanced by these nine Plaintiffs and judgment must issue dismissing their claims.

78 In considering whether there is a genuine issue for trial with respect to the FSTC applications of the remaining Plaintiffs, I now turn to the allegations regarding the use of the IELTS test, the Ministerial Instruction, and the failure to conduct a substitute evaluation.

Minimum Language Proficiency

79 Subsection 74(2) of the Regulations provides that the "minimum language proficiency thresholds fixed by the Minister shall be established with reference to the benchmarks described in the *Canadian Language Benchmarks* and the *Niveaux de compétence linguistique canadiens*."

80 The Plaintiffs admit at paragraph 12 of their Amended Statement of Claim that "the Minister is entitled to delegate the administering of the [language] test to an outside body." As noted earlier, the Minister has delegated this vis-à-vis the English test to two outside bodies, which each administers its own test. The Plaintiffs complain only of the inappropriateness of the IELTS test but make no similar claim regarding the CELPIP test used by the other body delegated by the Minister.

81 I accept the submission of the Defendants that there is no prohibition on the number of times an applicant may take a language test, that each applicant may choose which of the two English-language tests he wishes to take, and that an applicant may take both tests.

The IELTS Test

82 The Plaintiffs allege that the IELTS is culturally biased towards "British English" and unfairly requires a high proficiency in English.

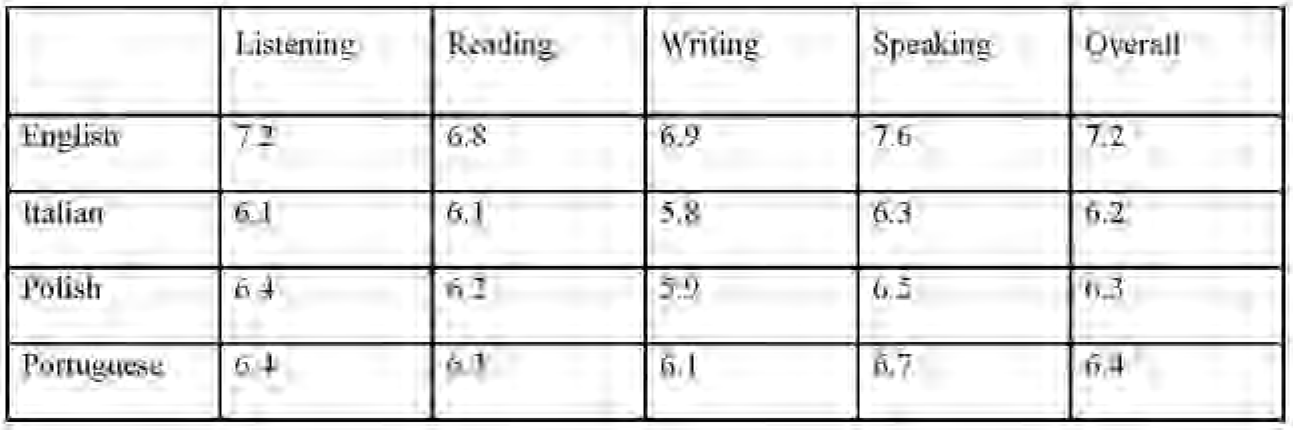
83 The Language Benchmarks established for the FSTC are as follows: Reading 4.0, Listening 5.0, Writing 4.0, and Speaking 5.0. Ms. Tyler in her affidavit provides the only evidence on this motion as to the meaning of these benchmarks. She attests that a score of 4 amounts to "fluent basic ability" and a score of 5 amounts to "initial intermediate ability."

84 In the context of the FSTC application these benchmarks require the following:

- Reading: "the ability to understand simple social messages; short simple instructions; and the purpose, main idea and key information in simple, short texts."
- Writing: "the ability to 'write short, simple texts about personal experience and familiar topics or situations related to daily life and experience'."
- Speaking: "the ability to 'communicate with some effort in short, routine social situations, and present concrete information about needs and familiar topics of personal relevance'."
- Listening: "the ability to 'understand, with some effort, the gist of moderately complex, concrete formal and informal communication'."

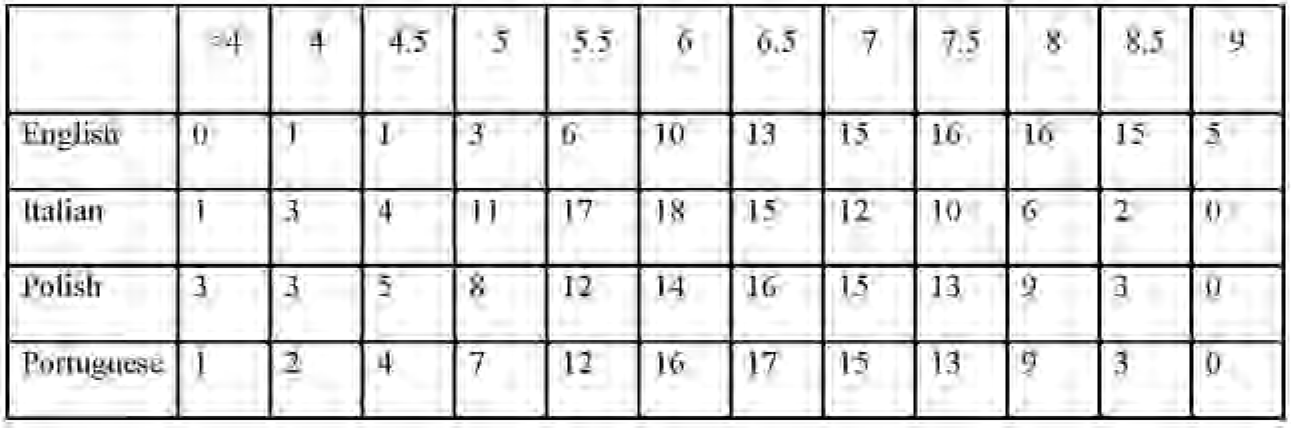
85 Given this description of the minimum language requirements and the fact that a benchmark of only 4 or 5 is required on a 12 point scale, and absent any evidence from the Plaintiffs to the contrary, the Court cannot conclude that the IELTS requires a "high proficiency" in English, as is alleged in the Amended Statement of Claim.

86 If the IELTS is culturally biased, as alleged in the Amended Statement of Claim, one would expect to see that English-speaking persons would do significantly better on the tests than persons, like the Plaintiffs, from Italy, Poland, and Portugal. However, the evidence presented by Ms. Tyler does not show that. A chart she attaches as an exhibit showing the 2013 IELTS scoring shows the mean scores by first language:



	Listening	Reading	Writing	Speaking	Overall
English	7.2	6.8	6.9	7.6	7.2
Italian	6.1	6.1	5.8	6.3	6.2
Polish	6.4	6.2	5.9	6.5	6.3
Portuguese	6.4	6.1	6.1	6.7	6.4

87 Perhaps more telling is the band score by percentage:



	<4	4	4.5	5	5.5	6	6.5	7	7.5	8	8.5	9
English	0	1	1	3	6	10	13	15	16	16	15	5
Italian	1	3	4	11	17	18	15	12	10	6	2	0
Polish	3	3	5	8	12	14	16	15	13	9	3	0
Portuguese	1	2	4	7	12	16	17	15	13	9	3	0

88 This last chart shows that very few persons tested whose mother tongue was not English failed to meet the minimum score of 4 or 5. Only 1% of Italian speakers scored less than 4 and only 8% scored less than 5; only 3% of Polish speakers scored less than 4 and only 11% scored less than 5; and only 1% of Portuguese speakers scored less than 4 and only 7% scored less than 5. This shows that the vast majority of test-takers of Italian, Polish, and Portuguese background passed the benchmark required by the Defendants.

89 In my view, the Plaintiffs have not shown that the IETLS is in any manner "unfair" to them based on their background. In particular, given the high test results of persons from Italy, Poland, and Portugal, it cannot be said that the test discriminates against persons from non-English speaking countries. While it is true that a greater percentage of English-speaking candidates pass the benchmarks than non-English-speaking applicants, this can hardly be surprising and more importantly does not in itself establish that there is a bias against non-English speaking applicants.

Ministerial Instructions

90 The Plaintiffs argue that the Ministerial Instructions requiring officers to consider only applications where the language benchmark had been met, were contrary to the Regulations. That allegation cannot succeed. As noted above, subsection 87.3(3) of the Act specifically empowers the Minister to issue instructions.

91 It is also pled that the instructions are *ultra vires* on the basis that they are counter to the express power granted to an officer to make a substituted evaluation pursuant to subsection 87.2(4) of the Regulations.

92 I agree with the Defendants' submission that "delegated or subordinate legislation is presumed to work together" and that the "interpretation that favours coherence will be adopted over an interpretation that generates conflict."

93 The Plaintiffs allege that the Minister in instructing officials not to process an application that fails to meet the language thresholds is acting contrary to subsection 87.2(4) of the Regulations which provides for the possibility of a substituted evaluation. They allege at paragraph 16 of their Amended Statement of Claim:

> The Plaintiffs state that, the Defendant Minister of Immigration, in directing his officers not to open or look at a file under the Federal Skilled Trade Class application under s.87.2(4) of the Regulations, notwithstanding that all the Plaintiffs, through their counsel, had requested substituted evaluation, is knowingly acting contrary to s. 87.2(4) of the Regulations and s.12(2) of the IRPA itself, and is blatantly contravening his clear statutory duty to process, under s 3(1)(f), of the IRPA, with respect these applications with the result that the Plaintiffs have suffered damages, and continue to suffer damages. [emphasis in original deleted]

94 The Plaintiffs have failed to convince me that there is a genuine issue for trial with respect to this allegation.

95 First, subsection 12(2) of the Act provides only that a "foreign national may be selected as a member of the economic class on the basis of their ability to become economically established in Canada" [emphasis added]. Accordingly, even if the Plaintiffs can establish their ability to become economically established in Canada that does not give them a right to be selected. That remains discretionary: there is no obligation or requirement on the Minister to select them.

96 Second, paragraph 3(1)(f) of the Act which sets out its objectives provides that one such objective is "to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society." The Plaintiffs have failed to plead any material fact that would support their claim that in issuing his instructions to process only those applications that meet the minimum language thresholds the Minister has breached this objective of the Act. Indeed it is arguable that the instruction that an applicant must meet the language requirement ensures that an applicant will be integrated more rapidly into Canadian society and thus is fully consistent with this purpose.

97 The Plaintiffs further allege that the Ministerial Instructions are in conflict with the Regulation that provides for substitute evaluation of applications.

98 In my view, there is no obvious conflict between these two provisions. Ministerial instructions are issued by the Minister under subsection 87.3(3) of the Act relating to the processing of FSTC applications to "best support the attainment of the immigration goals established by the Government of Canada" [emphasis added]. This is a far different and much broader goal than that which permits substituted evaluation. Subsection 87.2(4) of the Regulations makes it clear that substitute evaluation is directed to whether the applicant "will become economically established in Canada" [emphasis added].

99 Aside from different goals or purposes, the Ministerial Instruction does not nullify the possibility of possible substitute evaluation, because that option remains available if an application fails to meet any of the other requirements.

Loss or Damage Suffered

100 The Plaintiffs plead that they have suffered damages or loss as a result of the Defendants' actions. They must show that any loss is a direct result of the actions of the Defendants and that they could not avoid or mitigate that loss.

101 In my opinion, even if the Plaintiffs can establish that the IELTS is a higher standard than the Canadian Language Benchmark, as is alleged in paragraph 13 of their pleading, and even if they can establish that their IELTS results caused them damage or loss, they failed to mitigate their damage or loss because they failed to take the CELPIP test.

102 There is no allegation that the CELPIP test was inappropriate, or too high a standard, or focused on "British English" rather than "Canadian English" as is alleged regarding the IELTS. Even if the IELTS results could be said to have caused them loss or damage, they failed to mitigate that loss or damage by taking the CELPIP test. They have not shown that their language abilities would not have met the threshold under that test.

Costs

103 This claim is a proposed class proceeding. Rule 334.39(1) of the *Federal Courts Rules* provides that no costs are to be awarded in a class proceeding, except in the circumstances set out in paragraphs 334.39(1)(a)--(c). In *Paradis Honey Ltd v Canada*, 2014 FC 215 at para 122, the Court held that a motion to strike a statement of claim brought before the action has been certified, does not engage the class action rules and, in particular, the provision of Rule 334.39. The Defendants being successful are entitled to their costs.

ORDER

THIS COURT ORDERS that the Defendants' motion for summary judgment is granted, and this action is dismissed with costs to the Defendants.

R.W. ZINN J.

* * * * *

Appendix "A"

Federal Skilled Trades Class

Member of class

87.2(3) A foreign national is a member of the federal skilled trades class if

(a) following an evaluation by an organization or institution designated under subsection 74(3), they meet the threshold fixed by the Minister under subsection 74(1) for proficiency in either English or French for each of the four language skill areas;

(b) they have, during the five years before the date on which their permanent resident visa application is made, acquired at least two years of full-time work experience, or the equivalent in part-time work, in the skilled trade occupation specified in the application after becoming qualified to independently practice the occupation, and during that period of employment has performed

(i) the actions described in the lead statement for the occupation as set out in the occupational descriptions of the *National Occupational Classification*, and

(ii) a substantial number of the main duties listed in the description of the occupation set out in the *National Occupational Classification*, including all of the essential duties;

(c) they have met the relevant employment requirements of the skilled trade occupation specified in the application as set out in the *National Occupational Classification*, except for the requirement to obtain a certificate of qualification issued by a competent provincial authority; and

(d) they meet at least one of the following requirements:

(i) they hold a certificate of qualification issued by a competent provincial authority in the skilled trade occupation specified in the application,

(ii) they are in Canada and hold a work permit that is valid on the date on which their application is made and, on the date on which the visa is issued, hold a valid work permit or are authorized to work in Canada under section 186, and

(A) the work permit was issued based on a positive determination by an officer under subsection 203(1) with respect to their employment in a skilled trade occupation,

(B) they are working for any employer specified on the work permit, and

(C) they have an offer of employment -- for continuous full-time work for a total of at least one year in the skilled trade occupation that is specified in the application and is in the same minor group set out in the National Occupational Classification as the occupation specified on their work permit -- that is made by up to two employers who are specified on the work permit, none of whom is an embassy, high commission or consulate in Canada or an employer who is referred to in any of subparagraphs 200(3)(h)(i) to (iii), subject to the visa being issued to the foreign national,

(iii) they are in Canada and hold a work permit referred to in paragraph 204(a) or (c) -- that is valid on the date on which their application is received -- and, on the date on which the visa is issued, hold a valid work permit or are authorized to work in Canada under section 186, and the circumstances referred to in clauses (ii)(B) and (C) apply,

(iv) they do not hold a valid work permit or are not authorized to work in Canada under section 186 on the date on which their application is made and

(A) up to two employers, none of whom is an embassy, high commission or consulate in Canada or an employer who is referred to in any of subparagraphs 200(3)(h) (i) to (iii), have made an offer of employment to the foreign national in the skilled trade occupation specified in the application for continuous full-time work for a total of at least one year, subject to the visa being issued to them, and

(B) an officer has approved the offer for full-time work -- based on an assessment provided to the officer by the Department of Employment and Social Development, on the same basis as an assessment provided for the issuance of a work permit, at the request of up to two employers or an officer -- that the requirements set out in subsection 203(1) with respect to the offer have been met, and

(v) they either hold a valid work permit or are authorized to work in Canada under section 186 on the date on which their application for a permanent resident visa is made and on the date on which it is issued, and

(A) the circumstances referred to in clauses (ii)(B) and (C) and subparagraph (iii) do not apply, and

(B) the circumstances referred to in clauses (iv)(A) and (B) apply.

* * *

Travailleurs de métiers spécialisés (fédéral)

Qualité

87.2(3) Fait partie de la catégorie des travailleurs de métiers spécialisés (fédéral) l'étranger qui :

a) a fait évaluer sa compétence en français ou en anglais par une institution ou organisation désignée en vertu du paragraphe 74(3) et qui a obtenu, pour chacune des quatre habiletés langagières, le niveau de compétence établi par le ministre en vertu du paragraphe 74(1);

b) a accumulé, au cours des cinq années qui ont précédé la date de présentation de sa demande de visa de résident permanent, au moins deux années d'expérience de travail à temps plein ou l'équivalent temps plein pour un travail à temps partiel dans le métier spécialisé visé par sa demande après qu'il se soit qualifié pour pratiquer son métier spécialisé de façon autonome, et a accompli pendant cette période d'emploi, à la fois :

(i) l'ensemble des tâches figurant dans l'énoncé principal établi pour le métier spécialisé dans les descriptions des métiers spécialisés de la *Classification nationale des professions*,

(ii) une partie appréciable des fonctions principales du métier spécialisé figurant dans les descriptions des métiers spécialisés de la *Classification nationale des professions*, notamment toutes les fonctions essentielles;

c) satisfait aux conditions d'accès du métier spécialisé visé par sa demande selon la *Classification nationale des professions*, sauf l'exigence d'obtention d'un certificat de compétence délivré par une autorité compétente provinciale;

d) satisfait à au moins l'une des exigences suivantes :

(i) il a obtenu un certificat de compétence délivré par une autorité compétente provinciale pour le métier spécialisé visé par sa demande,

(ii) il se trouve au Canada et est titulaire d'un permis de travail valide au moment de la présentation de sa demande de visa de résident permanent et, au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au Canada au titre de l'article 186, les conditions suivantes étant réunies :

(A) le permis de travail lui a été délivré à la suite d'une décision positive rendue par l'agent conformément au paragraphe 203(1) à l'égard de son emploi dans un métier spécialisé,

(B) il travaille pour un employeur mentionné sur son permis de travail,

(C) il a reçu d'au plus deux employeurs mentionnés sur son permis de travail -- autres qu'une ambassade, un haut-commissariat ou un consulat au Canada ou qu'un employeur visé à l'un des sous-alinéas 200(3)h) (i) à (iii) -- sous réserve de la délivrance du visa de résident permanent, une offre d'emploi à temps plein pour une durée continue totale d'au moins un an pour le métier spécialisé visé par sa demande et faisant partie du même groupe intermédiaire, prévu à la *Classification nationale des professions*, que le métier mentionné sur son permis de travail,

(iii) il se trouve au Canada et est titulaire du permis de travail visé par un des alinéas 204a) ou c), lequel est valide au moment de la présentation de sa demande de visa de résident permanent et, au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au titre de l'article 186, et les conditions visées aux divisions (ii)(B) et (C) sont réunies,

iv) il n'est pas titulaire d'un permis de travail valide ou n'est pas autorisé à travailler au Canada au titre de l'article 186 au moment de la présentation de sa demande de visa permanent, et les conditions suivantes sont réunies :

(A) au plus deux employeurs -- autres qu'une ambassade, un haut-commissariat ou un consulat au Canada ou qu'un employeur visé à à l'un des sous-alinéas 200(3)h)(i) à (iii) -- ont présenté à l'étranger une offre d'emploi à temps plein d'une durée continue totale d'au moins un an pour le métier spécialisé visé dans la demande, sous réserve de la délivrance du visa de résident permanent,

(B) un agent a approuvé cette offre d'emploi sur le fondement d'une évaluation -- fournie par le ministère de l'Emploi et du Développement social à la demande d'un ou de deux employeurs ou d'un agent, au même titre qu'une évaluation fournie pour la délivrance d'un permis de travail -- qui énonce que les exigences prévues au paragraphe 203(1) sont remplies à l'égard de l'offre,

(v) au moment de la présentation de sa demande de visa de résident permanent et au moment de la délivrance du visa, il est titulaire d'un permis de travail valide ou est autorisé à travailler au Canada au titre de l'article 186, et les conditions suivantes sont réunies :

(A) les conditions visées aux divisions (ii)(B) et (C) et au sous-alinéa (iii) ne sont pas remplies,

(B) les conditions visées aux divisions (iv)(A) et (B) sont réunies.

End of Document

Committe for Monetary and Economic Reform v. Canada, [2015] F.C.J. No. 59

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

Ryer, Webb and Boivin JJ.A.

Heard: January 26, 2015.

Judgment: January 26, 2015.

Docket: A-228-14

[2015] F.C.J. No. 59 | [2015] A.C.F. no 59 | 2015 FCA 20 | 2015 CarswellNat 92 | 249 A.C.W.S. (3d) 309 | 468 N.R. 197

Between Committee for Monetary and Economic Reform ("Comer"), William Krehm, and Ann Emmett, Appellants/Respondents in the Cross-Appeal, and Her Majesty the Queen, The Minister or Finance, The Minister of National Revenue, The Bank of Canada, The Attorney General of Canada, Respondents/Appellants in the Cross-Appeal

(5 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Amendment of — Statement of claim — Leave to amend — Striking out pleadings or allegations — Appeal and cross-appeal from order striking statement of claim with leave to amend dismissed — Prothonotary initially struck plaintiffs' amended statement of claim without leave to amend — Federal Court judge considered issue de novo and struck pleading, but granted leave to amend — Judge did not make any error warranting appellate intervention in either appeal or cross-appeal.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, SOR/98-106, Rule 51, Rule 51(1)

Appeal From:

Appeal from an order of the Honourable Mr. Justice Russell of the Federal Court, dated April 24, 2014, in Docket No. T-2010-11.

Counsel

Rocco Galati, for the Appellants/Respondents in the Cross-Appeal.

Peter Hajecek, for the Respondents/Appellants in the Cross-Appeal.

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

RYER J.A.

1 The appeal and the cross-appeal relate to a decision of Russell, J. of the Federal Court (2014 FC 380) on a Motion made under Rule 51 of the *Federal Courts Rules* R. 51(1), SOR/98-106, appealing an Order of Prothonotary Aalto (2013 FC 855) which struck out the Amended Statement of Claim of Committee for Monetary and Economic Reform ("COMER"), William Krehm and Ann Emmett, the Appellants in the appeal, without leave to amend.

2 The Judge determined that he was required to consider the issues *de novo*, affording no deference to the Prothonotary's findings. He then found, in paragraph 64 of his reasons that:

> The role of the Court is to decide whether the Plaintiff's allegations have any factual and legal base to them, or more precisely in a motion to strike under Rule 221, whether the claims made in the Plaintiffs' claim have any reasonable prospect of success, or whether it is plain and obvious on the facts pleaded, that the claim cannot succeed.

3 After conducting his *de novo* reconsideration of the issues on the basis of this understanding of the test in Rule 221, the Judge concluded that the Amended Statement of Claim should be struck in its entirety. However, he granted leave to amend.

4 This Court may only interfere with the decision of the Judge if it was arrived at on a wrong basis or was plainly wrong: see *Z.I. Pompey Industrie v. ECU-Line N.V.*, at para 18 [2003] 1 S.C.R. 450, 2003 SCC 27. This standard of review requires us to afford deference to the Judge's decision.

5 Notwithstanding the able arguments of counsel, we have not been persuaded that the Judge made any error that would warrant our intervention in either the appeal or the cross-appeal. Accordingly, the appeal and the cross-appeal will be dismissed without costs. The Appellants are granted 60 days from the date hereafter to make amendments to the Amended Statement of Claim.

RYER J.A.

End of Document

Committee for Monetary and Economic Reform v. Canada, [2016] F.C.J. No. 185

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: October 14, 2015.

Judgment: February 8, 2016.

Docket: T-2010-11

[2016] F.C.J. No. 185 | [2016] A.C.F. no 185 | 2016 FC 147 | 351 C.R.R. (2d) 1

Between Committee for Monetary and Economic Reform ("Comer"), William Krehm, and Ann Emmett, Plaintiffs, and Her Majesty the Queen, The Minister of Finance, The Minister of National Revenue, The Bank of Canada, The Attorney General of Canada, Defendants

(147 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Motion by defendants to strike amended statement of claim allowed — Plaintiff, an economic think tank and its members, took issued with way in which budget was presented sought various declarations concerning defendants failure to provide interest-free loans to all levels of government for human capital expenditures — Claims regarding taxations without representation issue disclosed no reasonable cause of action and had no chance of success — Court did not have jurisdiction to grant free-standing requests for jurisdiction.

Motion by the defendants to strike the plaintiffs' amended statement of claim. The plaintiff, Committee for Monetary and Economic Reform ("COMER") was an economic think-tank dedicated to research and publication on issues of monetary and economic reform in Canada. The individual plaintiffs were members of COMER who had an interest in economic policy. The plaintiffs took issue with the way in which the Minister of Finance presented the budget. They sought a series of declarations that the defendants had failed to fulfill their legal duties to provide interest free loans to federal, provincial and municipal governments for the purpose of human capital expenditures resulting in lower human capital expenditures, that the Government of Canada used flawed accounting methods in relation to public finances thereby understating the benefit of human capital expenditures and undermining Parliament's role as guardian of the public purse and that those and other harms were the result of Canadian fiscal and monetary policy being controlled, in part, by private foreign interests through Canada's involvement in international monetary and financial institutions. They also sought damages of $10,000 for each of the individual plaintiffs for breach of their constitutional right of no taxation without representation and the infringement of the right to vote due to alleged constitutional breaches by the Minister, and the return of the portion of illegal and unconstitutional tax paid by each individual plaintiff. The defendants sought to strike the amended statement of claim on the grounds that it failed to comply with the leave to amend granted and failed to remedy the problems identified, it sought to add parties, it failed to disclose a reasonable cause of action, it was scandalous, frivolous or vexatious, it was an abuse of process, it failed to disclose facts which would show a breach of the plaintiffs' rights, the causal link between any action or inaction of the defendants and the alleged infringement was too speculative, it sought declaratory relief that was not available, the plaintiffs were not entitled to seek an advisory opinion from the court, it sought to adjudicate matters that were not justiciable, it sought to fetter the sovereignty of Parliament, the plaintiffs did not

have a s. 3 Charter right to any particular form of taxation, it concerned matters outside the jurisdiction of the court and the plaintiffs did not have standing to bring the claim as of right and did not meet the requirements of public interest standing.
HELD: Application allowed.

The amended statement of claim disclosed no reasonable cause of action and had no prospect of success at trial. The central allegation, that MPs were voting blind and had been hoodwinked by the Minister, was a bald assertion unsupported by facts. Furthermore, the plaintiffs had no right to insist that Parliament debate and pass budgets only in accordance with practices and procedures they approved of an advocated. There was no breach of s. 3 of the Charter as if they individual plaintiffs had a right to vote, they were fully represented in Parliament and it was Parliament that decided whether or not to pass the budget. The Court could not interfere with the way in which Parliament went about its business. With respect to the Bank Act issues, the plaintiffs had not resolved the problems of justiciability and jurisdiction that arose in the original statement of claim. The court did not have the jurisdiction to provide the plaintiffs with the declarations they sought. The plaintiffs had not leaded facts to demonstrate a real issue concerning the relative interests of each party and the nexus of that issue to the plaintiffs and their claim for relief. The legal issues were theoretical with no nexus to some interest of the plaintiffs other than an interest in having the court endorse their opinion on the Bank Act issues raised.

Statutes, Regulations and Rules Cited:

Bank of Canada Act, RSC 1985, c B-2, s. 18, s. 18(i), s. 18(j), s. 18(m), s. 24, s. 30.1

Bill of Rights of 1689, 1 Will & Mar sess 2, c 2, Art 9

Canadian Charter of Rights and Freedoms, 1982, s. 3, s. 7, s. 9, s. 15

Constitution Act, 1867, s. 53, s. 54, s. 90, s. 91, s. 91(1) (a), s. 91(3), s. 91(6), s. 91(14), s. 91(15), s. 91(16), s. 91(18), s. 91(19), s. 91(20), s. 101

Constitution Act, 1982, s. 36

Federal Courts Act, RSC 1985, c F-7, s. 17, s. 18, s. 18.1, s. 18.4(2)

Federal Court Rules, SOR/98-106, Rule 64, Rule 174, Rule 221

Parliament of Canada Act, RSC 1985, c P-1, s. 4, s. 5

Counsel

Rocco Galati, for the Plaintiffs.

Peter Hajecek, for the Defendants.

ORDER AND REASONS

RUSSELL J.

I. INTRODUCTION

1 This is a motion by the Defendants under Rule 221 of the *Federal Court Rules*, SOR/98-106 [*Rules*] to strike the Plaintiffs' Amended Statement of Claim of March 26, 2015 [Amended Claim].

II. BACKGROUND

2 The Plaintiff, Committee for Monetary and Economic Reform [COMER], is an economic "think-tank" based in Toronto. COMER was established in 1970 and is dedicated to research and publications on issues of monetary and economic reform in Canada. The individual Plaintiffs are members of COMER who have an interest in economic policy.

A. *History of the Litigation*

3 This litigation was commenced on December 12, 2011, with the filing of the original Statement of Claim, which was amended in minor ways on January 19, 2012 [Original Claim].

4 On August 9, 2013, the Original Claim was struck out in its entirety by Prothonotary Aalto, without leave to amend. Upon appeal from the decision of the Prothonotary, I struck the Original Claim in its entirety, but with leave to amend, by way of order on April 24, 2014 [Order of April 24, 2014].

5 Appeal and cross-appeals of my Order of April 24, 2014 were dismissed by the Federal Court of Appeal on January 26, 2015. The Plaintiffs filed the Amended Claim on March 26, 2015. The Defendants now move to strike out this Amended Claim.

B. *The Amended Claim*

6 The Plaintiffs' Amended Claim, while an amended version of the Original Claim, continues to seek a series of declarations relating to three basic assertions, as noted in my previous Order of April 24, 2014: first, that the *Bank of Canada Act*, RSC, 1985, c B-2 [*Bank Act*] provides for interest-free loans to the federal, provincial and municipal governments for the purposes of "human capital expenditures," and the Defendants have failed to fulfill their legal duties to ensure such loans are made, resulting in lower human capital expenditures by governments to the detriment of all Canadians; second, that the Government of Canada uses flawed accounting methods in relation to public finances, thereby understating the benefit of "human capital expenditures" and undermining Parliament's constitutional role as the guardian of the public purse; and third, that these and other harms are the result of Canadian fiscal and monetary policy being, in part, controlled by private foreign interests through Canada's involvement in international monetary and financial institutions.

7 The pleadings of fact which accompany the Amended Claim define "human capital expenditures" as those that encourage the qualitative and quantitative progress of a nation by way of the promotion of the health, education and quality of life of individuals, in order to make them more productive economic actors, through institutions such as schools, universities, hospitals and other public infrastructures. The Plaintiffs state that investment in human capital is the most productive investment and expenditure a government can make.

8 The Amended Claim seeks nine declarations. The first is that ss 18(i) and (j) of the *Bank Act* require the Minister of Finance [Minister] and the Government of Canada to request, and the Bank of Canada to provide, interest-free loans for the purpose of human capital expenditures to all levels of government (federal, provincial and municipal).

9 Second, the Plaintiffs ask the Court to declare that the Defendants have not only abdicated their statutory and constitutional duties with respect to ss 18(i) and (j) of the *Bank Act*, but that they have also, by way of a refusal to request and make interest-free loans under ss 18(i) and (j), caused a negative and destructive impact on Canadians through the disintegration of Canada's economy, its financial institutions, increases in public debt, a decrease in social services, as well as a widening gap between rich and poor, with the continuing disappearance of the middle class. In the accompanying facts to their Amended Claim, the Plaintiffs use a June 11, 2014 request of the Town of Lakeshore, Ontario as an example of an occasion when the Minister refused a request for an interest-free loan without regard to either the nature of the request or pertinent provisions of the *Bank Act*. The Plaintiffs say that the Minister's reasons for refusing the Town of Lakeshore's request are both financially and economically fallacious and not in accordance with statutory duties.

10 Third, the Plaintiffs seek a declaration that s 18(m) of the *Bank Act*, and its administration and operation, is unconstitutional and of no force and effect. They say the Defendants have abdicated their constitutional duties and handed them over to international, private entities whose interests have, in effect, been placed above those of Canadians and the primacy of the Canadian Constitution. The Plaintiffs state that no sovereign government such as Canada should ever borrow money from commercial banks at interest, when it can borrow from its own central bank interest-free, particularly when that central bank, unlike the banks of any other G-8 nation, is publically established, mandated, owned and accountable to Parliament and the Minister, and was created with that purpose as one of its main functions.

11 Fourth, the Plaintiffs ask the Court to declare that the fact that the minutes of meetings involving the Governor of the Bank of Canada [Governor] and other G-8 central bank governors have been kept secret is *ultra vires* the Governor, as being contrary to the *Bank Act* -- particularly s 24 -- and ought to be considered unconstitutional conduct.

12 The fifth declaration sought is that, by allowing the Governor to keep the nature and content of international bank meetings secret, by not exercising the authority and duty contained in ss 18(i) and (j) of the *Bank Act,* and in enacting s 18(m) of the *Bank Act*, Parliament has abdicated its duties and functions as mandated by ss 91(1)(a), (3), (14), (15), (16), (18), (19), (20) of the *Constitution Act, 1867,* as well as s 36 of the *Constitution Act, 1982.*

13 The Plaintiffs' sixth and seventh declarations involve the manner in which the Minister accounts for public finances, which the Plaintiffs say is conceptually and logically wrong. The Plaintiffs seek a declaration that the Minister is required to list human capital expenditures -- including those related to infrastructure as "assets" rather than "liabilities" in budgetary accounting -- as well as all revenues prior to the return of tax credits to individual and corporate tax payers, then subtract tax credits, then subtract total expenditures in order to arrive at an annual "surplus" or "deficit," as required by s 91(6) of the *Constitution Act, 1867*.

14 The eighth declaration sought is that taxes imposed to pay for the interest on the deficit and the debt to private bankers, both domestic and foreign, are illegal and unconstitutional. The Plaintiffs claim that this is the result of a breach of the constitutional right(s) to "no taxation without representation" which occurs when the Minister fails to disclose anticipated revenues to Parliament before the return of anticipated tax credits, prior to determining whether an anticipated surplus or deficit will be incurred, in the tabling of the budget. This means that a full and proper Parliamentary debate cannot properly take place, thus breaching the right to no taxation without representation under both ss 53 and 90 of the *Constitution Act, 1867*, as well as the unwritten constitutional imperatives to the same effect. Also, it results in an infringement of the Plaintiffs' right to vote under s 3 of the *Charter*, which is tied to the right to no taxation without representation with respect to the Minister's constitutional violations. The result is a breach of the terms of the *Bank Act* relating to interest-free loans and the consequent constitutional violations by the Executive of its duty to govern, and its relinquishing of sovereignty and statutory decision-making to private foreign bankers.

15 The ninth and final declaration sought is that the "privative clause" in s 30.1 of the *Bank Act* either (a) does not apply to prevent judicial review, by way of action or otherwise, with respect to statutorily or constitutionally *ultra vires* actions, or to prevent the recovery or damages based on such actions; or (b) if it does prevent judicial review and recovery, is unconstitutional and of no force and effect, as breaching the Plaintiffs' constitutional right to judicial review and the underlying constitutional imperatives of the rule of law, Constitutionalism and Federalism.

16 Besides the declaratory relief sought, the Plaintiffs also in the Amended Claim request damages in the amount of $10,000.00 each for individual Plaintiff: William Krehm, Anne Emmett, and for ten COMER Steering Committee [Steering Committee] members named in the Amended Claim, for the breach of their constitutional right of "no taxation without representation" and the inseparable infringement of the right to vote due to alleged constitutional breaches by the Minister. Further, the Plaintiffs request the return of the portion of illegal and unconstitutional tax, to be calculated and calibrated at trial, for each of the Plaintiffs and the members of the Steering Committing, consisting of the proportion of taxes to pay interest charges on the deficit, and debt between 2011 and the time of trial, paid by the Plaintiffs and Steering Committee members, due to the statutory and constitutional breaches of the Defendants' rights in refusing and/or failing to cover deficits in the budget by way of interest-free loans, as well as the breach of their right to no taxation without representation, to be calculated by the compounded interest changes set out in the budget, as a percentage of the budget, calculated as the same percentage paid by the Plaintiffs and Steering Committee members, to be calculated at trial.

III. ISSUES

17 The Defendants have brought a motion to strike the Amended Claim on the grounds that, *inter alia*:

1. it fails to comply with the leave to amend granted and fails to remedy the problems identified in the Order of April 24, 2014;
2. it seeks to add parties and new claims that are not permissible by virtue of the leave to amend and the *Rules*;
3. it fails to disclose a reasonable cause of action against the Defendants, or any one of them;
4. it is scandalous, frivolous or vexatious;
5. it is an abuse of process of the Court;
6. it fails to disclose facts which would show that the action or inaction of the Defendants, or any one of them, could cause an infringement of the Plaintiffs' rights under the *Charter* or the Constitution;
7. the causal link between the alleged action or inaction of the Defendants or any one of them, and the alleged infringement of the Plaintiffs' rights is too uncertain, speculative and hypothetical to sustain a cause of action;
8. it seeks declaratory relief only available under s 18.1 of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*] and in any event such relief is not available to the Plaintiffs;
9. the Plaintiffs are not entitled to seek an advisory opinion from the Court;
10. it seeks to adjudicate matters that are not justiciable;
11. it seeks to impose a fetter on the sovereignty of Parliament and seeks to overrule or disregard the privilege of the House of Commons over its own debates and internal procedures;
12. the Plaintiffs do not have a s 3 *Charter* right to any particular form of taxation and there is no causal connection, or legitimate expectation between their vote and the presentation of a budget before the House of Commons and resulting legislation;
13. it concerns matters outside the jurisdiction of the Court; and
14. the Plaintiffs do not have standing to bring the Amended Claim as of right, nor can they meet the necessary requirements for the grant of public interest standing.

IV. STATUTORY PROVISIONS

18 The following provisions of the *Bank Act* are applicable in these proceedings:

Powers and business

18. The Bank may

[...]

(i) make loans or advances for periods not exceeding six months to the Government of Canada or the government of a province on taking security in readily marketable securities issued or guaranteed by Canada or any province;

(j) make loans to the Government of Canada or the government of any province, but such loans outstanding at any one time shall not, in the case of the Government of Canada, exceed one-third of the estimated revenue of the Government of Canada for its fiscal year, and shall not, in the case of a provincial government, exceed one-fourth of that government's estimated revenue for its fiscal year, and such loans shall be repaid before the end of the first quarter after the end of the fiscal year of the government that has contracted the loan;

[...]

(m) open accounts in a central bank in any other country or in the Bank for International Settlements, accept deposits from central banks in other countries, the Bank for International Settlements, the International Monetary Fund, the International Bank for Reconstruction and Development and any other official international financial organization, act as agent or mandatary, or depository or correspondent for any of those banks or organizations, and pay interest on any of those deposits;

[...]

Fiscal agent of Canadian Government

24. (1) The Bank shall act as fiscal agent of the Government of Canada.

Charge for acting

(1.1) With the consent of the Minister, the Bank may charge for acting as fiscal agent of the Government of Canada.

To manage public debt

(2) The Bank, if and when required by the Minister to do so, shall act as agent for the Government of Canada in the payment of interest and principal and generally in respect of the management of the public debt of Canada.

Canadian Government cheques to be paid or negotiated at par

(3) The Bank shall not make any charge for cashing or negotiating a cheque drawn on the Receiver General or on the account of the Receiver General, or for cashing or negotiating any other instrument issued as authority for the payment of money out of the Consolidated Revenue Fund, or on a cheque drawn in favour of the Government of Canada or any of its departments and tendered for deposit in the Consolidated Revenue Fund.

[...]

No liability if in good faith

30.1 No action lies against Her Majesty, the Minister, any officer, employee or director of the Bank or any person acting under the direction of the Governor for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties that under this Act are intended or authorized to be executed or performed.

* * *

Pouvoirs

18. La Banque peut :

[...]

i) consentir des prêts ou avances, pour des périodes d'au plus six mois, au gouvernement du Canada ou d'une province en grevant d'une sûreté des valeurs mobilières facilement négociables, émises ou garanties par le Canada ou cette province;

j) consentir des prêts au gouvernement du Canada ou d'une province, à condition que, d'une part, le montant non remboursé des prêts ne dépasse, à aucun moment, une certaine fraction des recettes estimatives du gouvernement en cause pour l'exercice en cours -- un tiers dans le cas du Canada, un quart dans celui d'une province -- et que, d'autre part, les prêts soient remboursés avant la fin du premier trimestre de l'exercice suivant;

[...]

m) ouvrir des comptes dans une banque centrale étrangère ou dans la Banque des règlements internationaux, accepter des dépôts -- pouvant porter intérêt -- de banques centrales étrangères, de la Banque des règlements internationaux, du Fonds monétaire international, de la Banque internationale pour la reconstruction et le développement et de tout autre organisme financier international officiel, et leur servir de mandataire, dépositaire ou correspondant;

[...]

Agent financier du gouvernement canadien

24. (1) La Banque remplit les fonctions d'agent financier du gouvernement du Canada.

Honoraires

(1.1) La Banque peut, avec le consentement du ministre, exiger des honoraires pour remplir de telles fonctions.

Gestion de la dette publique

(2) Sur demande du ministre, la Banque fait office de mandataire du gouvernement du Canada pour la gestion de la dette publique, notamment pour le paiement des intérêts et du principal de celle-ci.

Encaissement des chèques du gouvernement canadien

(3) La Banque ne peut exiger de frais pour l'encaissement ou la négociation de chèques tirés sur le receveur général ou pour son compte et d'autres effets autorisant des paiements sur le Trésor, ni pour le dépôt au Trésor de chèques faits à l'ordre du gouvernement du Canada ou d'un ministère fédéral.

[...]

Immunité judiciaire

30.1 Sa Majesté, le ministre, les administrateurs, les cadres ou les employés de la Banque ou toute autre personne agissant sous les ordres du gouverneur bénéficient de l'immunité judiciaire pour les actes ou omissions commis de bonne foi dans l'exercice -- autorisé ou requis -- des pouvoirs et fonctions conférés par la présente loi.

19 The following provisions of the *Constitution Act, 1867*, are applicable in these proceedings:

Appropriation and Tax Bills

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Recommendation of Money Votes

54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed.

[...]

Application to Legislatures of Provisions respecting Money Votes, etc.

90. The following Provisions of this Act respecting the Parliament of Canada, namely, -- the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, -- shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

[...]

1A. The Public Debt and Property. (45)

[...]

3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.

[...]

6. The Census and Statistics.

[...]

14. Currency and Coinage.

[...]

16. Savings Banks.

[...]

18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.

[...]

* * *

Bills pour lever des crédits et des impôts

53. Tout bill ayant pour but l'appropriation d'une portion quelconque du revenu public, ou la création de taxes ou d'impôts, devra originer dans la Chambre des Communes.

Recommandation des crédits

54. Il ne sera pas loisible à la Chambre des Communes d'adopter aucune résolution, adresse ou bill pour l'appropriation d'une partie quelconque du revenu public, ou d'aucune taxe ou impôt, à un objet qui

n'aura pas, au préalable, été recommandé à la chambre par un message du gouverneur-général durant la session pendant laquelle telle résolution, adresse ou bill est proposé.

[...]

Application aux législatures des dispositions relatives aux crédits, etc.

90. Les dispositions suivantes de la présente loi, concernant le parlement du Canada, savoir: -- les dispositions relatives aux bills d'appropriation et d'impôts, à la recommandation de votes de deniers, à la sanction des bills, au désaveu des lois, et à la signification du bon plaisir quant aux bills réservés, -- s'étendront et s'appliqueront aux législatures des différentes provinces, tout comme si elles étaient ici décrétées et rendues expressément applicables aux provinces respectives et à leurs législatures, en substituant toutefois le lieutenant-gouverneur de la province au gouverneur-général, le gouverneur-général à la Reine et au secrétaire d'État, un an à deux ans, et la province au Canada.

Autorité législative du parlement du Canada

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

[...]

1A. La dette et la propriété publiques. (45)

[...]

3. Le prélèvement de deniers par tous modes ou systèmes de taxation.

4. L'emprunt de deniers sur le crédit public.

[...]

6. Le recensement et les statistiques.

[...]

14. Le cours monétaire et le monnayage.

[...]

16. Les caisses d'épargne.

[...]

18. Les lettres de change et les billets promissoires.

19. L'intérêt de l'argent.

20. Les offres légales.

[...]

20 The following provisions of the *Constitution Act, 1982*, are applicable in these proceedings:

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[...]

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[...]

Commitment to promote equal opportunities

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

Commitment respecting public services

(2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

* * *

Droits démocratiques des citoyens

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[...]

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[...]

Engagements relatifs à l'égalité des chances

36. (1) Sous réserve des compétences législatives du Parlement et des législatures et de leur droit de les exercer, le Parlement et les législatures, ainsi que les gouvernements fédéral et provinciaux, s'engagent à :

a) promouvoir l'égalité des chances de tous les Canadiens dans la recherche de leur bien-être;

b) favoriser le développement économique pour réduire l'inégalité des chances;

c) fournir à tous les Canadiens, à un niveau de qualité acceptable, les services publics essentiels.

Engagement relatif aux services publics

(2) Le Parlement et le gouvernement du Canada prennent l'engagement de principe de faire des paiements de péréquation propres à donner aux gouvernements provinciaux des revenus suffisants pour les mettre en mesure d'assurer les services publics à un niveau de qualité et de fiscalité sensiblement comparables.

21 The following provision of the *Rules* is applicable in these proceedings:

Motion to Strike

221.(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,

(b) is immaterial or redundant

(c) is scandalous, frivolous or vexatious,

(d) may prejudice or delay the fair trial of the action,

(e) constitutes a departure from a previous pleading, or

(f) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgement entered accordingly.

* * *

Requête en radiation

221.(1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :

(a) qu'il ne révèle aucune cause d'action ou de défense valable.

(b) qu'il n'est pas pertinent ou qu'il est redondant ;

(c) qu'il est scandaleux, frivole ou vexatoire ;

(d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;

(e) qu'il diverge d'un acte de procédure antérieur ;

(f) qu'il constitue autrement un abus de procédure.

Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

V. ARGUMENT

A. *Defendants' Submissions on the Motion*

(1) The Test on a Motion to Strike

22 The Defendants say that the test to strike out a pleading under Rule 221 is whether it is plain and obvious on the facts pleaded that the action cannot succeed: *Sivak et al v The Queen et al,* 2012 FC 272 at para 15 [*Sivak*]; *R v Imperial Tobacco Canada Ltd,* 2011 SCC 42 at para 17 [*Imperial Tobacco*]. While there is a rule that material facts in a statement of claim should be taken as true when determining whether the claim discloses a reasonable cause of action, this does not require the court to accept at face value bare assumptions or allegations which may be regarded as scandalous, frivolous or vexatious, or legal submissions dressed up as facts: *Operation Dismantle v*

The Queen, [1985] 1 SCR 441 at para 27 [*Operation Dismantle*]; *Carten v Canada*, 2009 FC 1233 at para 31 [*Carten*].

(2) Reasonable Cause of Action

23 The *Rules* require that the pleading of material facts disclose a reasonable cause of action. A pleading must: (i) state facts and not merely conclusions of law; (ii) include material facts; (iii) state facts and not the evidence by which they are to be proved; and (iv) state facts concisely in a summary form: *Carten*, above; *Sivak*, above; Rules 174 and 181 of the *Rules*. The Plaintiffs' Amended Claim fails to do this. Its allegations do not provide the necessary elements of each cause of action together with the material facts. Furthermore, it is not clear if the Plaintiffs continue to rely on the allegations of conspiracy and misfeasance as facts to support these allegations are not included in the pleadings. As a result, it cannot be said that the Amended Claim's assertions result in the liability of the Defendants, or any one of them.

24 The Amended Claim includes amendments that are not permissible under the *Rules:* new parties (the Steering Committee members) and a cause of action not grounded in the facts already pleaded (the allegation of a breach of s 3 *Charter* rights) have been added. The Defendants further argue that the Amended Claim breaches the terms of the permission to amend by failing to cure the problems identified in the Order of April 24, 2014.

25 The Defendants say that there is no constitutional duty to present the federal budget in the manner sought by the Plaintiffs. As a result, no breach of the principle of no taxation without representation has occurred. The Supreme Court of Canada has held that no taxation without representation means that the Crown may not levy a tax without the authority of Parliament: *Kingstreet Investments v New Brunswick*, [2007] 1 SCR 3 at para 14; *Constitution Act, 1867*, ss 53 and 90. The present circumstances suggest that this constitutional requirement has been satisfied.

26 As the master of its own procedure, Parliament cannot be said to have a duty to legislate. No cause of action can result from failing to enact a law: *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 354-355 [*NB Broadcasting*]; *Telezone Inc v Canada (Attorney General)*, [2004] OJ No 5, 69 OR (3d) 161 (CA) [*Telezone*]; *Lucas v Toronto Services Board*, 51 OR (3d) 783 at para 10; *Moriss v Attorney General*, [1995] EWJ No 297 (England and Wales Court of Appeal) at para 38.

27 Citing s 91(6) of the *Constitution Act, 1867*, the Plaintiffs allege that the accounting method employed in the budgetary process is unconstitutional. However, this subsection, "the Census and Statistics," is simply one of the classes of subjects enumerated in s 91 over which Parliament has exclusive legislative authority; it does not impose a duty to legislate and, as such, is of little help to the Plaintiffs. The Defendants point out that, in any event, much of what is being sought by the Plaintiffs is publically available from the Department of Finance. For example, *Tax Expenditures and Evaluations 2012* can be found online at http://www.fin.gc.ca/taxexp-depfisc/2012/taxexp12-eng.asp.

28 With respect to the Plaintiffs' legitimate expectations argument, the Defendants state that it falls under the doctrine of fairness or natural justice, and does not create substantive rights: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26. The only procedure due to a Canadian citizen is that proposed legislation receive three readings in the House of Commons and the Senate and that it receive Royal Assent: *Authorson v Canada (Attorney General)*, 2003 SCC 39 [*Authorson*]. The procedural rights described by the Plaintiffs have never existed: *Penikett v The Queen*, 1987 CanLII 145 (YK CA) at 17-18.

29 The Defendants say that the Plaintiffs' reliance on the *Magna Carta* does not assist them. While the document holds a seminal place in the development of Canadian constitutional principles, it has been displaced by legislation in both the United Kingdom and Canada. It has no contemporary independent legal significance or weight and is therefore "amenable to ordinary legislative change": *Rocco Galati et al v Canada,* 2015 FC 91 at para 74 [*Galati*].

30 Parliamentary privilege, including its corresponding powers and immunities, ensures the proper functioning of

Parliament and is one of the ways in which the constitutional separation of powers is respected: *Telezone*, above, at para 13; *Canada (House of Commons) v Vaid*, 2005 SCC 30 at para 21 [*Vaid*]. In *Authorson*, above, the Supreme Court affirmed its decision in *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753, indicating that the way in which a legislative body proceeds is a matter immune from judicial review and is one of self-definition and inherent authority. The United Kingdom *Bill of Rights of 1689*, 1 Will & Mar sess 2, c 2, partially codifies parliamentary privilege at article 9, precluding any court from impeaching or questioning the freedom of speech and debates or proceedings in Parliament: *Prebble v Television New Zealand,* [1994] UKPC 3, [1995] 1 AC 321 (JCPC); *Hamilton v al Fayed*, [2000] 2 All ER 224 (HL) [*Hamilton v al Fayed*].

31 Once a category of privilege is established, it is not the courts but Parliament that may determine whether a particular exercise of privilege is necessary or appropriate: *Parliament of Canada Act*, RSC 1985, c P-1, ss 4-5 [*Parliament of Canada Act*]; *Pickin v British Railways Board*, [1974] AC 765 (HL) at 790; *Vaid*, above, at para 29. Recognized categories of privilege include freedom of speech and control over debates and proceedings in Parliament: *Vaid*, above. The Defendants assert that the budget debate, its presentation, supporting papers and associated legislation fall under this category of privilege: *Roman Corp v Hudon's Bay Oil & Gas Co,* [1973] SCR 820 at 827-828; *NB Broadcasting,* above.

32 By virtue of ss 53 and 54 of the *Constitution Act, 1867*, "Money Bills" must originate in the House of Commons, and the Governor General must grant a recommendation for the expenditure of public funds. There is no suggestion in the Amended Claim that these requirements have not been satisfied.

33 COMER, as an unincorporated association, cannot benefit from the protection provided for the electoral rights of citizens provided by s 3 of the *Charter*. While this protection could apply to the two individual Plaintiffs, provided they are Canadian citizens, neither has plead such a cause of action. The Amended Claim makes no suggestion that the Plaintiffs' access to "meaningful participation" in the electoral process -- what the Supreme Court has determined is protected by s 3 -- has been in any way affected: *Figueroa v Canada (Attorney General*), [2003] 1 SCR 912 at para 27.

34 In order for a cause of action to be brought under the *Charter*, at least a threat of violation of a *Charter* right must be established: *Operation Dismantle*, above, at para 7. The Amended Claim does not demonstrate a link between the actions of any of the Defendants and the alleged s 3 harms. The Defendants further submit that s 3 has never been interpreted to encompass any rights or legitimate expectations that a claimant's elected representatives will enact any particular measures or refrain from doing so.

35 With respect to the Plaintiffs' damages claim for the return of allegedly unconstitutional taxes, the Defendants assert that no factual support has been brought forward to support such a claim.

36 The Defendants also address several other allegations in the Amended Claim. As regards the alleged misfeasance by public officers in the withholding of anticipated total revenue, the Defendants say that the necessary elements of the tort -- including any alleged state of mind of a person involved, wilful default, malice or fraudulent intention -- are not made out: *St John's Port Authority v Adventure Tours Inc*, 2011 FCA 198 at para 25. Of note is the absence of facts that would support a finding of deliberate and unlawful misconduct of a public officer, or that a public officer was aware that his or her conduct was unlawful and likely to harm the Plaintiffs: *Odhavji v Woodhouse*, 2003 SCC 69 at paras 23, 28-29. In terms of the nominate tort of statutory breach, the Supreme Court of Canada has established that it does not exist: *The Queen v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at 225. Even so, the remedy for a breach of statutory duty by a public authority is judicial review for invalidity: *Holland v Saskatchewan*, 2008 SCC 42 at para 9.

37 The Plaintiffs also make a claim of conspiracy, but again fail to plead the material facts necessary to support such an allegation, such as the identity of the officials engaged in the conduct, the type of agreement entered into, the time the agreement was reached, the lawful or unlawful means that were to be used, and the nature of the intended injury to the Plaintiffs. Other requirements that are missing include an agreement between two or more persons and intent to injure: G.H.L. Fridman, *Introduction to the Canadian Law of Torts*, 2nd ed (Markham: Butterworths, 2003) at 185.

38 The Plaintiffs plead that, through s 24 of the *Bank Act*, Parliament has allowed the impugned actions by the Government of Canada. However, the Defendants point out that this provision has nothing to do with the keeping of minutes by the Bank. In addition, the Plaintiffs have not provided the grounds necessary to demonstrate how s 30.1, which provides that no action lies against the Crown, the Minister of Finance and officials of the Bank of Canada for anything done or omitted to be done in good faith in the administration or discharge of any powers or duties under the *Bank Act*, would affect their rights.

(3) Declaratory Relief

39 The Defendants make a series of submissions in relation to the Plaintiffs' claim for declaratory relief. First, they say the Federal Court has jurisdiction to issue declaratory and coercive remedies only as prescribed in the *Federal Courts Act*. Section 18 indicates that extraordinary remedies can only be obtained on an application for judicial review under s 18.1. Subsection 18.4(2) allows the Court to direct that an application for judicial review be treated and proceeded with as an action, but does not authorize the Plaintiffs to initiate a request for declaratory or coercive relief in an action.

40 The requirements for proper judicial review, as set out by s 18.1, include that only someone who is "directly affected by the matter in respect of which relief is sought" may bring an application. The Plaintiffs are not directly affected.

41 The Plaintiffs' claim damages for a "return of the portion of illegal and unconstitutional tax." The Defendants say that it is hard to see how these taxes can be claimed without impugning the legality of the instruments that gave rise to their increase. Additionally, the law is clear that the Plaintiffs may only seek to attack administrative action by state actors by way of judicial review: *Telezone*, above, at para 52.

42 Second, in order to claim declaratory relief, entitlement must be established. The Supreme Court of Canada has held that a declaration of unconstitutionality is a declaratory remedy for the settlement of a real dispute: *Khadr v Canada (Prime Minister),* 2010 SCC 3 [*Khadr*]. Before the court can issue a declaratory remedy, it must have jurisdiction over the issue at bar, the question before the court must be real and not theoretical, and the person raising it must have a real interest in raising it. The Defendants say that the Plaintiffs have not met any of these requirements.

43 Third, the Plaintiffs are not entitled to refer matters for an advisory opinion. As determined in the Order of April 24, 2014, the Plaintiffs are asking that the Court declare that their reading of the *Bank Act* and the Constitution is correct. This is akin to asking the Court for an advisory opinion. Without an adequate description of how a private right or interest has been affected, the Plaintiffs have not demonstrated a statutory grant of jurisdiction by Parliament that the Court can rule on and find that statutory and constitutional breaches have occurred.

44 Fourth, declaratory relief necessitates a real dispute between the parties and cannot be issued in response to one that is merely hypothetical: *Operation Dismantle*, above, at para 33; *Diabo v Whitesand First Nation*, 2011 FCA 96; *Re Danson and the Attorney-General of Ontario*, (1987) 60 OR (2d) 676 at 685 (CA). A real dispute is not present here.

45 Fifth, the Plaintiffs have no real interest or right that has been affected by the interpretation or operation of s 18 of the *Bank Act*. As noted in the Order of April 24, 2014, despite claiming to be acting for "all other Canadians," the Plaintiffs have failed to produce a pleading demonstrating how "all other Canadians" have been impacted in a way that constitutes an infringement of an individual or collective right. The Court is confined to declaring contested legal rights, and cannot give advisory opinions on the law generally: *Gouriet v Union of Post Office Workers*, [1978] AC 435 at 501-502 [*Gouriet*].

(4) Justiciability

46 Justiciability is a normative inquiry that involves looking to the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication: *Friends of the Earth - Les Ami(e)s de la Terre v Canada (Governor in Council),* 2009 FCA 297 [*Friends of the Earth*].

47 The Defendants argue that the Court can, and in this case should, deal with statutory interpretation on a motion to strike: *Les Laboratoires Servier v Apotex Inc*, 2007 FC 837 at para 38. The Defendants state that it is critical to note that s 18 of the *Bank Act*, which enumerates the business and powers of the Bank of Canada, states that the Bank "may" do what is listed at paragraphs (a) through (p). The Plaintiffs want paragraphs (i) and (j) to be read as imperative: that the Bank of Canada is statutorily required, when necessary, to make interest-free loans for the purposes they define. Such mandatory language is not present and to invoke it borders on absurdity as it would suggest that Parliament did not follow through on its very purpose for creating a Bank of Canada, as set out in the *Bank Act's* preamble: to regulate credit and currency in the best interest of the economic life of the Canadian nation.

48 If the *Bank Act* is to be read as imperative, the Defendants say that it will become necessary for the Court to detail the occasions when the Government of Canada "must" request loans and the Bank "must" provide them. Without these specifications, any declaration made by the Court will be meaningless, and the courts will not make a declaration where "it will serve little or no purposes": *Terrasses Zarolega Inc v RIO*, [1981] 1 S.C.R. 94 at 106-107.

49 The Defendants point out that absent "objective legal criteria," the Court should decline to hear a matter since such a proceeding would entail significant consideration of policy matters, which are beyond the proper subject matter for judicial review: *Friends of the Earth*, above. at para 33.

50 In asking for a declaration that the Minister and the Government of Canada be required to request interest-free loans for "human capital" and or "infrastructure" expenditures, the Plaintiffs are not merely seeking an interpretation of the *Bank Act*; they are seeking a coercive order. Section 18 does not support such a request. The Defendants argue that whether a particular loan should be sought by the Government of Canada and made by the Bank is an inappropriate matter for judicial involvement, both institutionally and constitutionally.

51 Furthermore, the *Bank Act* does not set out any requirements in regards to how the Bank ought to exercise its lending powers. Loan-making is clearly subject to the Bank's discretion and contemplation of a wide range of circumstances that the Bank is best-positioned to weigh and consider.

52 The Defendants say that under the Plaintiffs' plan, the task of regulating credit and currency in the best interest of the economic life of Canada would become the responsibility of the Court, which would have to pronounce the requirements for loans on an *ad hoc* basis, with coercive orders.

53 Furthermore, the Plaintiffs' amendments have not addressed the deficiency related to the so-called improper "handing-off" to international institutions. The Defendants suggest that the Plaintiffs want the Court to instigate a grand inquisition in regard to monetary and fiscal matters. This is not the proper role of the Court and there is no such duty on the Defendants.

54 The allegation of "handing-off" to international institutions is not a legal cause of action and is not justiciable. It is not concerned with the objective legality of an action or inaction, but instead with the abstract concept of "private interests" being placed above the "interests of Canadians." Only the people of Canada can, through the election of their representatives, determine the interests of Canadians.

55 Government policy decisions and issues that are better decided by a branch of government are non-justiciable: *Imperial Tobacco*, above, at para 72; Lorne M Sossin: *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell: Toronto, 1999) at 4-5.

56 The Defendants say that the Amended Claim attacks the way in which Canada develops and implements fiscal and monetary policy, as well as its participation in international economic organizations. It attempts to address abstruse issues relating to the governance of the Bank of Canada and fiscal policy-making -- things that are properly the concern of governments, not the judiciary: *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 302; *Public Service Alliance of Canada v Canada*, [1987] 1 SCR 424 at para 36; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 21, 68; *Archibald v Canada*, [1997] 3 FC 335 at paras 54, 83.

57 The Amended Claim is so broad and general in its parameters that it defies judicial manageability.

(5) Court's Jurisdiction

58 The Defendants say that the test for determining if a matter is within the Federal Court's jurisdiction is stipulated in *ITO-International Terminal Operators LTD v Miida Electronics*, [1986] 1 SCR 752 at 766 [*ITO-International*]:

1. There must be a statutory grant of jurisdiction by Parliament.
2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act.*

59 As regards the first component of the test, there is no statutory grant for a suit to be brought against the Bank of Canada. It has been determined that s 17 of the *Federal Courts Act*, which provides that the Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown, does not apply to a statutory corporation acting as an agent of the Crown. Therefore, the Bank of Canada, a statutory corporation created by the *Bank Act*, cannot be said to be the Crown or a Crown Agent. The powers in s 18 are not fiscal agent powers, but rather powers that the Bank of Canada is entitled to exercise in its own right.

60 Also, the Court has no jurisdiction over a Minister of the Crown. He or she may not be sued in his or her representative capacity; the Queen is the only proper defendant in an action against the Crown: *Peter G White Management v Canada*, 2006 FCA 190.

61 The Defendants also say that the second part of the *ITO-International* jurisdictional test has not been met. It is not fulfilled simply by the fact that an allegedly misused power emanates from a federal statute. The Plaintiffs do not have specific rights, nor is there a detailed, corresponding statutory framework. The allegations against the Defendants relating to the abdication of statutory and constitutional duties can only be grounded in negligence, civil conspiracy or misfeasance. These matters are based on tort law and would properly be applied by the provincial courts.

62 As regards the third portion of the test, s 3 of the *Charter* is not properly characterized as a "law of Canada" in the s 101 sense. To support this statement, the Defendants apply the reasoning in *Kigowa v Canada (Minister of Employment and Immigration)*, [1990] 1 FC 804 at para 8, which examined ss 7 and 9 of the *Charter*.

(6) Standing

63 As a final issue, the Defendants assert that the Plaintiffs do not have standing to bring this claim. Their private rights have not been interfered with, nor have they suffered special damages specific to them from an interference with a public right: *Finlay v Canada (Minister of Finance)*, [1986] 2 SCR 607 at paras 18-22 [*Finlay*].

64 A general disdain for a particular law or governmental action is not enough to meet the standard of "genuine interest" for public interest standing. A stronger nexus than what is presented in the Amended Claim is required between the party making the claim and the impugned legislation: *Canadian Council of Churches v Canada*, [1992] 1 SCR 236; *Marchand v Ontario* (2006), 81 OR (3d) 172 (SCJ).

B. *Plaintiffs' Response to Defendants' Motion*

65 The Plaintiffs assert, to the extent that the Order of April 24, 2014 refused to strike the declaratory relief (the bulk of the Amended Claim), and ruled that it is justiciable, that this motion to strike is an abuse of process because *res judicata* and issue estoppel apply.

(1) The Test on a Motion to Strike

66 In terms of the general principles that ought to be applied on a motion to strike, the Plaintiffs assert that the facts pleaded by the Plaintiffs must be taken as proven: *Canada (Attorney General) v Inuit Tapirasat of Canada*, [1980] 2 SCR 735; *Nelles v Ontario* (1989), 60 DLR (4th) 609 (SCC) [*Nelles*]; *Operation Dismantle*, above; *Hunt v Carey Canada Inc* [1990] 2 SCR 959 [*Hunt*]; *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*]; *Nash v Ontario* (1995), 27 OR (3d) 1 (Ont CA) [*Nash*]; *Canada v Arsenault*, 2009 FCA 242 [*Arsenault*].

67 The Plaintiffs echo the test referenced by the Defendants, asserting that a claim can be struck only in plain and obvious cases where the pleading is bad beyond argument: *Nelles*, above, at para 3. The Court has provided further guidance in *Dumont*, above, that an outcome should be "plain and obvious" or "beyond doubt" before striking can be invoked (at para 2). Striking cannot be justified by a claim that raises an "arguable, difficult or important point of law": *Hunt*, above, at para 55.

68 The novelty of the Amended Claim is not reason in and of itself to strike it: *Nash*, above, at para 11; *Hanson v Bank of Nova Scotia* (1994), 19 OR (3d) 142 (CA); *Adams-Smith v Christian Horizons* [1997] O.J. No. 2887, (1997), 3 OR (3d) 640 (Ont Gen Div). Additionally, matters that are not fully settled by the jurisprudence should not be disposed of on a motion to strike: *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* (1991), 5 OR (3d) 778 (CA). In order for the Defendants to succeed, the Plaintiffs state that a case from the same jurisdiction that squarely deals with, and rejects, the very same issue must be presented: *Dalex Co v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 463 (CA). The Court should be generous when interpreting the drafting of the pleadings, and allow for amendments prior to striking: *Grant v Cormier -- Grant et al* (2001), 56 OR (3d) 215 (CA).

69 The Plaintiffs also remind the Court that the line between fact and evidence is not always clear (*Liebmann v Canada,* [1994] 2 FC 3 at para 20) and that the Amended Claim must be taken as pleaded by the Plaintiffs, not as reconfigured by the Defendants: *Arsenault*, above, at para 10.

(2) Constitutional Claims

70 As regards the general principles to be applied to their constitutional claims, the Plaintiffs state that, as previously plead to the Prothonotary and to me, the Constitution does not belong to either the federal or provincial legislatures, but rather to Canadians: *Nova Scotia (Attorney General) v Canada (Attorney General)*, [1951] SCR 31 [*Nova Scotia (AG)*]. Parliament and the Executive are bound by constitutional norms, and neither can abdicate its duty to govern: *Canada (Wheat Board) v Hallet and Carey Ltd,* [1951] SCR 81 [*Wheat Board*]; *Re George Edwin Gray,* (1918) 57 SCR 150 [*Re Gray*] at 157; *Reference re Secession of Quebec*, [1998] 2 SCR 217 [*Reference re Secession of Quebec*].

71 Furthermore, the Supreme Court of Canada has held that legislative omissions can lead to constitutional breaches (*Vriend v Alberta*, [1998] 1 SCR 493) and that all executive action and inaction must conform to constitutional norms: *Air Canada v British Columbia (Attorney General)*, [1986] 2 SCR 539; *Khadr*, above.

72 With respect to the budgetary issue, the Plaintiffs submit that: (a) contrary to *Arsenault*, the Defendants misstate the Plaintiffs' Amended Claim; and (b) that s 3 of the *Charter* is intrinsically tied to the right of no taxation without representation and/or any other underlying right directly connected to the right to vote.

73 The Plaintiffs say the Defendants misstate and fail to properly respond to the constitutional question. Two erroneous submissions and assumptions have been made. First, it is not plain and obvious that s 91(6) does not impose a duty, or that it is not arguable: *Wheat Board*, above; *Re Gray*, above, at 157; *Reference re Secession of Quebec*, above. Second, the Defendants have overlooked that the constitutional, primary duty in the budgetary process, is to outline all revenues and expenditures. This duty has evolved from the *Magna Carta* and is tied to the constitutional right to no taxation without representation. The Defendants have removed and failed to reveal the true revenue(s) to Parliament, which is the only body that can constitutionally impose tax and therefore approve the proposed spending. The Minister of Finance has essentially removed the ability of Parliament to properly review, debate and pass the budget's expenditures and corresponding tax provisions.

74 The Plaintiffs' position is misconstrued by the Defendants as an attempt to argue a right in the *Magna Carta*. All that is stated, the Plaintiffs argue, is that the right can be traced back to the *Magna Carta* and is codified by ss 53, 54 and 90 of the *Constitution Act, 1867*. It is submitted that the tort actions, which are founded in this right and the inseparable right to vote under s 3 of the *Charter*, may be "novel," but comply with the rules of pleading and the Order of April 24, 2014, while meeting the test for a reasonable cause of action.

75 Furthermore, the tort action was not, and should not be, framed in public misfeasance or conspiracy. Rather, the actions of the Minister of Finance, with respect to the budgeting process, and those of the Bank of Canada officials who relegated or abdicated their duty, relate to the constitutional breaches and torts pleaded.

(3) Declaratory Relief

76 On the issue of declaratory relief, the Plaintiffs say that the Defendants' submissions on the topic are, in any event, misguided and contrary to the jurisprudence. The Plaintiffs argue that the issue has already been decided by my Order of April 24, 2014 and was upheld by the Court of Appeal when it dismissed the Defendants' cross-appeal. Therefore, the matter constitutes *res judicata*, issue estoppel and abuse of process: *City of Toronto v CUPE, Local 79*, [2003] 3 SCR 77.

77 Declaratory relief goes to the crux of the constitutional right to judicial review: *Dunsmuir v New Brunswick,* 2008 SCC 9 at paras 27-31; *Singh v Canada (Citizenship and Immigration)*, 2010 FC 757 at para 38; *Canada v Solosky*, [1980] 1 SCR 821 at 830. The Supreme Court of Canada has recently reaffirmed the scope of the right to declaratory relief, indicating that it cannot be statute-barred: *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 134, 140 and 143.

78 The Defendants ignore ss 2 and 17 of the *Federal Courts Act* as well as Rule 64 of the *Rules*. The Court has held that declaratory relief is available, and may be sought, under s 17 of the *Federal Courts Act*: *Edwards v Canada* (2000) 181 FTR 219 [*Edwards*]; *Khadr*, above.

(4) Justiciability

79 As regards the issue of justiciability, noting that the Supreme Court of Canada has stated that the constitutionality of legislation has always been a justiciable issue, the Plaintiffs argue that just because the subject-matter at hand deals with socio-economic matters does not make it non-justiciable.

80 The Plaintiffs argue that the Defendants have "figure-skated" from the notion of justiciability to that of a "political question." The Plaintiffs state:

> The "Political question" doctrine is an old doctrine adopted early in the jurisprudence over "pure questions of policy" or "choice" over "policies" *over which no statutory nor constitutional dimensions exists over which the Court can adjudicate*. In a word the subject-matter did *not* involve asserted statutory or constitutional rights. This is not the situation in the within case.

81 In terms of issues dealing with socio-economic policies that the Supreme Court of Canada has found to be justiciable, the Plaintiffs point to the following:

- * Whether "wage and price" controls were within the competence of the federal Parliament: *Reference re Anti-Inflation Act, 1975*, [1976] 2 SCR 373;
- * Whether the limits on transfer payments between the federal government and provincial governments could unilaterally be altered: *Reference re Canada Assistance Plan (Canada)*, [1991] 2 SCR 525 [*CAP Reference*];

- A challenge by an individual regarding whether transfer payments by the federal government to the provincial governments with respect to welfare payments were illegal because the province was breaching certain provisions of the Canada Assistance Plan: *Finlay*, above.

82 The Plaintiffs assert that the clear test for justiciability is whether there is a "sufficient legal component to warrant the intervention of the judicial branch": *CAP Reference*, above, at para 33. The Amended Claim meets this test. When social policies are alleged to infringe or violate *Charter*-protected rights, they must be scrutinized; this does not exclude "political questions": *Chaoulli v Quebec (Procureur general)*, 2005 SCC 35 at paras 89, 183, 185. In such cases the question before the court is not whether the policy is sound, but rather whether it violates constitutional rights, which is a totally different question: *Operation Dismantle*, above, at 472.

83 The declaratory relief and damages sought in the Amended Claim are, according to the Plaintiffs, grounded in the interpretation of the *Bank Act*, and the constitutional duties and requirements of the budgetary process. These have not been respected. The Constitution, as a result, is being structurally violated and the Plaintiffs' rights are being infringed.

84 The Defendants have confused the notion of justiciability with that of enforceability by not properly distinguishing between the declaratory relief and tort relief sought, and in viewing some of the declaratory relief as non-enforceable. The statutory right to seek declaratory relief is provided for by Rule 64 of the *Rules*, whether or not any consequential relief is or can be claimed. In addition, the Supreme Court of Canada has recognized that instances may exist where it is appropriate to declare but not enforce a right: *Khadr*, above.

(5) Standing

85 Finally, the Plaintiffs submit that they clearly have standing to bring forward these justiciable issues on the facts pleaded. This standing is personal, but it is also public interest-based and is in line with recent jurisprudence: *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45; *Galati*, above.

86 The Supreme Court of Canada has ruled that the Constitution does not belong to the federal or provincial governments, but to Canadian citizens (*Nova Scotia (AG)*, above), and that it is a tool for dispute resolution, of which one of the most important goals is to serve well those who make use of it: *Reference Re Residential Tenancies Act,* [1996] 1 SCR 186 at 210.

87 The Plaintiffs submit that it is time to revisit the issue of standing with respect to the constitutional validity of statutes and executive actions. In cases like the present one, concerned with the constitutional validity of statutes and/or executive actions by way of declaratory relief, public interest standing is a constitutional right.

VI. ANALYSIS

88 Pursuant to my Order of April 24, 2014 (as endorsed by the Federal Court of Appeal on January 6, 2015), the Plaintiffs have now served and filed the Amended Claim and the Defendants have brought a second motion to strike.

89 The background to this dispute is set out in my Order of April 24, 2014.

A. *The Amendments*

90 While the Amended Claim maintains the declaratory relief described in paragraphs 1 to 10 substantially intact from their previous pleading, the Plaintiffs have dropped the allegations that the unlawful actions of the Defendants violate ss 7 and 15 of the *Charter*. Instead, the Plaintiffs now seek, as part of their declaratory relief, a declaration:

[...]

viii) that taxes imposed to pay for the interest on the deficit and debt to private bankers, both domestic and particularly foreign, are illegal and unconstitutional owing to, A/ the breach of the constitutional right(s) to no taxation without representation resulting from the Finance Minister's failure to disclose full anticipated revenues to MPs in Parliament, before the return of anticipated tax credits, prior to determining whether an anticipated surplus or deficit will be incurred, in the tabling of the budget, in that a full and proper debate cannot properly ensue as a result, thus breaching the right to no taxation without representation under both ss.53 and 90 of the ***Constitution Act, 1867***, as well as the unwritten constitutional imperatives to the same effect;

B/ the infringement of the Plaintiffs' right to vote, under s. 3 of the ***Charter***, tied to the right to no taxation without representation with respect to the Minister of Finance's constitutional violations;

C/ breach of the terms of the ***Bank of Canada Act***, with respect to interest-free loans, and the consequent constitutional violations, by the Executive, of its duty to govern, and relinquishing sovereignty and statutory decision-making to private foreign bankers;

[...]

91 The Plaintiffs have also made it clear that their tort claims are not based upon public misfeasance and/or conspiracy. The new damages claim reads as follows:

[...]

(b) damages in the amount of:

i) $10,000.00 each for the Plaintiffs William Krehm and Ann Emmett, as well as the ten (10) named COMER Steering Committee members, named in paragraph 2(a) of the within statement of claim, for the breach of their constitutional right of "no taxation without representation" and the inseparable infringement of the right to vote under s. 3 of the Charter, as tied to the right and imperative against no taxation without representation, due to the constitutional breaches by the Minister of Finance with respect to the budgetary process; and

ii) return of the portion of illegal and unconstitutional tax, to be calculated and calibrated at trial, for each of the Plaintiffs and members of COMER's Steering Committee, consisting of the proportion of taxes, to pay interest charges on the deficit, and debt, between 2011 and the time of trial, paid by the Plaintiffs and Steering Committee members of COMER, due to the statutory and constitutional breaches of the Defendants in refusing and/or failing to cover deficits in the budget by way of interest-free loans, as well as the breach of their right to no taxation without representation, to be calculated by the compounded interest changes set out in the budget, as a percentage of the budget, calculated as the same percentage paid by the Plaintiffs and Steering Committee members, to be calculated and calibrated at trial;

[...]

92 Other amendments throughout the Amended Claim either bolster the claims with more facts (e.g. paras 15(h) and 22) or reflect the basic shifts referred to above (see paras 39, 41, 43 and 47).

B. *Rule 221 -- Motion to Strike*

93 As with the previous strike motion, there is no disagreement between the parties as to the basic jurisprudence that governs a motion to strike under Rule 221. For purposes of this motion, I adopt the principles set out in paras 66 and 68 of my Order of April 24, 2014. Essentially, the test for striking an action is a high one and the Defendants must show that it is plain and obvious, assuming the facts pleaded to be true, that the pleadings disclose no reasonable cause of action or that there is no reasonable prospect that the claim will succeed. See *Imperial Tobacco,* above, at paras 17, 21 and 25.

94 As I found in my Order of April 24, 2014, this claim remains both novel and ambitious, but this does not mean that it is plain and obvious, assuming the facts pleaded to be true, that it does not give rise to a reasonable cause of action or that there is no reasonable prospect that it will not succeed at trial.

C. *Grounds for the Motion*

95 The Defendants have raised a significant number of grounds for striking the Amended Claim. I will deal in turn with those grounds that I feel have substance and relevance.

(1) Budget Presentation and Taxation

96 As regards the declaratory relief sought in paras 1(a)(vi) to (viii) of the Amended Claim dealing with the presentation of the Federal Budget by the Minister of Finance, that Defendants argue as follows:

> 12. There is no constitutional duty of presenting the federal budget in the manner sought by the plaintiffs. There is no breach of the principle of "no taxation without representation". This principle, as defined by the Supreme Court, means that the Crown may not levy a tax except with the authority of Parliament. This constitutional requirement was satisfied here.
>
> 13. Parliament is master of its procedure. It is well recognized that there is no duty on Parliament to legislate. There is no cause of action for the omission of Parliament to enact any law.
>
> 14. The plaintiffs allege that the accounting method used in the budgetary process is a breach of ss. 91(6) *Constitution Act, 1867*, which grants legislative power over "[t]he census and statistics" to Parliament. This provision will not aid them. Section 91 enumerates the classes of subjects and all matters coming within them to which the exclusive legislative authority of the Parliament of Canada is granted -- it does not impose duties on Parliament or the Government. A reference to a class of federal power in the *Constitution Act, 1867* is not the imposition of a duty upon Parliament to legislate in respect of that subject matter. S. 91(6) -- "the Census and Statistics" -- is one of the classes of subjects enumerated in s. 91 for which it is declared in the *Constitution Act, 1867* that "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within" this class of subjects.
>
> 15. In any event, much of the information sought by the plaintiffs to be included in the budget documents presented before Parliament is publicly available from the Department of Finance, for example: Tax Expenditures and Evaluations 2012 at: http:// .fin.gc.ca/taxexp-depfisc/2012/taxexp12-eng.as p.

> [footnotes omitted]

97 The facts supporting the Plaintiffs' request for declaratory relief on this issue are set out in paras 25-43 of the Amended Claim. The main judicial point is stated as follows:

> [39] The Plaintiffs state, and the fact is, that the above "accounting method" used in the budgetary process are [*sic*] not in accordance with accepted accounting practices, are conceptually and logically wrong, and have the effect of perpetually making the real and actual picture of what total "revenues", "total expenditures", and what the annual deficit/surplus" [sic] actually is, what the annual "deficit/surplus" actually is, in any given year, and what, as a result the standing national "debt" is. Moreover, and more importantly, the Plaintiffs state, and fact is [sic], that such "accounting" methods foreclose any actual or real debate, or consideration, by elected MPs, in Parliament, as the actual financial picture is not available nor disclosed to

> either Parliamentarians nor the Canadian public. The Plaintiffs state, and the fact is, that such accounting method breaches s. 91(6) of the ***Constitution Act, 1867*** and the duty of the Defendant(s) to maintain accurate "statistics", and the ability of MPs in Parliament to fully and openly debate the budget, which breaches the Plaintiffs' right(s) to "no taxation without representation" and also infringes their right to vote under s. 3 of the ***Charter,*** as tied to the no right to taxation without representation.
>
> [...]
>
> [41] The Plaintiffs state, and the fact is, that this failure and/or calculated choice by the Defendant Minister of Finance to withhold anticipated total revenue, before the subtraction of anticipated tax credits, along with anticipated expenditures, in the budget bill(s), violates the Plaintiffs' constitutional right to no taxation without representation as guaranteed by ss. 53 and 90 of the ***Constitution Act, 1867***, and unwritten constitutional imperative underlying it, dating back to the ***Magna Carta***, as well as diminishes, devalues and infringes on their right to vote under s. 3 of the ***Charter*** with respect to taxation as tied to deficit, debt, and the availability to debate the alternative of avoiding both by, ***inter alia***, exercising the interest-free Bank of Canada loans under s. 18 of the ***Bank of Canada Act***.

98 It is true, as the Defendants say, that the Plaintiffs take issue with the way the Minister presents the federal budget to Parliament. However, the allegations set out above are not just that the Minister's accounting methods are fallacious because they fail to take account of human capital and do not appropriately take tax credits into account. If this was the point of the claims, then clearly it would be nothing more than a debate about proper accounting procedures in the context of the federal budget. However, the Plaintiffs provide the facts about how the federal budget is presented to Parliament and say why they think it is inappropriate before they go on to state the legal basis of their claim. And the legal basis of the claim is that the Minister's accounting methods and practices breach s 91(6) of the *Constitution Act, 1867* because they mean the Defendants are not maintaining and presenting accurate statistics, which in turn breaches s 3 of the *Charter* because, in the end, inaccurate and misleading statistics prevent any meaningful debate on the budget in Parliament. This means in turn that MPs cannot fulfil their representative function and the Plaintiffs (at least the individual Plaintiffs) are therefore being taxed without any real representative input on the budget. This undermines s 3 of the *Charter* and the guarantees under ss 53 and 90 of the *Constitution Act, 1867*. This is my understanding of the Amended Claim on this issue.

99 Clearly, the Plaintiffs disagree with the way the Minister compiles and presents the budget to Parliament. They know that this, in itself, is not a legal issue they can bring to the Court. So they have hitched their complaints to s 91(6) of the *Constitution Act, 1867*, s 3 of the *Charter* and the no taxation without representation principle. Can this hitching be equated with any previous application of the constitutional principles and provisions cited and relied upon? Not to my knowledge. But that is not the issue before me. *Charter* litigation generally suggests that the Supreme Court of Canada may find a *Charter* or constitutional breach that has not been previously identified.

100 The Plaintiffs' target is the executive branch of government as embodied in the Minister of Finance. It is the Minister's actions that are alleged to thwart the Parliamentary process and to breach the *Constitution Act, 1867* and s 3 of the *Charter*. It has to be admitted that the arguments underlying the Plaintiffs' assertion of a Constitution and a *Charter* breach appear at this stage to be somewhat novel and esoteric but, as I have already said, this is not a sufficient ground for saying that they disclose no reasonable cause of action or that there is no reasonable prospect of success at trial.

101 The Plaintiffs reiterated the same points clearly in their oral arguments:

> The case before you is there is an executive breach of a constitutional requirement by the Minister of Finance with respect to the budget process, and that as a result the legislation that comes out of Parliament breaches the constitutional right to no taxation without representation. Why? The MPs are blindfolded.
>
> [Transcript of Proceedings p 38, lines 17-23]
>
> The right to vote includes the right to effective representation. If the MPs are blinded by executive constitutional breaches by the Minister of Finance, how does that ensure effective representation?
>
> [Transcript of Proceedings p 39, lines 1-5]

> [N]owhere in the pleadings are we asking Parliament to legislate. We are simply saying that there's an abdication of executive and parliamentary duty with respect to the budget as pleaded. That is a different matter.
>
> And the failure to act applies equally to the executive as it does to the legislative with respect to constitutional breaches...
>
> [Transcript of Proceedings p 39, lines 15-21]
>
> And the actual revenues are not presented to Parliament. That is what we have pleaded. That is the fact.
>
> [Transcript of Proceedings p 46, lines 20-22]
>
> At paragraph 22, I set out the codification of these principles in sections 53, 54, and 90, and then state that by removing and not revealing the true revenues of Parliament, which is the only body which can constitutionally impose tax and thus approve the proposed spending from the speech from the throne, the Minister of Finance is removing the elected MPs' ability to properly review and debate the budget and pass its expenditure and corresponding taxing provisions through elected representatives of the House of Commons. The ancient constitutional maxim of no taxation without representation was reaffirmed post-Charter by the Supreme Court of Canada in the Education Reference.
>
> [Transcript of Proceedings p 50, line 21 to p 51, line 5]

102 It seems to me that these arguments and assertions cannot apply to COMER itself, which has no right to vote. As regards the individual Plaintiffs, even assuming they pay tax, the allegations remain abstract and theoretical. A central allegation -- unsupported by facts -- is that MPs are voting blind and have been hoodwinked by the Minister of Finance. There are no facts pleaded to support this bald allegation. MPs may well understand the issues raised by the Plaintiffs concerning budgetary accounting practices, but may have decided to accept them. The Plaintiffs are alleging that Parliament is being misled by the Minister, but that the Plaintiffs are not.

103 There are no facts to say which MPs represent the individual Plaintiffs and whether those MPs have been approached and asked to deal with the issues raised in this claim or whether, having been made aware of the Plaintiffs' concerns, those MPs have voted for or against the budget. If MPs for the individual Plaintiffs have been apprised of the problem then, no matter how they vote, it is difficult to see how the Plaintiffs are not represented in Parliament on this issue. Representation does not mean that MPs must vote in accordance with the wishes of individual constituents. If representative MPs have not been contacted, then it is difficult to understand why the individual Plaintiffs have come to Court to ask that it make findings about their rights of representation in Parliament.

104 On the other hand, if MPs, or at least those which represent the individual Plaintiffs are aware of the accounting concerns that the Plaintiffs raise, then it seems to me there can be no undermining of the voting and representation rights of the individual Plaintiffs.

105 There are no facts in the pleadings to suggest that any MPs are "voting blind" or are being misled by the Minister of Finance. Similarly, there are none to establish that Parliament does not monitor and assess the budgetary process, including the way the budget is compiled and presented by the Minister of Finance. The logic of the Amended Claim is that if Parliament is not adopting and acting upon the Plaintiffs' concerns about the budgetary process then Parliamentarians are blind. This is an unsupported assertion. It is not a fact.

106 There is nothing more than a bald assertion that the Minister of Finance is "blindfolding" his Parliamentary colleagues and leading them astray to the detriment of the individual Plaintiffs, and, presumably, all Canadians with a right to vote.

107 Even at an abstract level, this seems far-fetched, to say the least. The Plaintiffs are asking the Court to simply assume that Parliament does not have the wherewithal to understand the way the budget is compiled and presented. The logic here is that, because the budget is not being presented as the Plaintiffs think it ought to be presented, their Parliamentary representatives are being hoodwinked by the Minister of Finance and obviously do not know what they are doing when they pass a budget. This position is presumptive and unsupported by any facts. It remains an abstract debate about how the budget should be presented.

108 Bald assertions, without supporting facts, are not sufficient to satisfy the rules of pleading. See Rule 174 and accompanying jurisprudence.

109 There is nothing in the facts as pleaded in the Amended Claim to suggest that Parliament is not fully aware of the criticisms levelled by the Plaintiffs against the Minister of Finance and that parliamentarians are not free to question and debate any budget presented from the perspective of those criticisms. Hence, there is nothing to support the allegation that the ability of MPs in Parliament to fully and openly debate the budget is impeded in any way. Further, if the Minister of Finance, in compiling the budget, chooses not to take "human capital" into account and/or chooses to withhold anticipated total revenue, before the subtraction of anticipated tax credits, along with anticipated expenditures, in budget bills, these choices also become the will of Parliament following the established procedures for debating and passing budgets. The Plaintiffs can have no right to insist that Parliament should only debate and pass budgets in accordance with the principles and procedures which they approve of and advocate. If the Plaintiffs disagree with the process then, like everyone else, they have access to their own Parliamentary representatives. Hence, in my view, there is no factual basis in the Amended Claim to support an allegation that the *Constitution Act*, *1867*, s 3 of the *Charter* or any constitutional principle is breached on the principle of no taxation without representation. If the individual Plaintiffs have a vote, then they are fully represented in Parliament, and it is Parliament that decides whether or not to pass the budget presented by the Minister of Finance in accordance with its own procedures. No facts are pleaded to suggest that Parliament is not fully aware of the kinds of criticisms that the Plaintiffs have raised in this action against the Minister and the budgetary process, or that Parliament is not aware that the budgetary process is not open to the kinds of criticisms that the Plaintiffs allege in their Amended Claim.

110 The Supreme Court of Canada made the following general point in *Authorson*, above, at para 38, quoting *Reference re Resolution to Amend the Constitution,* above:

> How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the "court" aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to them for their opinion on a bill or a proposed enactment). It would be incompatible with the self-regulating -- "inherent" is as apt a word -- authority of Houses of Parliament to deny their capacity to pass any kind of resolution. Reference may appropriately be made to art. 9 of the *Bill of Rights* of 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".

111 The Plaintiffs are not attacking any particular budget legislation that may have had an impact upon them that gives rise to a cause of action in any court of law. They are attacking the Parliamentary process that they say is used to present, debate and pass budget bills into law. They want the Court to interfere, albeit on Constitutional and *Charter* grounds, with the way Parliament goes about its business. In my view, the jurisprudence is clear that the Court cannot do this. The same conclusions must be reached even if the Court looks at the matter from the perspective of "when legislation is enacted and not before." Budget bills are passed in accordance with a self-regulating process in Parliament during which MPs can raise the issues of concerns to the Plaintiffs. There are no facts pleaded to suggest that the Plaintiffs are not as fully represented in Parliament on budget bills as they are on any other bill.

112 As the House of Lords made clear in *Hamilton v al Fayed*, above:

> Article 9 of Bill of Rights 1689 provides:

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."
>
> It is well established that article 9 does not of itself provide a comprehensive definition of parliamentary privilege. In *Prebble v. Television New Zealand Ltd.* [1995] 1 AC 321 at p. 332, I said:
>
> "In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performances of its legislative functions and protection of its established privileges: *Burdett v. Abbott* (1811) 14 East 1; *Stockdale v. Hansard* (1839) 9 Ad. & E.C. 1; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271; *Pickin v. British Railways Board* [1974] AC 765; *Pepper v. Hart* [1993] AC 593. As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163: 'the whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere."

113 This is confirmed by s 18 of the *Constitution Act, 1867* and s 4 of the *Parliament of Canada Act*. The privileges, immunities and powers of the Senate and House of Commons and their members are matters of self-definition and regulation by Parliament. In my view, the presentation, debate and passing of the federal budget allows for no role by the Courts. In the present case, no facts are pleaded to support a case that Parliament is not cognizant of the Minister's methodology or the perspectives of the Plaintiffs, or is being blinded.

114 As far as the *Constitution Act, 1867* and s 3 of the *Charter* are concerned, COMER, as an unincorporated association, has no electoral rights. As regards the individual Plaintiffs, there are no facts pleaded to suggest that they do not have effective representation in Parliament when it comes to budget bills. In *Reference Re Provincial Electoral Boundaries (Saskatchewan),* [1991] 2 SCR 158 at 1836, the Supreme Court of Canada explained what representation means:

> Ours is a representative democracy. Each citizen is entitled to be *represented* in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative...
>
> [emphasis in original]

115 Representation does not mean that the Plaintiffs have a right to force Parliament to proceed in a way that better suits their view of the appropriate way to present and pass a budget, and they have not pleaded facts to show that any particular budget legislation has negatively impacted a legal right that they enjoy.

116 There is nothing in the Amended Claim to suggest that the individual Plaintiffs do not enjoy the same meaningful participation in the electoral process as any other Canadian voter. See *Figueroa*, above, at para 27. The Plaintiffs do not lack effective representation simply because budget bills are not presented and dealt with in accordance with their views of what they should or should not contain, and there is no suggestion that they lack a voice in the deliberations of government because they are unable to bring their grievances and concerns to the attention of the MPs who represent them. In my view, Constitutional and *Charter* protection cannot mean that individual voters have the right or the expectation that their views on the appropriate presentation and enactment of any particular piece of legislation will be followed by Parliament. This is not to say that voter concerns about the way that Parliament enacts legislation are not legitimate concerns. However, how Parliament proceeds is a matter of self-definition (see *Authorson*, above) unless, of course, there is some "overriding constitutional or self-imposed statutory or indoor prescription." In my view, notwithstanding the able arguments of Plaintiffs' counsel, the Plaintiffs do not plead anything in the Amended Claim to establish an overriding Constitutional prescription or a breach of s 3 of the *Charter* that could ground their claim for declaratory relief or damages for this aspect of their claim. The Plaintiffs don't even attempt to litigate any particular budget legislation. They focus their claim instead upon the budget compilation and Parliamentary process itself, and I think the jurisprudence is clear that the Court simply cannot go there. Article 9 of the *Bill of Rights of 1688/89* also prevents the Court from entertaining any action against any member of Parliament which seeks to make them personally liable for acts done or things said in Parliament. See *Hamilton v al Fayed*, above.

117 In my view, then, those allegations of the Amended Claim that raise the taxation issue and seek relief based upon the *Constitution Act, 1867* and s 3 of the *Charter,* and the principle of no taxation without representation have to be struck because it is plain and obvious that they disclose no reasonable cause of action and have no reasonable prospect of success.

(2) *Bank Act* Issues

118 The balance of the Amended Claim deals with alleged breaches of the *Bank Act* by the Minister of Finance and the Government of Canada. In its essentials, this aspect of the claim has not changed since I reviewed the Plaintiffs' previous Amended Statement of Claim in April, 2014.

119 I think it is useful to bear in mind the grounds of the Defendants' cross-appeal that the Federal Court of Appeal was asked to consider in January, 2015 and which it dismissed:

1. The Judge erred in fact and law in finding that there are alleged breaches or issues in the Plaintiffs' Amended Statement of Claim ("Claim") that are justiciable;
2. The judge erred in law by finding that s. 18 of the *Bank of Canada Act* could not be interpreted in a motion to strike, but would require full legal argument on a full evidentiary record;
3. The judge erred in law by finding that had the learned Prothonotary determined s. 18 of the *Bank of Canada Act* to be a "legislative imperative" that the Claim would then become justiciable;
4. The judge erred in law by finding that even if s. 18 of the *Bank of Canada Act* is permissive, that this does not dispose of the matter of justiciability;
5. The judge erred in fact and in law by finding that the Claim does not require the Court to adjudicate and dictate competing policy choices and that objective legal criteria exist to measure the Plaintiffs' allegations;
6. The judge erred in law and in fact by characterizing the Claim as one which requires the Court to assess whether the Defendants have acted, and continue to act, in accordance with the *Bank of Canada Act* and the *Constitution*;
7. The judge erred in fact and in law by finding that relevant and material facts have actually been pleaded in the Claim in support of the declarations sought that the policies and actions allegedly pursued by the Defendants have not complied with the Bank of Canada Act and the Constitution;
8. The judge erred in law in finding on a motion to strike that any allegations in the Claim of breach of statute and/or of constitutional obligations may be justiciable depending on whether the Plaintiffs can establish a reasonable cause of action though appropriate and future amendments;

...

120 It also has to be borne in mind that in my Order of April 24, 2014, I did not say that the Plaintiffs were likely to succeed with their *Bank Act* claims. All I said was that the claims had to be struck in their entirely because, as they stood, they did not disclose a reasonable cause of action and had no prospect of success. The Federal Court of Appeal endorsed this position.

121 I concluded that the "full import of the *Bank Act* and what is required of Canada and those Minister and officials who act, or don't act, in accordance with the Bank Act is at the heart of this dispute" (para 72) and that:

> [76] So, as regards the declaratory relief sought in this Claim, it is my view that the matters raised could be justiciable and appropriate for consideration by the Court. Should the Plaintiffs stray across the line into policy, they will be controlled by the Court. There is a difference between the Court declaring that the Government or the Governor, or the Minister, should pursue a particular policy and a declaration as to

> whether the policy or policies they have pursued are compliant with the Bank Act and the Constitution. The facts are pleaded on these issues. Subject to what I have to say about other aspects of the Claim, the Plaintiffs should be allowed to go forward, call their evidence, and attempt to make their case. It cannot be said, in my view, that it is plain and obvious on the facts pleaded that the action cannot succeed as regards this aspect of the Claim. And even if s.18 of the Bank Act is interpreted as purely permissive, that does not decide the issue raised in the Claim that Canada has obviated crucial aspects of the Bank Act and has subverted or abdicated constitutional obligations by making itself subservient to private international institutions.

122 I said the *Bank Act* claims "*could be* justiciable and appropriate for consideration by the Court"(emphasis added) because the Plaintiffs do give their account of the socio-economic problems that arise from alleged breaches of the *Bank Act* and related constitutional principles. I concluded that this provided context for the alleged breaches in the claims because the Court needs to understand the Plaintiffs' version of what is at stake and what flows from the alleged breaches:

> [75] The difficult boundary between what a court should and should not decide will arise time and again in a case like the present. However, the issue is not whether the Court should mandate the Government and the Bank to adopt the economic positions espoused and advocated by the Plaintiffs. Nor will the Court be deciding whether a particular policy is "financially or economically fallacious," although this kind of accusation does appear in the Claim. In my view, the Court is being asked to decide whether particular policies and acts are in accordance with the Bank Act and the Constitution. If justiciability is a matter of "appropriateness," then the Court is the appropriate forum to decide this kind of issue. In fact, the Court does this all the time. The Supreme Court of Canada has made in clear that the Parliament of Canada and the executive cannot abdicate their functions (see *Wheat Board*, above) and that the executive and other government actors and institutions are bound by constitutional norms. See *Reference re Secession of Quebec*, above, and *Khadr*, above.

123 From a *res judicata* perspective, it has to be borne in mind that the portions of the claim related to the *Bank Act* were struck under Rule 221. My comments about justiciability -- "could be justiciable and appropriate for consideration by the Court," -not "are justiciable" simply went to Prothonotary Aalto's findings that they were not justiciable because they involved matters of policy rather than law. I was simply pointing out that legal issues could be distinguished from policy issues, so that the *Bank Act* claims could become justiciable "subject to what I have to say about other aspects of the Claim..." And when I say the "facts are pleaded on these issues," (para 76) the "issues" I am referring to are the facts that distinguish the law from policy. The Plaintiffs are right to point out that I thought the *Bank Act* claims could go forward, but this was subject to issues of jurisdiction and what I had to say about the other aspects of the claim, and the Federal Court of Appeal endorsed this reasoning and this approach to the claims.

124 The reason I said the *Bank Act* claims "could be justiciable and appropriate for consideration by the Court" is because, as drafted, these claims give rise to problems of jurisdiction and justiciability that the Plaintiffs should have the opportunity to resolve by way of amendments. Now that amendments have been made the Court has to decide whether the Plaintiffs have resolved these problems.

125 The grounds brought forward by the Defendants in the present Rule 221 motion, as well as the arguments of the Plaintiffs, have to be considered in light of what the Court has already ruled about the *Bank Act* claims and what the Federal Court of Appeal has endorsed.

126 The Plaintiffs fault the Defendants for again raising arguments on justiciability that the Court has already decided and the Federal Court of Appeal has endorsed. As a reading of my Order of April 24, 2014 shows, my conclusions on justiciability at that time were subject to serious reservations. I concluded that there were legal issues in the claims (breaches of the *Bank Act* and the Constitution) that the Court could deal with and that could be distinguished from the socio-economic policy assertions in the claims: "In my view, the Court is being asked to decide whether particular policies and acts are in accordance with the Bank Act and the Constitution. If justiciability is a matter of 'appropriateness,' then the Court is the appropriate forum to decide this kind of issue."

127 I did not conclude, however, that the claims as drafted were sufficient to allow the Court to carry out this function (otherwise I would not have struck them under Rule 221), and I went on to point out that the *Bank Act* and related Constitutional claims had to be struck, and indicated what the Plaintiffs needed to do by way of amendment to allow the Court to consider the legal (as opposed to the socio-economic policy aspects) of the claims. It has to be borne in mind that I struck all of the claims and that the Federal Court of Appeal did not just endorse what I said about justiciability; it also endorsed my decision to strike all of the claims and my reasons for doing so. So the important issue before me at this juncture is not whether the Court *could* examine and rule on the legal aspects of the claims; the issue is whether the amendments are sufficient to allow the Court to do this, and whether they overcome the problems I identified that compelled me to strike all of the claims in 2014.

128 To be fair to both sides of this dispute, my Order of April 24, 2014 may sometimes confuse issues of jurisdiction and justiciability. The Federal Court of Appeal seemed to have no problem with this and, however these concerns should be characterized, I did set them out in some detail and I will discuss them here as I described them in my Order of April 24, 2014. The Defendants may not be entirely wrong when they characterize those problems as being about justiciability rather than jurisdiction.

129 In my Order of April 24, 2014, I went on to examine the jurisdictional problems that arose in the Amended Statement of Claim that was then before me:

> [86] As I have concluded that it is not plain and obvious that the breach of statutory and constitutional obligations and the declaratory relief sought is not justiciable, all I can do at this juncture is decide whether the Court has the jurisdiction to deal with this aspect of the Claim. If amendments are made to portions of the Claim that are struck, this issue may have to be re-visited.
>
> [87] At this stage in the proceedings, s. 17 of the *Federal Courts Act* appears sufficiently wide enough to give the Federal Court concurrent jurisdiction where relief is sought against the Crown. This doesn't end the matter, of course, and the Defendants have asked the Court to examine and apply the *ITO v Miida Electronics Inc*, [1986] 1 SCR 752 at p. 766 [*ITO*], jurisdictional test.
>
> [88] Given the Federal Court of Appeal decision in *Rasmussen v Breau*, [1986] 2 FC 500 at para 12, to the effect that the *Federal Courts Act* only applies to the Crown *eo nomine*, and not to a statutory corporation acting as an agent for the Crown, it is difficult to see why the Bank should be named as a Defendant. However, the main problem in the way of determining jurisdiction at this stage is that the Plaintiffs have yet to produce pleadings that adequately set out how any private or other interest has been affected by the alleged statutory and constitutional breaches. The Plaintiffs are asking the Court to declare that their view of the way the Bank Act and the Constitution should be read is correct, and that breaches have occurred. This is akin to asking the Court for an advisory opinion, and I see nothing in the jurisprudence to suggest that the Court has the jurisdiction to provide this kind of ruling in the form of a declaration.
>
> [89] The Plaintiffs are extremely vague on this issue. They simply assert that the Federal Court has jurisdiction to issue declarations concerning statutes such as the Bank Act, and jurisdiction over federal public actors, tribunals and Ministers of the Crown. They say they have private rights to assert but, as yet, and given that the tort and Charter claims must be struck, I see no private rights at issue. In addition, they claim to be acting for "all other Canadians," but, once again, they have yet to produce pleadings that adequately plead how the rights of "all other Canadians" have been impacted in a way that translates into the infringement of an individual or a collective right. If the rights of all Canadians are impacted, then the individual Plaintiffs would be able to describe, in accordance with the rules that govern pleadings, how their individual rights have been breached, but they have, as yet, not been able to do this.
>
> [90] It seems to me that the fundamental problem of how the Plaintiffs can simply come to the Court and request declarations that their interpretations of the Bank Act and the Constitution are correct is the reason why they have attached tortious and Charter breaches to their Claim. They know that they need to show how individual rights have been infringed but, as of yet, they have not even set out in their pleadings how their own rights have been infringed, let alone the rights of "all other Canadians."

> [91] This means that, in terms of the *ITO* principles, the Plaintiffs have yet to show a statutory grant of jurisdiction by the federal Parliament that the Court can entertain and rule on the Claim as presently constituted (i.e. simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleadings of how a private right or interest has been affected and the grounds for a valid cause of action), and they have yet to cite an existing body of federal law which is essential to the disposition of the case and which nourishes such a statutory grant of jurisdiction. The Plaintiffs do not have any specific rights under the legislation which they cite and they have provided no statutory or other framework for the exercise of any rights. They may be able to do these things with appropriate amendments to the pleadings. As yet, however, I cannot see how the Court acquires the jurisdiction to provide the declaratory relief that is sought.
>
> [emphasis in original]

130 It seems to me that the Plaintiffs have not resolved these problems in the Amended Claim.

131 The Plaintiffs take a very forceful and wide view on the availability of declaratory relief and the Court's jurisdiction to grant such relief. The Plaintiffs take the position that

> any citizen has a constitutional right, subject to frivolous and vexatious or no jurisdiction of the Court, to bring a public interest issue to the Court.
>
> [Transcript of Proceedings p 62, lines 25-27]

132 Even if I were to accept this broad approach to standing, I still have to decide the jurisdictional issue which I could not decide in April, 2014 for the reasons quoted above that were endorsed by the Federal Court of Appeal, and which, to use the Plaintiffs' own logic, I must accept as *res judicata*. I said that the Plaintiffs could not just ask the Court for an advisory opinion on these *Bank Act* issues because "I see nothing in the jurisprudence to suggest that the Court has the jurisdiction to provide this kind of ruling in the form of a declaration." In retrospect, I might have characterized this as a justiciability issue but, in my view, the terminology doesn't matter because I decided that the problem was that the Plaintiffs were asking for a free-standing declaration that amounted to an advisory opinion and the Court is not in the business of granting free-standing opinions.

133 The Plaintiffs' position on this issue is as follows:

> You have at paragraph 29 the ruling in Dunsmuir with respect to judicial review as a constitutional right. And Dunsmuir and other cases see judicial review writ large. It's not the procedural avenue of judicial review by way of application as opposed to by way of action. Under section 17 this Court has ruled one can seek declaratory relief by way of action, and that is in my factum.
>
> But if I can refer Your Lordship to paragraph 31, where I actually extract the portions from the Manitoba Métis case, and they are italicized and bolded at pages 242 and 243.
>
> "Citing Thorsen, [1975] 1 S.C.R. 138, the Supreme Court of Canada in this case", which is 2013 case," states: 'The constitutionality of legislation has always been a justiciable issue. The right of the citizenry to constitutional behaviour by Parliament can be vindicated by declaration that legislation is invalid or that a public act is ultra vires.'"
>
> That is paragraph 134 that is extracted. That is exactly what my clients seek with respect to the actions of the Minister of Finance and the resulting constitutional breach of their right to vote -- of their right not to be taxed without effective representation by their MPs, because they're blindfolded by the Minister of Finance and what he does not deliver, which is a constitutional requirement, we say.
>
> And then over the page from paragraph 140, the Supreme Court states:
>
> "The Courts are the guardians of the Constitution and cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionally and the rule of law demand no less."

> And then the passage that really answers my friend at paragraph 143 of Manitoba Métis Federation -- an Inc., by the way, a corporation brought the challenge.
>
> "Furthermore, the remedy available under this analysis if of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available."
>
> That statutorily reproduced under rule 64 of the Federal Courts Act, My Lord, which is reproduced at paragraph 32 of my factum, and this court in Edwards, which is right below that, has ruled that the declaratory relief may be sought in an action under section 17, which was have done. And then which is consistent with the Supreme Court of Canada jurisprudence in Khadr and Thorsen.
>
> [Transcript of Proceedings p 54 line 8 to p 55, line 28]

134 The Plaintiffs appear to be of the view that, as a think-tank, they can simply come to Court and ask the Court to declare that the Minister of Finance and the Government of Canada are required to do certain things under the *Bank Act*, and that they have abdicated their constitutional duties, and allowed international private entities to trump the interests of Canadians. COMER has no Constitutional or *Charter* rights to assert and the individual Plaintiffs are no differently situated from any other Canadian and have no demonstrable individual Constitutional and *Charter* rights to assert. In the Amended Claim, the Plaintiffs collectively remain a think-tank, seeking the Court's endorsement of alleged *Bank Act* and Constitutional breaches related to the *Bank Act* and international institutions.

135 Having been given the opportunity to amend, there are still no material facts in the Amended Claim that link the impugned legislative scheme embodied in the *Bank Act* to an effect on themselves as Plaintiffs. Their argument is that freestanding declarations on the constitutionality of laws and legal authority are always available to any Canadian citizen.

136 Since my Order of April 24, 2014 was considered by the Federal Court of Appeal, the Federal Court of Appeal has had occasion to consider and pronounce in some detail on what the Court can do with pleadings that contain freestanding requests for declaratory relief. In *Mancuso v Canada (National Health and Welfare),* 2015 FCA 227 [*Mancuso*], the Federal Court of Appeal provided the following guidance:

> [31] The appellants allege that their action can nonetheless proceed to trial on the basis of the surviving paragraphs. It is not problematic, in their view, that there are no material facts in the statement of claim, including none that link the impugned scheme to an effect on themselves as plaintiffs. They base this argument on the proposition that freestanding declarations on the constitutionality of laws and legal authority are always available.
>
> [32] On this latter point, there is no doubt. Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the *Constitution Act, 1867* be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.
>
> [33] The Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.
>
> [34] Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation -- in other words, a failure to meet the second *Khadr* requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's vires. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more

> than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.
>
> [35] This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.

137 In the present case, the Plaintiffs have not, in their Amended Claim, pleaded facts to demonstrate a "real" issue concerning the relative interests of each party, and the nexus of that real issue to the Plaintiffs and their claim for relief. Although as I pointed out in my Order of April 24, 2014, the Plaintiffs do distinguish between legal issues and policy issues, the legal issues remain theoretical with no real nexus to some interest of the Plaintiffs, other than an interest in having the Court endorse their opinion on the *Bank Act* issues raised.

138 The Plaintiffs have not addressed the jurisdictional problems I referred to in paras 85 to 91 of my Order of April 24, 2014 and/or what might generally be referred to as the jurisdiction of the Court to entertain, or its willingness to grant, free-standing requests for declaration.

139 Apart from the taxation issues which I have concluded are not justiciable for reasons set out above, the Plaintiffs have made little attempt in their amendments to rectify the problems I raised in my Order of April 24, 2014. The declaratory relief related to the *Bank Act* remains the same. The damages claimed in 1(b)(ii) appear to be based upon s 3 of the *Charter* and the no taxation without representation principle, which I have found to be non-justiciable.

140 The Plaintiffs have urged me to treat my Order of April 24, 2014 and the Federal Court of Appeal decision on that judgement as *res judicata*. If I do this then I have to say that in their Amended Claim the Plaintiffs have still provided no legal or factual basis for the infringement of their private rights, and the declarations remain nothing more than a request that the Court provide an advisory opinion that supports their view of the way the *Bank Act* and the Constitution should be read.

141 In order to overcome this problem in their first Amended Statement of Claim, the Plaintiffs hitched their declaratory relief to ss 7 and 15 of the *Charter* and various tort claims, all of which they have now abandoned. In their stead, they have now hitched the declaratory relief to claims based on s 3 of the *Charter* and Constitutional guarantees of no taxation without representation, which I have found to be non-justiciable. This leaves the Court in the same situation as it found itself in April, 2014:

> [91] This means that, in terms of the *ITO* principles, the Plaintiffs have yet to show a statutory grant of jurisdiction by the federal Parliament that the Court can entertain and rule on the Claim as presently constituted (i.e. simply declare that statutory and constitutional breaches have occurred without an adequate description in the pleadings of how a private right or interest has been affected and the grounds for a valid cause of action), and they have yet to cite an existing body of federal law which is essential to the disposition of the case and which nourishes such a statutory grant of jurisdiction. The Plaintiffs do not have any specific rights under the legislation which they cite and they have provided no statutory or other framework for the exercise of any rights. They may be able to do these things with appropriate amendments to the pleadings. As yet, however, I cannot see how the Court acquires the jurisdiction to provide the declaratory relief that is sought.

142 It seems to me that the Federal Court of Appeal in *Mancuso*, above, has now made it clear that a claim for a pure declaration must establish through pleading sufficient material facts that the Court has jurisdiction over the claims "and a real as opposed to a theoretical question in respect of which the person raising has an interest."

143 I do not wish to denigrate, or even downplay, the Plaintiffs' concerns about the way that Parliament has dealt with economic and monetary issues. But not all concerns can be translated into legal action that can, or should, be dealt with by a court of law. Rather than supplement their previous ss 7 and 15 *Charter* claims, and their previous tort claims, the Plaintiffs have abandoned those claims altogether and have now come up with claims based upon s 3 of the *Charter* and Constitutional guarantees of no taxation without representation. As able as their arguments are, the sudden switch to a new game plan suggests that the Plaintiffs are not able to remove their concerns from the political realm and to characterize them in such a way that they can be dealt with by this Court.

144 It seems to me, then, that the latest Amended Claim discloses no reasonable cause of action and has no prospect of success at trial. It also seems to me that the Plaintiffs are still asking the Court for an advisory opinion in the form of declarations that their view of the way the *Bank Act* and the Constitution should be read is correct. It also seems to me that they have failed to show a statutory grant of jurisdiction by Parliament that this Court can entertain and rule on their claim as presently constituted, or that they have any specific rights under the legislation which they invoke, or a legal framework for any such rights. As the Supreme Court of Canada pointed out in *Operation Dismantle*, above, the preventive function of a declaratory judgment must be more than hypothetical and requires "a cognizable threat to a legal interest before the Court will entertain the use of its process as a preventative measure" (para 33). The Court is not here to declare the law generally or to give an advisory opinion. The Court is here to decide and declare contested legal rights. See *Gouriet*, above, at 501-502.

D. *Other issues*

145 The Defendants have raised a number of other issues going to the adequacy and appropriateness of the Amended Claim but, in light of the fundamental problems I have dealt with above, I see no point in going any further with my analysis.

E. *Leave to Amend*

146 The Plaintiffs have asked the Court to consider, as an alternative form of relief, that they be allowed to proceed on the declaratory relief in their Amended Claim, with leave to amend any struck portions with respect to the damages portion of the claim.

147 As set out above, I do not think that, even for the declaratory relief sought, that the Plaintiffs have been able to raise their claim above a mere request for an advisory opinion. In addition, as further explained above, given that the Plaintiffs have not been able to rectify the fundamental issues I pointed out in my Order of April 24, 2014, and have not suggested any way in which they could be rectified, I see no point in allowing an amendment. Having previously permitted the Plaintiffs such an opportunity, their response convinces me that, for reasons given, they have no scintilla of a cause of action that this Court can or should hear. Without having any real legal interest at stake, the Plaintiffs remain a think tank seeking to have the Court endorse their political and academic viewpoint. Amendments are not going to change this.

ORDER

THIS COURT ORDERS that

1. The Plaintiffs' latest Amended Claim is struck in its entirety;
2. Leave to amend is refused;
3. Costs are awarded to the Defendants.

RUSSELL J.

Committee for Monetary and Economic Reform v. Canada

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

M. Noël C.J., D.G. Near and D.J. Rennie JJ.A.

Heard: December 7, 2016.

Oral judgment: December 7, 2016.

Docket: A-76-16

[2016] F.C.J. No. 1391 | [2016] A.C.F. no 1391 | 2016 FCA 312

Between Committee for Monetary and Economic Reform ("Comer"), William Krehm, and Ann Emmett, Appellants, and Her Majesty the Queen, The Minister of Finance, The Minister of National Revenue, The Bank of Canada, The Attorney General of Canada, Respondents

(14 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — Appeal by Committee, Krehm and Emmet from order striking amended statement of claim dismissed — Action challenged the manner in which the Parliament handled monetary and economic issues — Court lacked jurisdiction to provide advisory opinion on state of law in general, challenged by appellants as contrary to their rights to no taxation without representation — Federal Courts Rules, Rule 221.

Appeal by the Committee for Monetary and Economic Reform, Krehm and Emmet from an order striking their amended statement of claim without leave to amend. Their action challenged the way Parliament handled economic and monetary issues in Canada, and sought declarations of various statutory violations and tortious conduct of conspiracy and misfeasance of public office. The respondents, the Crown, the Ministers of Finance and of National Revenue, the Bank of Canada and the Attorney General of Canada successfully moved to strike the original claim as disclosing no reasonable cause of action, but on appeal, the appellants were granted leave to amend their claim. In their amended pleadings, the appellants abandoned claims under sections 3 and 15 of the Canadian Charter of Rights and Freedoms, 1982, substituting claims pursuant to section 3, asserting a right to no taxation without representation. This claim was also struck in the order under appeal.
HELD: Appeal dismissed.

There was no error in the order, characterizing the claim as one for an advisory opinion on the

law in general, something beyond the jurisdiction of the court. The amended claim disclosed no reasonable cause of action and had no chance of success at trial.

Statutes, Regulations and Rules Cited:

Bank of Canada Act, R.S.C. 1985, c. B-2

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, s. 3, s. 7, s. 15

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3

Federal Courts Rules, SOR/98-106, Rule 221

Appeal From:

Appeal from a judgment of the Federal Court dated February 8, 2016, Docket No. T-2010-11 (2016 FC 147).

Counsel

Rocco Galati, for the Appellants.

Peter Hajacek, for the Respondents.

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

D.J. RENNIE J.A.

1 This is an appeal brought by the Committee for Monetary and Economic Reform, William Krehm, and Ann Emmet (the appellants) from an order issued pursuant to Rule 221 of the *Federal Court Rules* (SOR/98-106) by Russell J. (the Federal Court judge) striking out the appellants' amended statement of claim without leave to amend (2016 FC 147).

2 The appellants commenced an action challenging the way Parliament handles economic and monetary issues in Canada and initially sought declarations of violations of the *Bank of Canada Act*, R.C.S. 1985, c. B-2 [*Bank of Canada Act*]; the *Constitution Act, 1867*, (U.K), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]; and of tortious conduct of conspiracy and misfeasance in public office.

3 The respondents brought a motion to strike, and on August 9, 2013, Prothonotary Aalto struck out the appellants' original statement of claim in its entirety without leave to amend on the basis that it did not disclose a reasonable cause of action (2013 FC 855).

4 By decision rendered on April 24, 2014, the Federal Court judge sitting in appeal from the Prothonotary's decision, reconsidered the matter *de novo.* Applying the test for striking out set out by the Supreme Court in *R v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, he too held that the statement of claim did not reveal a cause of action, but was of the view that the possibility that the appellants could come up with a proper pleading with respect to specified issues could not be excluded. He therefore granted the appellants leave to amend (2014 FC 380). On the appeal and cross-appeal which followed, this Court disposed of the matter from the bench, dismissing both (2015 FCA 20).

5 On March 26, 2015, the appellants filed an amended statement of claim wherein they abandoned prior claims made pursuant to sections 7 and 15 of the *Charter* and substituted therefor claims pursuant to section 3 of the *Charter,* asserting a right to "no taxation without representation".

6 The respondents again moved to have the statement of claim struck on the basis that the appellants' amended statement of claim failed to rectify any of the previous deficiencies and therefore disclosed no reasonable cause of action.

7 By decision rendered on February 8, 2016, the Federal Court judge again struck the amended statement of claim in its entirety, this time however without leave to further amend.

8 This is the decision now under appeal.

9 The essence of the Federal Court judge's reasoning for striking the amended statement of claim is summed up at paragraph 144 of his reasons:

> It seems to me, then, that the latest Amended Claim discloses no reasonable cause of action and has no prospect of success at trial. It also seems to me that the Plaintiffs are still asking the Court for an advisory opinion in the form of declarations that their view of the way the *Bank Act* and the Constitution should be read is correct. It also seems to me that they have failed to show a statutory grant of jurisdiction by Parliament that this Court can entertain and rule on their claim as presently constituted, or that they have any specific rights under the legislation which they invoke, or a legal framework for any such rights. As the Supreme Court of Canada pointed out in *Operation Dismantle*, [1985] 1 S.C.R. 441 above, the preventive function of a declaratory judgment must be more than hypothetical and requires "a cognizable threat to a legal interest before the Court will entertain the use of its process as a preventative measure" (para 33). The Court is not here to declare the law generally or to give an advisory opinion. The Court is here to decide and declare contested legal rights.

10 The appellants assert that the opinion so expressed is wrong in law. In support of this proposition, they essentially reiterate the arguments which they urged upon the Federal Court judge and ask that we come to a different conclusion. Counsel for the appellants focused his argument during the hearing on the issue of standing and the right to seek declarations of constitutionality. It remains however that, as the Federal Court judge found, the right to a remedy is conditional on the existence of a justiciable issue.

11 Reviewing the matter on the least deferential and most favourable standard from the appellant's perspective (*i.e.*: correctness), we are unable to detect any error which would warrant our intervention.

12 The arguments raised by the appellants have been given full consideration and there is nothing that we could usefully add to the judgment below to explain why the Federal Court judge correctly held that the appellants' claims, as set out in their amended statement of claim, are bound to fail.

13 As to the denial of leave to amend, after having granted leave once, the Federal Court judge held that leave ought not to be granted a second time. Keeping in mind that this aspect of the decision embodies a discretionary element, we can detect no error in the conclusion reached by the Federal Court judge as expressed at paragraph 147 of his reasons.

14 The appeal will be dismissed with costs.

D.J. RENNIE J.A.

End of Document

Committee for Monetary and Economic Reform v. Canada, [2017] S.C.C.A. No. 47

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: February 1, 2017.

Record updated: May 4, 2017.

File No.: 37431

[2017] S.C.C.A. No. 47 | [2017] C.S.C.R. no 47

Committee for Monetary and Economic Reform ('COMER'), William Krehm and Ann Emmett v. Her Majesty the Queen, Minister of Finance, Minister of National Revenue, Bank of Canada and Attorney General of Canada

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) May 4, 2017.

Catchwords:

Civil procedure — Pleadings — Standing — Declaratory judgments — Jurisdiction — Applicants' statement of claim struck out without leave to amend pursuant to s. 221 of the Federal Courts Rules, SOR/98-106 — Is the right to seek justiciable declaratory constitutional relief, particularly in public interest litigation, irreconcilable with the pre-Patriation notion of "private reference" (or "free-standing" or "advisory" opinion)? - - Is the right to seek declaratory constitutional relief, in respect of the budgetary process and the legislative provisions of the Bank of Canada Act, R.C.S. 1985, c. B-2, foreclosed by a successful underlying cause of action for damages tied to the declaratory relief?

Case Summary:

The applicants commenced an action against the respondents. They sought declarations of violations of the Bank of Canada Act, R.C.S. 1985, c. B-2; the Constitution Act, 1867, (U.K), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5; ss. 7 and 15 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11; and of tortious conduct of conspiracy and misfeasance in public office. The applicants sought damages for the violations alleged.

The respondents brought a motion to strike. The Federal Court Prothonotary struck out the original statement of claim in its entirety without leave to amend on the basis that the claim did not disclose a reasonable cause of action. On appeal from the Prothonotary's decision, the Federal Court judge agreed that the claim should be struck but granted leave to amend the pleadings. The Federal Court of Appeal dismissed the appeal and cross-appeal from that decision.

The applicants filed an amended statement of claim where they abandoned prior Charter claims and added a claim pursuant to s. 3 of the Charter, asserting a right to "no taxation without representation". The respondents again moved to have the statement of claim struck on the basis that the applicants failed to rectify any of the previous deficiencies in the pleadings, and that the claim therefore disclosed no reasonable cause of action.

Counsel

Rocco Galati (Rocco Galati Law Firm Professional Corporation), for the motion.

Peter Hajecek (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:
   FILED: February 1, 2017.

   SUBMITTED TO THE COURT: March 27, 2017.

   DISMISSED WITH COSTS: May 4, 2017 (without reasons)

   Before: R.S. Abella, A. Karakatsanis and R. Brown JJ.

   The request for an oral hearing is dismissed. The application for leave to appeal is dismissed with costs.

Procedural History:

Motion to strike amended statement of claim without leave to
amend granted
February 8, 2016
Federal Court
(Russell J.)
2016 FC 147

Appeal dismissed
December 7, 2016
Federal Court of Appeal
(Noël C.J., Near and Rennie JJ.A.)
2016 FCA 312; [2016] F.C.J. No. 1391

End of Document

Da Silva Campos v. Canada (Minister of Citizenship and Immigration), [2015] F.C.J. No. 908

Federal Court Judgments

Federal Court

Zinn J.

Heard: In writing.

Judgment: July 20, 2015.

Amended judgment: November 13, 2015.

Docket: T-2502-14

[2015] F.C.J. No. 908 | [2015] A.C.F. no 908 | 2015 FC 884 | 2015 CF 884 | 2015 CarswellNat 3252 | 257 A.C.W.S. (3d) 434 | 37 Imm. L.R. (4th) 113

Proposed Class Action Proceeding Between Andre Da Silva Campos, Armando Filipe Freitas Goncalves, Aurelio Eduardo Marques Anjo, Aurelio Jose Esteves Mota, Avelino Jesus Linhares Ormonde, Cacia Aparecida Silva Freitas, Carlos Alberto Lima Araujo, Carlos Garces Gois, Carlos Manuel Loureiro Silva, Claudia Felismina Carvalho Da Costa, Emanuel Pereira Pires, Francisco Filipe Pereira Antunes, Grzegorz Jozef Biega, Henrique Manuel Rodrigues De Matos, Herminio Augusto Jorge Pedro, Joao Gomes Carvalho, Joao Luis Agrela Santos, Joao Pedro Sousa Reis, Jorge Pinheiro Gomes Prior, Jose Antonio Campos De Azevedo, Jose Antonio Silva Moniz, Jose Carlos Sousa Costa, Jose Filipe Cunha Casanova, Jose Luis Pereira Cunha, Leandro Filipe Matos Gomes De Sa, Luis Carlos Figueiredo Bento, Luis Filipe Silverio Vicente, Maciej Stanislaw Zaprzala, Manuel Agostinho Tome Lima, Manuel Domingos Borlido Barreiras, Manuel Costa Santos, Marco Filipe Silva Martinho Martinho, Marco Paulo Cruz Pinheiro, Maria Isabel De Castro Gouveia, Michal Szleszynski, Nuno Rodrigo Rodrigues Borges, Paolo Romandia, Pedro Manuel Cardoso Areias, Pedro Manuel Gomes Silva, Pedro Filipe Vilas Boas Salazar Novais, Ricardo Jorge Carvalho Rodrigues, Roberto Carlos Oliveira Silva, Rogerio Jesus Marques Figo, Rosalino De Sousa Henriques, Rui Manuel Henriques Lourenco, Rui Miguel Da Costa Lopes, Silvio Arnaldo Fernandes, Sofia Alexandra Leal Areias Silva, Vitor Miguel Dos Santos Ribeiro, Wiktor Antoni Reinholz, Wojciech Pawel Kaczmarski, Alessandro Colucci, Antonio De Arruda Pimentel, Augusto Jose Da Costa Santos, Bonifacio Manuel Costa Santos, Carlos Alberto Lima Araujo, Carlos Filipe Botequilhas Raimundo, Daniel Orlowski, Dariusz Domagala, Eugenio Pedro Machado Da Silva, Felice Di Mauro, Filipe Jose Laranjeiro Henriques, Hugo Rafael Paulino Da Cruz, Jose Carlos Sousa Costa, Luis Carlos Da Ponte Cabral, Paulo Alexandre Arruda Viana, Ricardo Jorge Vasconcelos Barroso, Vitor Manuel Esteves Silva Vieira, Ana Filipa Cruz Pereira, Ana Rita Araujo, Arnaldo Gomes Bras, Bruno Marcelo Martins Fernandes, Cacia Aparecida Silva Freitas, Claudia Felismina Carvalho Da Costa, Fernando Antonio Pereira Mendes, Fernando Jorge Riqueza Baganha, Helder Antonio Santos Avila Brum, Henrique Manuel Rodrigues De Matos, Hernani Sebastiao Moutinho Correia, Iga Gluszko, Joao Filipe Brito Ferreira, Jose Luis Pereira Cunha, Lauzer Vincente Gomes Lopes, Luis Miguel Pereira Da Silva, Mafalda Medeiros Costa, Maria Isabel De Castro Gouveia, Mario Andre Lima Rocha, Michal Szleszynski, Nuno Rodrigo Rodrigues Borges, Paolo Romandia, Paulo Filipe Raposo Martins, Rafael Manuel Borges Batalha, Ricardo Miguel Pires De Sousa, Sandra Cristina Pires De Sousa Fernandes, Sara Cristina Custodio Pereira, Silvio Arnaldo Fernandes, Sofia Alexandra Leal Areias Silva, Stephanie Oliveira, Vitor Carvalho Marques Figueiredo, Alessandro Colucci, Antonio De Arruda Pimentel, Antonio Desiderio Ferreira Andre, Antonio Marciano Rajao Rosmaninho, Antonio Ricardo Ferraz De Sousa, Armando Filipe Freitas Goncalves, Augusto Jose Da Costa Santos, Aurelio Eduardo Marques Anjo, Aurelio Jose Esteves Mota, Bonifacio Manuel Costa Santos, Carlos Manuel Alves Barreira Luis, Emanuel Pereira Pires, Fernando Azevedo Ferreira, Fernando Jorge Neves Ferreira, Jose Antonio Fernandes Da Costa, Jose Filipe Cunha Casanova, Justyna Tadel, Mario Fernando Conceicao Martinho, Paulo Jorge Franco, Pedro Manuel Gomes Silva, Pedro Filipe Vilas Boas Salazar Novais, Ricardo Jorge Carvalho Rodrigues, Ricardo Jorge Martins Ferreira Antunes, Rui Miguel Da Costa Lopes, Wiktor Antoni Reinholz, Andre Da Silva Campos, Carlos Manuel Alves Barreira Luis, Eugenio Pedro Machado Da Silva, Filipe Jose Laranjeiro Henriques, Francisco Filipe Pereira Antunes, Lanzer Vicente Gomes Lopes, Luis Filipe Silverio Vicente, Luis Miguel Pereira Da Silva, Rui Miguel Da

Costa Lopes, Sandra Cristina Pires De Sousa Fernandes, Andrzej Tomasz Waga, Avelino Jesus Linhares Ormonde, Carlos Alberto Barbosa Silva, Carlos Antonio Ferreira Matos, Carlos Garces Gois, Carlos Jesus Correia, Carlos Manuel Loureiro Silva, Daniel Filipe Costa Ferreira, Enrique Fernandez Pereira, Fabio Soares Moniz, Fernando Medeiros Cordeiro, Gilvane Paulino Damiao, Grzegorz Jozef Biega, Helio Alexandre Da Silva Gomes, Herminio Augusto Jorge Pedro, Igor Sergio Gouveia Gomes, Joao Filipe Sousa Araujo, Joao Gomes Carvalho, Joao Luis Agrela Santos, Joao Pedro Sousa Reis, Jorge Pinheiro Gomes Prior, Jose Antonio Campos De Azevedo, Jose Antonio Silva Moniz, Leandro Filipe Matos Gomes De Sa, Luis Carlos Figueiredo Bento, Maciej Stanislaw Zaprzala, Manuel Agostinho Tome Lima, Manuel Borges Leal, Manuel Costa Santos, Marco Filipe Da Silva Martinho, Marco Paulo Da Cruz Pinheiro, Paulo Joao Duarte Sabino, Paulo Alexandre Costa Reis, Pedro Manuel Cardoso Areias, Pedro Miguel Ribeiro Pontes, Ricardo Jorge Fonseca Furtado, Ricardo Jorge Santos Ferreira, Roberto Carlos Oliveira Silva, Rogerio De Jesus Marques Figo, Rosalino De Sousa Henriques, Rui Manuel Fernandes Lima, Rui Manuel Henriques Lourenco, Vitor Alberto Vergas Marcal, Vitor Manuel Esteves Silva Vieira, Vitor Miguel Dos Santos Rireiro, Wieslaw Kotula, Artur Grzegorsz Kotula, Wojciech Pawel Kaczmarski, Bruno Marcelo Martins Fernandes, Carlos Alberto Ferreira Jesus, Edgar Da Cruz Santos, Joaquim Carlos Piedade Ferreira, Tiago Fernando Marques Maio, Aurelio Jose Esteves Mota, Carlos Manuel Loureiro Silva, Emanuel Pereira Pires, Fernando Antonio Pereira Mendes, Fernando Azevedo Ferreira, Iga Gluszko, Joao Filipe Brito Ferreira, Jorge Pinheiro Gomes Prior, Lauzer Vicente Gomes Lopes, Maciej Stanislaw Zaprzala, Manuel Costa Santos, Mario Fernando Conceicao Martinho, Nuno Rodrigo Rodrigues Borges, Pedro Filipe Vilas Boas Salazar Novais, Rafael Manuel Borges Batalha, Rosalino De Sousa Henriques, Rui Manuel Fernandes Lima, Rui Manuel Henriques Lourenco, Sandra Cristina Pires Sousa Fernandes, Tiago Fernando Marques Maio, Vitor Alberto Vergas Marcal, Wiktor Antoni Reinholz, Wojciech Pawel Kaczmarski, Adelino Silva Capela, Alexandre Ferreira Filipe, Andresz Tomasz Myrda, Antinio Joaquim Oliveira Martins, Antinio Manuel Da Silva Marques, Carlos Eurico Ferraz De Sousa, Eduardo Manuel Rodrigues Marcelino, Isaac Manuel Leituga Pereira, Isabelle Angelino, Joao Pedro Esteves Ferreira, Joao Tiago Soares, Joaquim Agostinho Da Costa Rodrigues, Joaquim Ferreira Soares, Jose Augusto Lopes Ferreira, Jose Carlos Gouveia Salgado, Jose Manuel Sieira Gavina, Jose Joaquim Marques Tourita, Juvenal Silva Cabral, Mario Luis Costa Rodrigues, Miguel Alexandre Andrino Gomes, Miltin Cesar Aguiar Carreiro, Robert Zlotsz, Sergio Fernandes Silva Anselmo, Siivino Araujo Couto, Simao Pedro Martins Da Costa, And Valdemar Ferreitra Costa, Plaintiffs, and Minister of Citizenship and Immigration, Minister of Employment and Social Development, Her Majesty the Queen, Defendants

(14 paras.)

Counsel

Rocco Galati, for the Plaintiffs.

Roger Flaim, Prathima Prashad, for the Defendants.

[Editor's note: Amended reasons were released by the Court on November 13, 2015. The changes were not indicated. This document contains the amended text.]

ORDER AND REASONS

ZINN J.

1 The defendants move to strike the Statement of Claim, without leave to amend. They submit that it discloses no reasonable cause of action, and is riddled with deficiencies such that the "claim is beyond particularizing or amending [and] should be struck in its entirety." I agree; however, the plaintiffs ought to be granted an opportunity to file an amended claim that properly and specifically sets out their claim(s).

2 The present Statement of Claim comes close to being incomprehensible. The claim appears to assert that the plaintiffs have suffered damages and loss as a result of the delay, misfeasance, discrimination, negligence, and illegality in the processing of Labour Market opinions [LMOs], Labour Market Impact Assessments [LMIAs], work permits and permanent residence applications.

3 This is a proposed class action proceeding against two Ministers for certain alleged acts and omissions, and against Her Majesty the Queen for the tortious acts and omissions of her officials and servants, including the two Ministers.

4 It is alleged that all of the plaintiffs applied for, and were denied, LMO or LMIA assessments, on Temporary Work Permits [TWP], Work Permits [WP], or Provincial Nominee Program [PNP] permanent resident consideration. The plaintiffs are sorted into eight groups (it is unclear to the court whether some plaintiffs appear in more than one group), as described in paragraph 2 of the Statement of Claim, as follows:

> [Group 1] "are all Foreign Temporary Workers, [TFW] pursuant to the *IRPA Regulations,* under the authority of s. 12(2) of the *IRPA,* who applied for Foreign Temporary Worker permits and were denied because no Labour Market Opinion ("LMO") or Labour Market Impact Assessment ("LMIA") had been processed by the Defendant Minister of Employment and Social Development (formerly Minister for Human Resources and Social Development), following which the Minister of Immigration and his officials denied them work permits due to the inordinate, inexplicable, and actionable delay by the Minister of Human Resources and Social Development, contrary to his statutory duty to process, pursuant to s. 3(1)(f) of the *IRPA,* which applications were filed and denied to the Plaintiffs set out in, and in accordance with,*" Schedule A"* of the within Statement of Claim;"
>
> [Group #2] "are all Foreign Temporary Workers, pursuant to the *IRPA Regulations,* who were denied permits based on the erroneous, arbitrary, and *ultra vires* assessment that the Plaintiffs' trade or work category lack a labour market "shortage", which refusals were made based on conceded facts by the Defendants that:
>
> (i) that no statistics existed with respect to "shortages";
>
> (ii) that the Defendant Ministers expressed, publicly, that they hoped to have such statistics as to shortages, by 2015; and
>
> (iii) that the best-placed authority as to shortages are the Provincial, local Labour authorities, industries, and trade unions;
>
> which applications were filed and denied to the Plaintiffs set out in, and in accordance with, *"Schedule B"* to the within statement of claim;"
>
> [Group #3] "were denied LMO/LMIA consideration due to illegal and *ultra vires* Ministerial directions and instructions by the Minister of Employment and Social Development, of a moratorium up to June 201h, 2014, which moratorium was applied nationally even though it arose from a local problem in Western Canada with no such problem existing in Ontario, particularly with the "ethnic food sector", and further which instructions were due to the incompetence and *ultra vires* LMO/LMIA assessments, as well as the impossible and onerous policies and requirements then imposed on June 20'h, 2014, looking forward beyond June 20'h, 2014, which included some of the following:
>
> (i) commit to hiring and training Canadians at high wage rates even though the employers cannot find Canadians willing and able to be trained and, further, if a company failed to find and train a Canadian worker over a 3-5 year period, then the company could face l year in jail and a $100,000 fine;
>
> (ii) agree to let in Ministry of Employment and Development (Human Resources and Social Development) investigators into their office, unannounced and without warrant, to review and take all company records; Ministry of Employment and Development (Human Resources and Social Development) investigators also were given ability to enter residential premises;

which LMO/LMIA applications, were filed and denied to the Plaintiffs set out in, and in accordance with *"Schedule C'* of the within Statement of Claim;"

[Group #4] were denied, contrary to law, and by way of illegal and *ultra vires* policy change and Minister's instructions, which policies and changes changed after the Plaintiffs' application was submitted, but before a decision on the assessment was made, whereby the new policies and instructions were applied to the LMO/ LMIA, resulting in a refusal of the application, and actionable damages caused to the Plaintiffs set out in, and in accordance with *"Schedule D"* of the within Statement of Claim;

[Group #5] were denied an LMO/LMIA assessment and decision in order to .renew their work permits, due to arbitrary, and *ultra vires,* compliance order(s) against their employers and Plaintiffs which made it impossible to obtain a decision, such as:

(i) the inexcusable, inordinate delay in processing and verifying which could take 5-6 months;

(ii) making assessments, and assumptions regarding commercial, market and labour standard conditions which did not accord with reality and were based on mere assumptions without evidence, when the expertise, evidence, and information lay with local Provincial authorities, industries, and unions which were not accessed by the Defendants' officials;

(iii) while they called them "investigations" with respect to the compliance orders, the Defendants' officials in fact never showed up at work-sites, or offices, to speak to employers or employees; and

(iv) while an employer was under "compliance review", all applications for that employer were not processed;

which resulted in the denial of an LMO/LMIA assessment for the Plaintiffs who applied for one, prior to the arbitrary compliance orders were put in place, but before an assessment/decision could be made, which caused actionable damages for the Plaintiffs as set out in, and in accordance with *"Schedule E'* of the within Statement of Claim;"

[Group #6] "were not able to apply for required LMO/LMIA, to renew their work permits, due to arbitrary, and *ultra vires,* arbitrary changes to LMO/LMIA Rules for which these Plaintiffs made it impossible to obtain a decision, which rules include such orders as:

(i) the Defendants' officials would change the wage rates without notice;

(ii) the Defendants' officials would change the advertising requirements without notice;

(iii) the Defendants' officials would charge their analysis of their "labour market" statistics without notice; and

(iv) the Defendants' officials would change language requirements without notice;

which resulted in the denial of an LMOILMIA assessment for the Plaintiffs who applied for one, prior to the arbitrary rules were put in place, but before an assessment/decision could be made, which caused actionable damages for the Plaintiffs as set out in, and in accordance with *"Schedule F'* of the within Statement of Claim;"

[Group #7] "were eligible Provincial Nominee Program ("PNP") Applicants in Ontario who applied but, because of either illegal and *ultra vires* "quota" and inexplicable, illegal, and actionable delay by the Defendant Minister of Immigration, as well as superimposing and overriding provincial criteria and selection with irrelevant and *ultra vires* federal criteria, will not receive an answer to their application for their permanent residence, and will see removal proceedings against them before a decision can be made, thus causing actionable damages to these Plaintiffs as set out, and in accordance with *"Schedule G"* of the within Statement of Claim;"

[Group #8] "who qualify for the "PNP" Programme in Ontario but who, because of the illegal, arbitrary, and *ultra vires* Federal "quota" by the Defendant Minister of Immigration, as well as super imposing and overriding provincial criteria and selection with irrelevant and *ultra vires* federal criteria, will not be

> processed, and subject to removal proceedings prior to a decision and thus caused actionable damages to the Plaintiffs as set in, and in accordance with *"Schedule H"* of the within Statement of Claim;"

5 The plaintiffs submit that "the substantive issues" in this motion have been dealt with by the court in Cabral et al v Canada (Minister of Citizenship and Immigration) et al, T-2425-14, which is referred to as "the companion case" and they argue that the basis of the within motion is "virtually indistinguishable, in law, and that the within motion to strike ought to be dismissed, as was largely the case in T-2425-14."

6 I agree with the defendants that the ruling on the motion to strike in T-2425-14 is of limited assistance in deciding the within motion because the subject matter of the actions are significantly different. I also agree with the defendants that the ruling in T-2425-14 is relevant in two respects: (i) whether the motion should be heard orally rather than in writing, and (ii) with respect to the plaintiffs' challenge to section 49 of the *Federal Courts Act* which bars jury trials should be struck. For the reasons given in T-2425-14, I find that this motion may be properly disposed of in writing pursuant to Rule 369 of the *Federal Courts Rules*, and that the allegation challenging section 49 of the *Federal Courts Act*, must be struck from the Statement of Claim.

7 The defendants submit that the plaintiffs, as TFWs, are "without standing with respect to claims concerning the processing of applications for [LMO/]LMIAs and thus paragraphs 2(a)-(f) and 6(a)-(f) do not disclose a reasonable case of action." It is accurate, as the defendants plead that LMOs and LMIAs are applied for and issued to employers, not the workers hired under them. However, it is not plain and obvious that a worker cannot be adversely affected by the failure or delay of Canada to issue a LMO or LMIA to a prospective employer which would have permitted the worker to be hired. On the other hand, it is unclear to the court that the claim, as currently drafted, pleads that all or any of the plaintiffs would have been hired as temporary workers had these documents been issued.

8 I am far from convinced that it is plain and obvious that none of these plaintiffs have a possible claim against the defendants; however, as presently drafted, the Statement of Claim cannot stand. The Statement of Claim suffers from a number of deficiencies that cannot be cured simply by striking its offensive parts for what would remain would not make sense. These deficiencies include the following:

1. The plaintiffs have not responded to what appears to be an accurate submission by the defendants that "the title of the proceeding lists 236 plaintiffs but upwards of 90 are listed twice [and] seven plaintiffs appear multiple times with names spelled in different ways making it unclear whether they are duplicate or different plaintiffs." This must be corrected in order that the defendants know who is bringing the action and without that information they are unable to mount much if any specific defence.
2. The Schedule "B" plaintiffs are described in paragraph 2(b) as having been denied permits but in Schedule "B" the plaintiffs are described as having been denied "LMIAs". This inconsistency must be resolved.
3. The Schedule "A" plaintiffs are described as having been denied LMIAs, but in Schedule "A" the plaintiffs list the dates they applied for work permits, which is not relevant to the claim these plaintiffs are advancing. Again, this must be resolved.
4. "In paragraph 12(a), the plaintiffs make passing reference to a 'criminal law duty of care, under s. 126 of the Criminal Code" [but] no facts are pleaded in respect of this claim, nor is this alleged duty of care otherwise referenced in the pleading." Absent such particulars, this pleading should be struck.

9 The defendants submit that "the plaintiffs plead no material facts supporting a claim that delays in the processing of applications for LMIAs are actionable." The plaintiffs plead that there were delays in processing the LMOs and LMIAs and that those delays were "inordinate, inexplicable and actionable." I do not accept, as the defendants suggest, that the claim must set out the dates of application, the date of denial, and the processing time that passed. Those facts can be discovered through a demand for particulars if the information is not otherwise available to the defendants. It is not necessary for the purposes of pleading. On the other hand, the plaintiffs must plead more than mere delay. Without pleading the basis for its assertion that there was a delay (such as comparing the processing time to an average, or basing the processing on some specific direction or policy), the defendants cannot respond.

10 I agree with the defendants that the plaintiff s' pleading that they have been or will be denied permanent resident visas owing to 'quotas', 'delays', and 'ultra-vires federal criteria' is far too general. The plaintiffs must plead material facts to establish the alleged quota, delay and ultra-vires claims, and plead facts the support the allegation that they have been or will be denied permanent resident visas to which they would otherwise be entitled.

11 I agree with the defendants that the "plaintiffs allege certain Ministerial instructions, policies, compliance orders, rules, quotas, and 'federal criteria' are 'illegal and ultra-vires'" without specifically identifying them or stating how they are illegal or ultra-vires. Absent this information, the pleading is deficient as it lacks material facts necessary for the defendants to respond to the allegation.

12 The Statement of Claim, insofar as it makes allegations relating to TFWP, LMIAs, the PNP, the Federal Skilled Workers Program, the Federal Trades Program, work permits, permanent residence visas, compliance orders, assessments of labour shortages, and the food-services moratorium of 2014, is deficient because there are no facts or insufficient facts pled to permit the defendants and the court to understand the bases of these claims. I agree with the defendants that these pleadings are "neither complete nor intelligible."

13 I further agree with the defendants that it appears that part of this claim, as it relates to the plaintiffs in T-2425-14, is duplicative. If so, and to that extent, it is improper.

14 These irregularities and material deficiencies are sufficient, in the court's view, to strike the Statement of Claim in its entirety; however, because there may be an actionable claim by some of these plaintiffs, they will be granted leave to file a Fresh Statement of Claim within sixty (60) days that conforms to these reasons, failing which the claim will be dismissed.

ORDER

THIS COURT ORDERS that:

1. The Statement of Claim is struck in its entirety;
2. The plaintiffs are granted leave to file a Fresh Statement of Claim within sixty (60) days of this Order that complies with the Reasons provided, failing which the action will be dismissed; and
3. Costs are in the cause.

ZINN J.

End of Document

Gill v. Maciver, [2022] O.J. No. 1018

Ontario Judgments

Ontario Superior Court of Justice

E.M. Stewart J.

Heard: September 27-29, 2021.

Judgment: February 24, 2022.

Court File No.: CV-20-652918-0000

[2022] O.J. No. 1018 | 2022 ONSC 1279

Between Dr. Kulvinder Kaur Gill and Dr. Ashvinder Kaur Lamba, Plaintiffs, and Dr. Angus Maciver, Dr. Nadia Alam, André Picard, Dr. Michelle Cohen, Dr. Alex Nataros, Dr. Ilan Schwartz, Dr. Andrew Fraser, Dr. Marco Prado, Timothy Caulfield, Dr. Sajjad Fazel, Alheli Picazo, Bruce Arthur, Dr. Terry Polevoy, Dr. John Van Aerde, Dr. Andrew Boozary, Dr. Abdu Sharkawy, Dr. David Jacobs, Tristan Bronca, Carly Weeks, The Pointer, The Hamilton Spectator, Société-Radio Canada, the Medical Post, Defendants

(318 paras.)

Counsel

Rocco Galati, for the Plaintiffs.

Howard Winkler and Eryn Pond, for the Defendant Dr. Angus Maciver.

Julian Porter, for the Defendant Nadia Alam.

Jaan Lilles and Katie Glowach, for the Defendants Dr. David Jacobs, Dr. Alex Nataros, Dr. Abdu Sharkawy, Dr. Nadia Alam and Dr. Michelle Cohen.

Susan Toth, for the Defendant Dr. John Van Aerde.

Andrea Gonsalves and Caitlin Milne, for the Defendant Dr. Andrew Fraser.

Alex Pettingill, for the Defendants Dr. Ilan Schwartz, Dr. Marco Prado, Timothy Caulfield and Dr. Sajjad Fazel.

Timothy Flannery, for the Defendant Dr. Terry Polevoy.

Daniel Iny and Melanie Anderson, for the Defendant Dr. Andrew Boozary.

Meredith Hayward and Michael Binetti, for the Defendants Tristan Bronca and The Medical Post.

Brian Radnoff and David Seifer, for the Defendant The Pointer Group Incorporated.

Andrew MacDonald, Carlos Martins and Emma Romano, for the Defendants André Picard and Carly Weeks.

George Pakozdi, for the Defendant Alheli Picazo.

Emma Carver, for the Defendant Bruce Arthur.

REASONS FOR DECISION

E.M. STEWART J.

Nature of the Motions

1 The Plaintiffs have initiated proceedings as against these more than 20 Defendants and claim damages in the aggregate of approximately $12,000,000.00 for defamation and other purported causes of action.

2 The Defendants have brought these several motions pursuant to s. 137.1 of the *Courts of Justice Act* ("CJA"), R.S.O 1990, c C.43. Section 137.1 allows for the dismissal by judicial order of a proceeding that limits debate on matters of public interest. These motions are more commonly referred to as "anti-SLAPP" motions. A SLAAP refers to a strategic lawsuit against public participation, a characterization which the Defendants argue aptly attaches to the proceedings brought against them.

3 The Plaintiffs argue that the motions do not satisfy the test for dismissal at this early stage and therefore submit that the relief requested by the Defendants should not be granted.

4 The most relevant portions of Section 137.1 of the CJA provide as follows:

> **Dismissal of proceeding that limits debate**
>
> **Purposes**
>
> 137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s.3.
>
> **Definition, "expression"**
>
> (2) In this section,
>
> "expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.
>
> **Order to dismiss**
>
> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.
>
> **No dismissal**
>
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

5 It is not disputed that the tort of defamation is governed by a well-established test requiring that three criteria be met:

(a) that the words complained of were published, meaning that they were communicated to at least one person other than the plaintiff;

(b) the words complained of referred to the plaintiff; and

(c) the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person.

6 Even if the definition of defamation is met, a defendant may have several defences to rely on to escape liability. These include justification, fair comment, qualified privilege and responsible journalism (see: *Grant v. Torstar Corp.*, 2009 SCC 61).

7 In order to properly consider the issues raised by a motion brought pursuant to s. 137.1 evidence may be filed by the parties to provide background and context to an impugned statement as well as to establish the chances of success of the claims and any available defences.

8 Subsections 137.1(3) and (4) of the CJA set out a two-part test for a motion to dismiss an action on this basis. First, the defendant has the onus of showing that the plaintiff's proceeding arises from an expression that "relates to a matter of public interest". If the defendant meets that threshold, the court must dismiss the action unless the plaintiff satisfies the court that there are grounds to believe the proceeding has substantial merit, that there are grounds to believe that the defendant has no valid defence, and that the harm suffered by the plaintiff is sufficiently serious such that the public interest in allowing the proceeding to continue outweighs the public interest in protecting that expression.

9 It is instructive to repeat that, once it has been established by the Defendants that the impugned communication relates to a matter of public interest, the burden on these motions rests on the Plaintiffs to establish that there is substantial merit to each of their claims.

10 The three factors that comprise the plaintiff s onus to meet the second branch of the test are conjunctive. If the plaintiff fails to meet the onus on any one of those three requirements, the action must be dismissed.

11 The Supreme Court of Canada has considered the test for dismissal under s. 137.1 and has expressed views on issues related to the approach to be applied thereunder in two recent decisions: *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 and *Bent v. Platnick*, 2020 SCC 23.

12 In *Pointes Protection*, "substantial merit" was defined as a real prospect of success. The requirement was further refined in *Bent v. Platnick* as demonstrating a prospect of success that need not be demonstrably likely, but one that weighs more in favour of the plaintiff.

13 Substantial merit has been described as a more demanding standard than that applicable on a motion to strike a claim pursuant to Rule 21 of the *Rules of Civil Procedure* for failure to disclose a cause of action. Accordingly, more than merely some chance of success is required. In *Bent v. Platnick*, was stated (at para. 49):

> ...for an underlying proceeding to have "substantial merit", it must have a real prospect of success -- in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff. In context with "grounds to believe", this means that the motion judge needs to be satisfied that there is a basis in the record and the law -- taking into account the

> stage of the proceeding -- for drawing such a conclusion. This requires that the claim be legally tenable and supported by evidence that is reasonably capable of belief.

14 In *Bent v. Platnick*, the Court went on to state (at paras 87 and 88):

> In *Pointes Protection*, this Court clarifies the fact that unlike s. 137.1(3), which requires a showing on a balance of probabilities, s. 137.1(4)(a) expressly contemplates a "grounds to believe" standard instead: para.35. This requires a basis in the record and the law - taking into account the stage of the litigation - for finding that the underlying proceeding has substantial merit and that there is no valid defence.
>
> I elaborate here that, in effect, this means that any basis in the record and the law will be sufficient. By definition, "a basis" will exist if there is a single basis in the record and the law to support a finding of substantial merit and the absence of a valid defence. That basis must of course be legally tenable and reasonably capable of belief. But the "crux of the inquiry" is found, after all, in s. 137.1(4)(b), which also serves as a "robust backstop" for protecting freedom of expression.

15 The "crux of the inquiry" therefore is the balancing exercise required by s. 137.1(4)(b) which involves a weighing of the seriousness of the harm to the Plaintiffs as a result of the expressions of the Defendants and the public interest in permitting the proceeding to continue, versus the public interest in protecting the expression.

16 Having considered the submissions made on behalf of the parties, having applied the provisions of the legislation referred to above which govern the determination of the issues in light of the principles and considerations articulated by the Supreme Court of Canada in the authorities noted above, for the reasons that follow I find that an application of the test under s. 137.1 to each claim, including the allegations of "negligence" and "conspiracy" (which are nothing but dressed-up and unsubstantiated variations of the central claims of alleged defamation), must result in a dismissal of all claims.

17 I also conclude that these claims are precisely ones that are of the kind that s. 137.1 is designed to discourage and screen out.

The Plaintiffs

18 The Plaintiff Dr. Kulvinder Kaur Gill ("Dr. Gill") is a medical doctor practising at an allergy, asthma and clinical immunology clinic with locations in Brampton and Milton, Ontario. Dr. Gill has been a member of the Ontario Medical Association ("OMA") Governing Council and transparency of the OMA and the harm of escalating cuts to frontline health care. She is a founding member and leader of Concerned Ontario Doctors ("COD") which operates in part as a platform for the expression of her views.

19 The undisputed evidence on the motion plainly shows that Dr. Gill is not afraid to voice unpopular views or to court controversy.

20 Dr. Gill also is a frequent commentator on issues related to the Covid-19 pandemic and does so frequently on her Twitter account which has attracted more than 63,000 "followers".

21 Accordingly, in addition to her campaign of attack on the OMA and its leadership, Dr. Gill has been an outspoken critic of prevailing public health advice on how to prevent or slow Covid-19 infection from spreading throughout the community, using social media platforms including Twitter to disseminate her controversial views. In doing so, Dr Gill has suggested that the risks posed by the Covid-19 virus are exaggerated, vaccines are unnecessary, lockdowns are illogical, and hydroxychloroquine is an effective treatment for infection caused by the virus.

22 Dr. Gill has been formally and publicly cautioned by the College of Physicians and Surgeons of Ontario against using her position as a physician to bolster her dissemination of such misleading information which contradicts the positions advocated by public health authorities in Ontario and Canada. The prohibition contained in the *Regulated*

Health Professions Act against use in a civil proceeding of documents or details of the College's investigation requires that no further mention or consideration of same enter into the deliberations required by these motions.

23 The Plaintiff Dr. Ashvinder Kaur Lamba ("Dr. Lamba") is a medical doctor practising as a physician at a long-term care home and a retirement home in Etobicoke, Ontario and is an addiction physician in Thornhill, Ontario. She also has a family practice in Brampton. Dr. Lamba is a former OMA delegate and member of the OMA Governing Council and is now Secretary of the Board of COD.

24 Dr. Lamba is to some extent a secondary protagonist with respect to the advancement of these claims which, in large part, arise out of matters in which Dr. Gill is the central figure. Dr. Lamba did not swear or file an affidavit in response to these motions. She asserts her claims only as against two of the Defendants and only with respect to allegations relating to statements said to have been made concerning her OMA activities and positions.

25 The multi-million dollar claims for damages made by both Plaintiffs are for reputational damage only, although each Plaintiff continues to be active in their professional organization and affairs and to practise medicine unimpeded in Ontario. As will be referred to below, the Plaintiffs have advanced very little basis for demonstrating that they or their reputations have been damaged as a result of the statements or conduct of any of the Defendants.

The Defendants

26 The Defendant Dr. Angus McIver ("Dr. McIver") is an elderly physician who holds no leadership position in the OMA. He has a primary Twitter account ("@smootholdfart") with 1206 followers, and a now-deleted secondary Twitter account ("@vitomaciver") which had been used mainly for posting photos of his dog.

27 The Defendant Dr. Nadia Alam ("Dr. Alam") is a medical doctor practising as a family physician and anaesthetist in Ontario and is a Board Director of the Halton Hills Family Health Team. Dr. Alam has been and remains active in the OMA. From 2017-2020 she was a member of the Board of Directors of the OMA and was OMA President during 2018-2019. Dr. Alam is represented by two separate counsel in connection who separately address the two categories of allegations the Plaintiffs have made against her.

28 The Defendant Dr. David Jacobs ("Dr. Jacobs") is a physician specializing in diagnostic radiology in Toronto. Dr. Jacobs is a leader in his specialty associations and professional governing bodies.

29 The Defendant Dr. Alex Nataros ("Dr. Nataros") is a family physician practising medicine in British Columbia. Dr. Nataros is a recipient of the Leadership and Advocacy Award of the College of Family Physicians of Canada.

30 The Defendant Dr. Michelle Cohen ("Dr. Cohen") is a family physician in Brighton, Ontario who is a public advocate on health policy issues, having published articles in various newspapers and periodicals on health policy topics.

31 The Defendant Dr. John Van Aerde ("Dr. Van Aerde") is a specialist in paediatric medicine. Although now retired from clinical practice, Dr. Van Aerde remains active in various medical associations, medical education institutions as well as the Canadian Medical Association.

32 The Defendant Dr Andrew Fraser ("Dr. Fraser") is a tenured professor at the University of Toronto Donnelly Centre for Cellular and Biomedical Research. He conducts research on genetic models of development and disease, and has significant training and experience in pathology and statistical analysis.

33 The Defendant Dr. Ilan Schwartz ("Dr. Schwartz") is a physician with a subspecialty in infectious diseases, employed by the University of Alberta and the Alberta Health Services. Dr. Schwartz was involved in clinical trials of the use of hydroxychloroquine that were among the many such research investigations that showed it to be an ineffective treatment for Covid-19 infection.

34 The Defendant Dr. Marco Prado ("Dr. Prado") is a professor at Western University with an established expertise in biochemistry and immunology.

35 The Defendant Timothy Caulfield ("Caulfield") is a health policy and health sciences professor at the University of Alberta's Faculty of Law and School of Public Health whose research has dealt with misinformation in the context of health care and Covid-19.

36 The Defendant Dr. Sajjad Fazel ("Dr. Fazel") is a post-doctoral associate at the University of Calgary and also holds a Masters Degree in Public Health.

37 The Defendant Dr. Terry Polevoy ("Dr. Polevoy") is a retired family physician who is an active leader within various medical associations, including associations of physicians in his area of practice and provincial associations. Dr. Polevoy is active on social media, primarily through his Twitter account where he frequently shares information, opinions and news stories on a variety of subjects including politics and health care.

38 The Defendant Dr. Andrew Boozary ("Dr. Boozary") is a physician in Toronto and the Executive Director of Population Health and Social Medicine at the University Health Network.

39 The Defendant Dr. Abdu Sharkawy ("Dr. Sharkawy") is a physician with a specialization in infectious diseases and internal medicine. He routinely speaks in public and using his Twitter account to educate members of the public on health and medicine matters.

40 The Defendant The Medical Post publishes both a print magazine and an online newspaper for Canadian physicians. The online newspaper is published daily and is only available to registered users or subscribers.

41 The Defendant Tristan Bronca has worked with the Medical Post and has become familiar with the scientific literature on hydroxychloroquine showing it is not an effective treatment for covid-19.

42 The Defendant The Pointer Group Incorporated ("The Pointer") is a paid subscription-bases digital-only media platform that provides locally-focused news in the Peel and Greater Toronto Regions.

43 The Defendant André Picard ("Picard") is the Staff Senior Health Columnist for The Globe and Mail where he has worked since 1987. Picard reports and writes on health and health care issues. He is the author of six books on health-related subjects and speaks publicly on frequent occasions on such matters, also using a Twitter account for that purpose.

44 The Defendant Carly Weeks is a Health Reporter for The Globe and Mail where she has been a staff writer since 2007. She writes and often speaks publicly on health-related topics and additionally uses a Twitter account for that purpose.

45 The Defendant Alheli Picazo ("Picazo") is a freelance writer who primarily covers the topics of politics and health. She uses Twitter for this purpose and often tweets about the Covid-19 pandemic and related issues.

46 The Defendant Bruce Arthur ("Arthur") is a columnist at the Toronto Star. He uses his Twitter account to express personal views and concerns on a variety of topics, including the Covid-19 pandemic.

47 The Plaintiffs have discontinued their action as against the Defendants The Hamilton Spectator and Societe-Radio Canada.

Preliminary Observations

48 As can be seen from the above descriptions of the Defendants, the Plaintiffs have brought these proceedings against more than 20 individual physicians, academics, medical and scientific experts, and journalists as well as against publications that have and continue to provide valuable information to the public about Covid-19.

49 In the motions before the Court, the Defendants seek to avail themselves of a provision enacted by the legislature that is intended to operate as a shield against anyone seeking to stifle debate on issues that are of interest to the public. The ultimate issue before me is whether these claims are such that they should be dismissed on that basis at this early stage.

50 The provision under which the Defendants move for orders dismissing the claims against them is not the first or the only available recourse by which a proceeding may be terminated or curtailed by the courts when appropriate. For instance, Rules 2.1.01, 20 and 21 establish bases upon which proceedings may be dismissed or adjudicated upon short of any full trial. No one has an absolute and unfettered right to pursue any civil claims through to full trial and judgment without confronting a possible roadblock that may bring the proceedings to a halt.

51 One may well wonder about the motives of these full-time physicians who remain active in what might fairly be described as the politics of their professional associations in bringing proceedings seeking staggering money judgments against such a broad array of persons whom they claim to perceive as having injured their reputations. The sheer variety of their targets and the magnitude of their claims set them up to be examined pursuant to s. 137.1.

52 Because there are so many claims made in these proceedings against so many Defendants, and so many arguments and defences advanced by them, applying the test on each of the motions brought on their behalf is a daunting task. However, it does appear that the claims can be grouped generally into 2 categories: those that arise out of statements made by some Defendants in the context of an OMA dispute, and those that arise out of or were provoked by the controversial views expressed by Dr. Gill about pandemic-related matters.

53 In dealing with the substance of these various motions, I may repeat the same positions taken by various parties, or make liberal reference to those parts of the written submissions that have been filed on behalf of some parties as well as the rationales for those arguments as advanced.

54 In several instances, some Defendants have sought to avail themselves of more than one available defence. As will be seen below, I consider it unnecessary to determine to any full extent or comment upon the defences of justification that have been asserted because I consider that the additional defences of fair comment, responsible journalism and/or qualified privilege offer full defences to the claims and therefore no entry into what may be (at its highest) an arbitration of matters of scientific debate is necessary. By declining to do so, I do not purport to suggest that the opinions of the Plaintiffs are of equal persuasive merit to those views expressed by the Defendants, but only that a thorough evaluation of them for the purposes of these motions is not strictly required.

55 As a general observation, counsel for the Plaintiffs has urged the Court to agree that it must adopt a fairly narrow approach to the s. 137.1 analysis referred to herein, must avoid drawing any inferences, and must not arrive at any conclusions based on a qualitative assessment of the evidence tendered by the parties.

56 In my opinion, to adopt an overly-rigid and narrow approach to the analysis of the material filed in this case would be to ignore the stated purpose of the legislation as well as the "crux of the inquiry" and "robust backstop" descriptions employed by the Supreme Court of Canada to describe the balancing process that is designed to protect, in appropriate cases, freedom of expression on matters of public interest from the chilling prospect of litigation.

57 Having said that, the material filed by the parties is such that it requires very little or nothing by the way of credibility assessments to dispose of the motions. Rather, the expressions or conduct of the Defendants that are the subject of the action are basically not in dispute. The critical task is to determine if they are protected when the analysis established by s. 137.1 is applied. Having carefully considered the evidence and arguments put forward by the Plaintiffs, I nevertheless am of the opinion that the expressions complained of attract the protection that a s. 137.1 analysis permits.

58 For greater clarity, I view all of the expressions or statements complained of by the Plaintiffs to have been made on matters of public interest. The test required by s. 137.1 has been applied to each in order to determine the appropriate result. In each case, I should be taken to have accepted and adopted fully the submissions advanced on behalf of each of the Defendants.

The OMA Dispute Claims

A. Dr. MacIver

59 Section 137.1 places an initial burden, which is purposefully not an onerous one, on a defendant to satisfy the motion judge that the proceeding arises from an expression that relates to a matter of public interest. At this first stage of the s. 137.1 analysis, it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest. The only question is whether the expression pertains to any matter of public interest, defined broadly.

60 The expression in the action brought against Dr. Maciver concerns tweets published by him on his Twitter feed in September 2018. In its entire context, Dr. Maciver's expression pertains to the public debate about the OMA sparked by the Plaintiffs and their physician advocacy organization COD on Twitter and their blocking of physicians who do not agree with their views.

61 When Dr. Maciver published his tweets, the Plaintiffs through COD had been engaged in ongoing, serious and inflammatory attacks on the OMA and its leadership on Twitter and on other platforms. These attacks included allegations of fraud and corruption. Dr. Maciver wanted to respond to the Plaintiffs' Twitter attacks directly on their Twitter feeds that was the site of the public conversation but could not do so because the Plaintiffs had blocked him and others from engaging with them on Twitter.

62 Frustrated by the Plaintiffs' blocking of him, Dr. Maciver tweeted the words complained of on his own Twitter feed. In his initial tweet, which is the primary subject of this litigation as against him, Dr. Maciver used some rather offensive name-calling towards the Plaintiffs. He deleted this tweet within days after posting it.

63 The following facts provide context to Dr. Maciver's expression:

(a) Prior to and at the time of the publication of the words complained of, there was significant interest in Ontario and, in particular, within the Ontario medical community concerning the contract negotiations between the Government of Ontario and the OMA, on behalf of Ontario physicians.

(b) Since its formation, COD has taken positions critical of and has attacked the OMA and its leadership. The Plaintiffs, as leaders of COD, have a "lack of confidence in the integrity, fairness, accountability and transparency of the OMA." Dr. Maciver is one of the many OMA physicians who strongly oppose COD's and the Plaintiffs' ongoing attacks on the OMA.

(c) In October 2017, Dr. Maciver replied to a COD tweet, expressing his ongoing disappointment in COD "continuing to fragment the profession in Ontario." Soon after his fairly benign expression of disappointment, the Plaintiffs blocked him from posting on their Twitter account.

(d) The Plaintiffs also have blocked the Twitter accounts of other physicians who appeared to dissent from their political views concerning the OMA.

(e) Prior to the publication of the words complained of, the Plaintiffs used Twitter to criticize the OMA and its leadership. These criticisms included allegations of fraud and corruption. Some examples of this are as follows:

* OMA=toxic culture of misogyny, bullying & intimidation

> * None of them are held to account for their lies, unethical conduct, and bullying & intimidation of frontline MDs
>
> * Corrupt OMA's hypocrisy on Full Display
>
> * We will be fully united once we truly revamp the OMA. But that can only happen once it's dismantled, the vermin scurries out...
>
> * The following is the epitome (so far) of the egregiousness of this organization and its so called "leaders" - how disgusting can they get?
>
> * Instead, corrupt OMA's implementing draconian Code of Conduct to silence MDs
>
> * ...undemocratic OMA passed Part 1 of 2 Part Code of Conduct to silence MDs from exposing unethical conduct
>
> * LAME DUCK OMA...Incoming OMA Pres Nadia Alam was NEVER elected by membership
>
> * Of course, the corrupt OMA rewards its unethical "leaders" with accolades and rewards. One word: karma.
>
> * Unbelievable hypocrisy on display
>
> * The corrupt OMA is taking extreme measures to muzzle your doctors...

64 Leading up to the publication of his impugned tweets in September 2018, Dr. Maciver became increasingly frustrated by the Plaintiffs' attacks on the OMA and, in particular, their attacks on the honesty and integrity of its leadership. Dr. Maciver believed the Plaintiffs' attacks were very serious charges which called for debate and response on the main forum in which they were being made, i.e. the Plaintiffs' Twitter feeds. Because the Plaintiffs had blocked Dr. Maciver, he could not respond directly to them.

65 On September 4, 2018, Dr. Maciver lost his temper over the Plaintiffs' ongoing conduct and what he viewed as the inflammatory positions they were taking on behalf of COD. Dr. Maciver reacted on his @smootholdfart account about being blocked by the Plaintiffs on Twitter. He made further tweets from his @vitomaciver account the same day and on September 8, 2018. From the outset, the primary focus of the Plaintiffs' complaint and this action against Dr. Maciver concerns the words "corksoakers" and "twats" published in the initial smootholdfart tweet.

66 In its entire context, Dr. Maciver's expression pertains to the public debate about the OMA sparked by the Plaintiffs and COD on Twitter and their blocking on Twitter of physicians who dissent from their inflammatory views.

67 I am of the opinion that the impugned communications authored by Dr. Maciver were on a matter of public interest.

68 In terms of referencing the Plaintiffs in the initial @smootholdfart Tweet, Dr. Maciver understood Dr. Gill and Dr. Lamba to be the public faces of COD on Twitter. This is the only reason he referenced them.

69 The law is clear that people have no legal duty to "always be calm, cool, kind, gentle and polite." It has long been recognized by courts that "there is a distinction between actionable defamation and mere obscenities, insults and other verbal abuse" and "[t]he courts cannot award damages in favour of the victims of empty threats, insulting words or rudeness" (see: *Langille et al v. McGrath*, 2000 CanLII 46809).

70 The law tolerates such speech not only as an expression of free speech in a free society but also as a safeguard against our court system being flooded with litigation.

71 It is clear from the words complained of and the overall context in which they were published on Twitter that Dr. Maciver was communicating his disapproval of the conduct of the Plaintiffs. The offensive language used by him is pure name-calling, and not defamation.

72 Although some of the language used by Dr. Maciver on Twitter may have been unprofessional and ill-advised, the words complained of are not defamatory and therefore not actionable. There is an important distinction in the law of defamation between words that are actionable for being defamatory and words that merely contain insults and are not actionable. Freedom of speech would be seriously curtailed if insulting comments, which have caused no harm to reputation, were actionable for being defamatory (see: *Diop v. Transdev Dublin Light Rail*, 2019 IEHA 849).

73 On multiple occasions, Dr. Maciver has apologized to the Plaintiffs both publicly and privately and shown contrition for the heated language he used on Twitter. The fact of Dr. Maciver's apologies was also made known within the physician community on Twitter.

74 On September 7, 2018, the Plaintiffs published a Facebook post to COD's many followers which referred to Dr. Maciver's "vulgarity" and repeated the allegedly offending language. In the post, the Plaintiffs wrongfully claimed that Dr. Maciver called them "cock sucking cunts" and further incorrectly told their readers that Dr. Maciver made his tweets as a leader of the OMA.

75 Any reputational harm to the Plaintiffs purportedly caused by Dr. Maciver's expression is evidently of very low magnitude, if any has actually occurred.

76 Dr. Gill offered no evidence of any harm arising from Dr. Maciver's briefly published expression, other than vague, unparticularized statements. In fact, it is her own evidence that she remains "a highly regarded member of [her] profession." Dr. Lamba has not seen fit to tender evidence on this motion to describe the alleged harm that she claims to have suffered.

77 Even if for the purposes of this motion the words complained of are found to be defamatory of the Plaintiffs and that some general damages to their reputation are therefore to be presumed, then the record before me supports a conclusion that any damages suffered are likely to be assessed as merely nominal and insufficient to warrant continuation of this proceeding.

78 An application of the s. 137(4)(b) "crux of the matter" analysis therefore requires a dismissal of the Plaintiffs' claims against Dr. Maciver. For the reasons he asserts, the public interest in protecting Dr. Maciver's right to speak out on a matter of public interest outweighs any considerations that might otherwise favour allowing the action against him to continue.

79 Accordingly, the relief requested by Dr. Maciver is hereby allowed and the action against him is dismissed.

B. Dr. Alam and the Medical Post

80 In 2018 Dr. Alam was President of the OMA. The Plaintiffs objected to what they described as Dr. MacIvor's vulgarity and demanded via Facebook that the OMA and Dr. Alam censure him.

81 Dr. Alam was then called upon to comment on this situation by members of the OMA as well. As such, Dr. Alam has raised a very strong defence that her response was written on an occasion of qualified privilege in furtherance of her duties to communicate to OMA membership and to respond to what may fairly be described as an attack upon her and the OMA by the Plaintiffs.

82 The basic elements of the attack by the Plaintiffs may be seen in a statement published by the Plaintiffs on their Facebook page which states, in part:

> We are your Ontario Doctors
>
> September 7, 2018
>
> #METOOMEDICINE & THE TOXIC ONTARIO MEDICAL ASSOCIATION-PART 1

> A glimpse of OMA's toxicity. This is what we and frontline MDs are subjected to in private by the Ontario Medical Association (OMA) "leaders" and staff. Now one of the OMA's "leaders" feels so empowered that he now publicly makes his racist, sexist and misogynistic comments on Twitter. Slang for "cock sucking cunts".
>
> This vulgarity is from Dr. Angus Maciver: The OMA's "distinguished leader"
>
> who was awarded "OMA Life Member Award" for his ongoing 20 years on the corrupt OMA Council, currently as President of the Perth County Medical
>
> Society and previously as the Chair of the OMA Section of General Surgery. He is also a "leader" of the Ontario Association of General Surgeons, a former Royal College of Canada examiner and former University of Western Ontario Schulich School of Medicine faculty.
>
> This is the "new", "reformed" and "progressive" OMA. OMA; its leaders never practice what they preach and either repeatedly engage in, encourage or turn a blind eye to such disgusting behaviours. This is the toxic and pervasive culture at OMA's corrupt core.
>
> ... This is the toxic and pervasive culture at the OMA's corrupt core. In the past 72 hrs, not a single OMA "leader", medical "leadership" organization or
>
> "feminist" advocacy "leader" has condemned this OMA "leader". Silence of
>
> acceptance has followed Maciver's vulgarity. It is unacceptable that still in 2018, it is not the vulgarity of comments or actions that evoke condemnation, but rather the privileged status of the harasser that evoke silence, and even worse, further empowerment of the harasser by those who witnessed it.
>
> The OMA is a toxic and self-serving organization that is corrupt to its core...
>
> As a young, visible minority, female Canadian frontline MDs, fighting the corrupt establishment that is the OMA has felt akin to battling Goliath. But we are empowered by the truth and driven by knowing we are fighting for the future of Ontario's healthcare and for you: our patients and our colleagues.
>
> ... We demand action from the Ontario Government NOW: a prompt, full independent forensic review of the corrupt OMA.
>
> -Dr Kulvinder Gill, President - Concerned Ontario Doctors
>
> -Dr. Ashvinder Lamba, Board Director - Concerned Ontario Doctors
>
> #exposcoma #carenotcuts #onpoli #onhealth #cdnhealth #healthcare #cdnpol #sexism #racism #misogyny FordNation Christine Elliott Robin Martin Effie Triantafilopoulos Ontario PC Party Andrea Horwath Ontario NDP

83 On September 8, 2018, after the Plaintiffs posted their statement on Facebook, some OMA members formed the mistaken belief that Dr. Maciver had been speaking on behalf of the OMA or that he was an OMA staff member when he posted the tweet referred to.

84 Dr. Alam consulted with senior management and staff of the OMA and it was agreed that she should contact Dr. Maciver in order to encourage him to apologize for what he had reportedly said, and Dr. Alam did so. Dr. Maciver advised that he had tried and would continue trying to resolve the dispute.

85 On September 9, 2018, Drs. Gill and Lamba posted a further statement on Facebook, a partial transcript of which is as follows:

> We are Your Ontario Doctors
>
> September 9, 2018
>
> #Metoomedicine & the toxic Ontario medical association-part 2
>
> ... We have never spoken to or interacted with OMA's decorated leader, Dr. Angus Maciver, in our personal or professional lives. We have never interacted with him ever on any social media platform. But he has now

> forced himself into our lives. Six days ago, this OMA leader felt so empowered that he directly attacked the only two young, female, visible minority MDs on the entire Board of Concerned Ontario Doctors, using slang to call us "cock sucking cunts" on Twitter as other OMA leaders enabled and encouraged him. There was no apology. There were no condemnations from any of the OMA leaders or any of the many medical leadership organizations he is affiliated with. All these medical "leaders" condoned his toxic behavior and vulgarity with their silence. The OMA normalized it.
>
> ... What is most disturbing is that all of the OMA "leaders" remained silent publicly. Not a single OMA leader condemned their decorated leader for his overtly vulgar misogyny. Not one.
>
> ... The most disturbing was that after 6 days of silence, the OMA President Nadia Alam's response is to defend and empower him, validate his lies and attack us (see Picture 3 in comments below). The corrupt OMA, that MDs are forced to be members of and pay millions to for it to protect our "best" interests, defends the harasser and his professional misconduct. The OMA President Nadia Alam's first statement on Twitter came this morning (see Picture 4 in comments below), 6 days after the OMA leader's misogyny and only following mounting public pressure. Again Alam does not condemn him. she defends and empowers him, validates his lies and attacks us. This is failed leadership.
>
> This is the same OMA President who just months ago, on International Women's Day, said she was "grateful that brave women speak up to change culture from the ground up like #metoo" (see Picture 5 in comments below). Now Alam is attacking those "brave women" because it is the toxic and corrupt OMA that she is defending.
>
> The OMA President Alam's empowerment of the harasser comes as a selfproclaimed "feminist" & #metoo "advocate". Her response is deemed by the corrupt OMA to be the only word and is supposed to close the chapter. But it won't. Because #TimesUP. MDs have had enough of OMA's toxicity.
>
> ... As we have said before (Part 1: goo.gl/GFJ485), the OMA is a deeply corrupt, authoritarian, abusive and toxic organization. It is the biggest threat to the future of healthcare in ON and Canada. Ford's government must immediately undertake a fully independent forensic review of the OMA.
>
> -Dr Kulvinder Gill, President - Concerned Ontario Doctors
>
> -Dr. Ashvinder Lamba, Board Director - Concerned Ontario Doctors
>
> #exposcoma #carenotcuts #onpoli #onhealth #cdnhealth #healthcare #cdnpol #sexism #racism #misogyny FordNation Christine Elliott Robin Martin Effie Triantafilopoulos Ontario PC Party Andrea Horwath Ontario NDP

86 On Sunday September 23, 2018, Dr. Alam received an e-mail from Drs. Lamba and Gill sent to her official OMA e-mail address and to her personal e-mail account. The text of that e-mail reads as follows:

> Drs. Kulvinder Gill and Ashvinder Lamba are giving the Ontario Medical Association (OMA) and its President Dr. Nadia Alam one last opportunity to tell the truth and condemn Dr. Angus Maciver for his vulgar misogyny and harassment against them. Do the right thing. Otherwise, your lies will be exposed.

87 Section 25 of the *Libel and Slander Act* allows qualified privilege to apply on a matter of public interest between two or more people who have a direct interest in the matter, even if the communication is witnessed or reported on by media or other people.

88 Parenthetically, on November 7, 2018 the Plaintiffs filed complaints against Dr. Alam with the College of Physicians and Surgeons of Ontario and in 2019 with the Human Rights Tribunal of Ontario concerning these same grievances.

89 Once the Plaintiffs demanded that Dr. Alam respond publicly and accused her and the OMA of being corrupt the words of Dr. Alam complained of became a matter of public interest such as to satisfy s. 137.1(3) of the CJA and additionally were ones of special importance.

90 I agree that a defence of qualified privilege is therefore available to Dr. Alam and applies here.

91 Qualified privilege exists where a person making a communication has "an interest or duty (legal, social, moral, or personal) to publish the information in issue to the person to whom it is published" and the recipient has a "corresponding interest or duty to receive it". This privilege attaches to the circumstance, and not the communication. Where the occasion itself is found to be covered by qualified privilege, then a defendant may publish remarks that are perhaps untrue and defamatory (unless the dominant motive was malice) without liability therefor.

92 There has not been any evidence of malice led by the Plaintiffs to defeat the qualified privilege defence asserted by Dr. Alam.

93 Dr. Alam therefore has satisfied the test of having a valid defence. In their Statement of Claim, the Plaintiffs also allege that Dr. Alam was in breach of her "duty of care" to them and was negligent in her conduct. There can be no recognized duty of care in these circumstances of such strong criticism of Dr. Alam that would limit her ability to respond proportionately as was done here. These additional claims that have been alleged are, in reality, mere restatements of the claims for defamation and are likewise dismissed.

94 The Plaintiffs also allege that a quotation attributed to Dr. Alam that was published in the Medical Post was defamatory. Specifically, Dr. Alam's quote in the article was as follows:

> "I spoke to Dr. McIver [sic]. By then he had already apologized to the physicians on Twitter and over email. He is blocked by them so unclear if it got through. He agreed, there is no place for this type of language between colleagues. Ever."

95 On its face, I find that there is nothing defamatory about the impugned statement, a strong defence. The full article in which this statement appears is contained at paragraphs 10 and 11 of the Factum filed on behalf of the Medical Post. Seeing Dr. Alam's statement in context will simply undermine any possible assertion that it is defamatory.

96 The Plaintiffs failed to serve a libel notice or commence an action within the requirements of s. 5 of the *Libel and Slander Act* which constitutes an absolute bar to this action against the Medical Post, a similarly strong defence.

97 As noted above, the third and final step of the section 137.1 analysis is the heart of the test. This section requires a balancing of the public interest in allowing a harmed plaintiff to pursue litigation against the public interest in protecting expressions. This step has been described as a "robust backstop" that allows judges to dismiss claims even if they are technically meritorious. Even where a plaintiff can show their proceeding has substantial merit and the defendant has no valid defence, it may still be in the public interest to prioritize protecting the expression over allowing a plaintiff to pursue a cause of action despite the harm it caused. To make this determination, the harm to the plaintiff as a result of the expression is weighed against the public interest in protecting that expression.

98 To overcome this hurdle, the Plaintiffs must show 1) the existence of harm, 2) that the harm is linked to the expression, and 3) if harm is established and linked, that this linked harm is sufficiently serious to make it preferable to allow the proceeding to continue, rather than protecting the expression.

99 Harm includes both monetary and non-monetary damages. While the Plaintiffs do not need to establish the full details of the harm, nor to have it be monetized, they do have to provide evidence of the existence of the harm, or evidence from which a judge can draw an inference of likelihood in respect of the existence of the harm, as well as the relevant causal link. Bald assertions will not be sufficient.

100 As already noted, the Plaintiffs have not produced any evidence of harm suffered or to be suffered by them as a result of the words of which they complain.

101 Dr. Alam's statements in issue and the Medical Post article are of sufficient importance to satisfy the balancing test as set out in s. 137.1(4)(b). Dr. Alam's speech and the information in the article were necessary and valuable. An application of the balancing test results in a determination strongly in favour of these Defendants. As a result, the claims against Dr. Alam and, to the extent it is also a target of these claims, against the Medical Post must be dismissed.

The Covid-19 Claims

102 The Covid-19 claims arising out of statements made by the Defendants other than Dr. Maciver appear to be advance only by Dr. Gill. She has been very vocal in her criticism of how government officials and agencies and organizations like the World Health Organization ("WHO") have responded to the ongoing worldwide pandemic.

103 The bulk of the communications in this category occurred on the lively and rather unbridled platform of Twitter, and comprise what may be accurately described as a Twitter Storm.

A. André Picard and Carly Weeks

104 In early August 2020 Dr. Gill posted tweets in which she expressed her views on how society should respond to the pandemic. In the first, Dr. Gill said "we don't need a vaccine" for Covid-19, stating that those who had not figured this out were "not paying attention". In the second, she stated that society could "safely return to normal life now" with what she referred to as "#Humanity's existing effective defences against #COVID19", identified by her as "The Truth", "T-cell Immunity" and hydroxychloroquine ("HCQ").

105 Andre Picard, the Staff Senior Health Columnist for The Globe and Mail, tweeted on his Twitter account that he found it "quite shocking" that Dr. Gill would publicly state such opinions that were so contrary to the prevailing consensus among medical professionals, scientists, and public health officials.

106 Dr. Gill then attacked Picard by posting a tweet implying that he had no right to comment because of his lack of medical training and insinuating that he was advancing the so-called "political WHO narrative", apparently improperly influenced by his association with a charity established in memory of the late former Prime Minister Pierre Trudeau.

107 The other three tweets by Picard and the single tweet by Weeks complained of were posted in the flurry of Twitter activity that followed Dr. Gill's attack on Picard. These included tweets about the controversial use of HCQ to treat Covid-19, and others attacking Picard or expressing support for him.

108 Dr. Gill alleges that the tweets are defamatory of her. In addition, she appears to allege that Picard and Weeks engaged in some form of conspiracy to injure her.

109 When Picard became aware of Dr. Gill's tweets, he was concerned that any prominent Ontario physician would publicly state views that were so contrary to the consensus among physicians, scientists and public officials on subjects on which he had reported extensively. He was concerned that Dr. Gill's statements had the potential to misinform or mislead people.

110 In addition to the numerous tweets attacking Picard for his statement, several tweets were posted supporting him. Among the tweets posted on August 6, 2020 was one by the Defendant Tristan Bronca:

> "The country's top health journalist (accurately) points out that this doctor maybe shouldn't be pushing a drug that is now primarily pushed by conspiracy theorists. She responds with a conspiracy-minded smear about how he's in bed with the WHO. Remarkable work."

111 At 5:55pm on August 6, 2020, Picard responded to Bronca's tweet by posting the second of his tweets that Dr. Gill complains of:

> "Add the subsequent avalanche of tweets from an army of hydroxychloroquine bots and unhinged conspiracy theorists and you have a concise summary of my day."

112 As the discussion continued, at some point a "hashtag" was created that read "#IStandWithPicard". Twitter users include a hashtag symbol (#) before a relevant keyword or phrase to categorize or aggregate tweets and allow others to find them more easily.

113 Users who posted tweets that included #IStandWithPicard did so to voice their support for Picard in response to the many tweets attacking him. Among them was a tweet from Picard's colleague at The Globe and Mail, Weeks.

114 On the evening of August 6, 2020, Weeks saw that the #IStandWithPicard hashtag was trending on Twitter because Picard was being attacked by many users.

115 After reading Picard's comments, Weeks agreed with Picard's reaction of "shock." Based on her research, reading and reporting about COVID-19, Weeks knew that there was a wealth of scientific literature and research regarding the lack of efficacy of HCQ against Covid-19, the difficulty of achieving herd immunity and the necessity of a safe and effective vaccine that contradicted Dr. Gill's opinions.

116 Weeks sought to express her agreement with Picard's opinion about Dr. Gill's tweets and to show support for him in light of the negative comments that had been directed at him. She also sought to promote the dissemination of accurate information concerning COVID-19. Weeks was concerned that Dr. Gill's statements had the potential to misinform or mislead people.

117 On the evening of August 6, 2020 Weeks responded to one of Picard's tweets by posting what is essentially the only expression by her, one for which she is being sued by the Plaintiffs for millions of dollars in damages:

> "André is one of the finest health communicators - anywhere - and has done more to help the public understand #COVID19 than anyone in the country. Grateful, as usual, for his no-nonsense takes and the fact he doesn't hesitate to call out BS when he sees it. #IStandWithPicard"

118 At 8:37 a.m. on August 7, 2020, Picard posted the third of his tweets about which Dr. Gill complains, in which he reiterated his concern that a Canadian pediatrician had publicly stated that a coronavirus vaccine was not necessary:

> "While I appreciate all the kindness, and am flattered to have my own hash tag #IStandWithPicard, I would prefer that people focus not on trolls but on my initial concern, that a Canadian pediatrician is saying we don't need a #coronavirus vaccine. #Covid19 #antivax @cpso_ca"

119 Picard tagged the Twitter account of the College of Physicians and Surgeons of Ontario because there was an ongoing public discussion about whether and how social media use by physicians during the pandemic should be regulated, a topic of evidently great public interest.

120 Later on the morning of August 7, 2020, Dr. Jim Woodgett, a research scientist, posted a thread on Twitter in which he advocated for the dissemination and open-minded exchange of quality information and warned against drawing attention to misinformation. Dr. Woodgett suggested that Twitter users replace #IStandWithPicard with #IStandWithScience in their tweets. Among the tweets in Dr. Woodgett's thread was one that stated:

> "I'm sure André appreciates the support, but (apologies to him) he doesn't need it and the hashtag serves to direct people to the source of the issue. On the contrary, antivaccine and pro-HCQ advocates have everything to gain by attracting attention. This fuels their cause."

121 In reply to this tweet on August 7, 2020, Picard posted the fourth and final of his tweets about which Dr. Gill complains, advocating for the dissemination of good science instead of engaging in pointless Twitter exchanges:

> "Thank you for this thoughtful thread. I wholeheartedly agree with this point in particular. We should use our energy to promote good science, not interacting with bots, trolls and politically-driven anti-science, #antivax (what's the polite word?) dogmatists. #Covid19 #scicomm."

122 In my opinion, all of the expressions complained of made by Picard and Weeks are on matters of intense public interest.

123 Those same expressions are in the nature of fair comment on statements made by Dr. Gill on a similar platform and therefore attract that defence. The Plaintiffs have not discharged their burden of showing that his defence to all their claims has no chance of success.

124 Applying the public interest balancing test, I conclude that the need to protect the freedom of these Defendants to express such views far outweighs the considerations that might apply to any factors in favour of allowing the claims of Dr. Gill against Picard and Weeks, including the unsubstantiated claims of conspiracy, to continue. Accordingly, all claims against Picard and Weeks are dismissed.

B. Tristan Bronca

125 On August 6, 2020, Bronca read the tweet by Picard mentioned above on Twitter:

> It's quite shocking to see a Canadian physician leader @dockaurG saying we don't need a #coronavirus vaccine, we just need t-cell immunity, hydroxychloroquine and "the Truth". #Covid19.

126 There were two tweets by Dr. Gill visible in Picard's tweet. Her August 4, 2020 tweet stated:

> "If you have not figured out that we don't need a vaccine, you are not paying attention. #Factsnotfear".

127 The second tweet of Dr. Gill stated:

> #Humanity's existing effective defences against #COVID19 to safely return to normal life now:
>
> -The Truth
>
> -T-cell Immunity
>
> -Hydroxychloroquine

128 Bronca believed that Dr. Gill's statements ran counter to all the public health advice and scientific opinion Bronca was aware of at the time. Dr. Gill's tweet concerned him, especially given her job as a physician. Bronca was aware of other social media communications and tweets by Dr. Gill that were of the same vein.

129 Bronca also saw Dr. Gill's response attacking Picard on August 6, 2020:

> It is quite shocking that a journalist with absolutely no medical training is attacking a MD for stating scientific facts. Not surprising given picardonhealth is a Pierre Trudeau Foundation Mentor & on its Trudeau "#COVID19 Impact Committee" to drive the political WHO narrative.

130 Bronca believed that Dr. Gill's attack on Picard had made him the target of many negative comments and criticism on Twitter. Bronca took a screenshot of the tweets of Picard and Dr. Gill and added his own opinion in his tweet, which stated:

> "The country's top health journalist (accurately) points out that this doctor maybe shouldn't be pushing a drug that is now primarily pushed by conspiracy theorists. She responds with a conspiracyminded smear about how he's in bed with the WHO. Remarkable work.

131 The "country's top health journalist" refers to Picard. "This doctor" refers to Dr. Gill. The drug referred to in the Bronca Tweet is hydroxychloroquine.

132 Through his work with Medical Post, Bronca had been immersed in reports of the studies and analysis being done relating to the efficacy of hydroxychloroquine as a treatment for Covid-19. Bronca had also spoken with medical experts who were well versed on the scientific literature on the topic of hydroxychloroquine who did not believe it was an effective treatment for Covid-19. By August 6, 2020, Bronca understood that the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19.

133 Bronca's tweet addresses Dr. Gill's attack on Picard and her accusation that he is driving "the political WHO narrative". Bronca understood that "WHO" refers to the World Health Organization. He understood the word "narrative", as used by Dr. Gill, is a common buzzword used by some to characterize the allegedly nefarious activities of global or high-powered organizations and the alleged lies they tell to cover up or disguise these activities.

134 Bronca thought that Dr. Gill's attack on Picard suggested that he was an active part of those allegedly nefarious activities and lies. Bronca had seen no evidence that Picard was so involved. It appeared to him that by using the language she did, Dr. Gill was attempting to smear Picard and subject him to negative comments and online hate.

135 Bronca's tweet on August 6, 2020, questions surrounding the development of effective treatments for Covid-19, and the development of vaccines for the prevention of Covid-19 were matters of great public interest to both the medical profession and the public at large. Bronca believes he should be able to publicly express his concerns about statements that run counter to public health advice and scientific opinion without the risk of lengthy and costly litigation for doing so.

136 The Bronca tweet falls within the statutory definition of expression, which is expansive. Dr. Gill's claim against Bronca clearly "arises from" the Bronca tweet. In August 2020, and for many months prior to and after, the issue of treatments for and vaccinations for Covid-19 were matters of great public interest due to the global Covid-19 pandemic. The Bronca tweet, which responded to what he fairly considered to be misleading information regarding hydroxychloroquine as treatment for Covid-19, related to a matter of public interest.

137 In my view, the Bronca tweet constitutes fair comment on a matter of public interest. This defence has been described as one that:

> "Protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts."

138 The Bronca tweet was based on facts. As of August 6, 2020 the majority of the scientific evidence showed that hydroxychloroquine was not an effective treatment for Covid-19. In addition, the use of hydroxychloroquine in the treatment of Covid-19 had been promoted by Alex Jones and on websites like the Gateway Pundit, both of which had a history of promoting conspiracy theories. With respect to the second sentence of the Bronca tweet, it is a fact that Dr. Gill accused Picard of "driv[ing] the political WHO narrative" in her August 6, 2020 response to Picard.

139 The Bronca tweet was also recognizable as comment by any reasonable reader of the tweet.

140 Accordingly, there are grounds to believe that Bronca's defence of fair comment has a real prospect of success. The Plaintiffs have not discharged their onus to show otherwise.

141 In the weighing of the interests pursuant to s. 137(4)(b), the Plaintiffs cannot satisfy the requirement that the harm suffered by them as a result of Bronca's expression is sufficiently serious such that the public interest in permitting the action to continue outweighs the public interest in protecting that expression. Indeed, the public interest in the protection of the right of Bronca to speak about such matters of intense public interest strongly favours dismissal of these claims.

142 Accordingly, all claims against Bronca are dismissed.

C. Dr. Jacobs, Dr. Cohen, Dr. Nataros, Dr. Alam and Dr. Sharkawy

143 The Plaintiffs have claimed against these five Defendants in defamation on the basis of their various Twitter posts, and provision by them of commentary in articles published by the Canadian Broadcasting Corporation, as follows:

(a) That a single tweet by Dr. Sharkawy, posted August 6, 2020 in response to the Picard tweet is defamatory of Dr. Gill;

(b) That three tweets by Dr. Jacobs dated August 7, 10 and 12, 2020 are defamatory of Dr. Gill;

(c) Against Dr. Cohen on the basis of a series of tweets posted between August 6, 2020 and August 11, 2020, and comments made by Dr. Cohen in CBC's August 10, 2020 article "Ontario doctor subject of complaints after COVID-19 tweets", and in CBC's video news story "Complaints Filed against Ontario doctor after COVID-I 9 tweets" dated August 10, 2020;

(d) Against Dr. Nataros on the basis of a series of tweets posted between August 6, 2020 to October 21, 2020, and comments made by Dr. Nataros in CBC's August 10, 2020 article "Ontario doctor subject of complaints after COVID-19 tweets", and in CBC's video news story "Complaints Filed against Ontario doctor after COVID-I 9 tweets" dated August 10, 2020;

(e) That a tweet posted by Dr. Alam on August 6, 2020 in response to the Picard tweet is defamatory of Dr. Gill.

144 The Plaintiffs have asserted several causes of action as against these Defendants broadly as a whole, with little to no particularization of alleged individual involvement. The Plaintiffs plead these Defendants are liable in negligence, conspiracy, and "breach of the doctor Defendants' professional obligations".

145 The Plaintiffs' claims of conspiracy are deficiently pleaded bare assertions. The pleadings are bald, overly speculative, or simply restated legal principles rather than pleaded material facts. The Plaintiffs' pleading fails to set out any alleged "agreement" with particularity, lumps these Defendants all together, and gives no particulars of damages. In my view, it is clear from the pleadings the conspiracy claim will fail.

146 Further, the Plaintiffs have failed to meet their burden to adduce any evidence reasonably capable of belief to establish grounds to believe a conspiracy of this nature could have substantial merit or, for that matter, any merit at all.

147 The Plaintiffs also broadly assert a negligence claim as against these Defendants. The general law of negligence requires that a claim in negligence be based on a duty of care owed to them by these Defendants. The Plaintiffs assert that a special duty of exists "as set out in protocol" when a physician makes representations or remarks about a fellow doctor to the public. No such duty of care between or among physicians exists such that a cause of action may arise.

148 The Plaintiffs also assert that these Defendants are liable to the Plaintiffs in "breach of the doctor Defendants' professional obligations". The Plaintiffs have provided no basis in the record or law to support a breach of professional obligation gives rise to an independent cause of action. The Plaintiffs thereby fail in their burden to establish that there are grounds to believe the proceeding has substantial merit.

149 The Plaintiffs' claim against Dr. Sharkawy pertains to a single tweet made on August 6, 2020, which is alleged to be defamatory to Dr. Gill.

150 In response to the Picard tweet, on August 6, 2020 Dr. Sharkawy tweeted the following:

> dockaurG Curious.,.who exactly are the "Concerned Doctors of Ontario" and do they espouse your views? The rest of us Ontario MDs are quite "concerned" that you are spreading very dangerous misinformation that will cost lives #Accountability.

151 Dr. Sharkawy embedded the Picard tweet, and by extension, the two embedded tweets of Dr. Gill embedded in the Picard tweet.

152 The Plaintiffs have the onus of showing that that none of the defences raised by Dr. Sharkawy are legally tenable or supported by evidence that is reasonably capable of belief such that they can be said to have no real prospect of success. Dr. Sharkawy relies on the defences of fair comment and justification. In my view the Sharkawy tweet meets all the requirements of the defence of fair comment. Dr. Sharkawy was responding to the fact Dr. Gill had publicly posted certain tweets regarding COVID-19 public health measures in the midst of the global COVID-19 pandemic, to the effect that COVID-19 vaccines were not necessary, and HCQ was an appropriate treatment for COVID-19. Dr. Sharkawy's statement that "[t]he rest of us Ontario MDs are quite concerned" was fair comment or at least presents a strong defence of fair comment.

153 The Sharkawy tweet further satisfies the requirement that any person could honestly express that opinion on the proved facts. The public health guidance at the time, and to this day, is contrary to the views expressed by Dr. Gill in her August 4 tweet (about vaccines) and August 6 tweet (about HCQ) that Dr. Sharkawy commented his concerns about. Any reasonable person could form the same concerns and opinion on the proved facts in light of the conflict with generally accepted public health guidance.

154 The Plaintiffs allege Dr. Jacobs' August 7, 2020 tweet is defamatory. Dr. Jacobs's August 7, 2020 tweet responds to two prior tweets of Dr. Gill, which are attached to Dr. Jacobs tweet as a screenshot. Dr. Jacobs August 7, 2020 tweet reads as follows:

> No, we're not living through a scandal. We're living through one of the deadliest pandemics in the last century. What is most shocking is a medical doctor pushing conspiracy theories.
>
> This needs to stop. #Cdnpoli #COVID19 #IStandWithPicard
> #vaccine #coronavirus
>
> [Attached screenshot of Dr. Gill's July 3 tweet]
>
> We're living thru one of deadliest #BigPharma scandals in history. Most shocking/frightening--majority oblivious. #HCQWorks as prophylaxis & early treatment in #COVID19. HCQ doesn't work for greedy BigPharma, politicians abusing power, corrupted WHO/CCP, bought out media/academics
>
> [The July 3 tweet attached a June 30, 2020 tweet by Dr. Gill, which was also attached to Dr. Jacobs August 7, 2020 tweet]
>
> Irrational fear is driven by politicians abusing power, media misinformation, unethical academics, BigPharma COIs & corrupted WHO co-opted by CCP. Science & medicine have been hijacked & are being exploited for power & greed...

155 There are no grounds to believe the Jacobs tweet is capable of bearing the defamatory meaning alleged in paragraph 151, including such imputations as to "call into question Dr. Gill's mental stability" or "suggest that she was/is endangering the lives of her patients".

156 Further, the Plaintiffs cannot meet their burden under s. 137.1(4)(a)(ii) to show that there are grounds to believe Dr. Jacobs has no valid defence of fair comment. Dr. Jacobs further relies on the defence of fair comment. The Jacobs August 7 tweet satisfies the test for the defence of fair comment in that it is based on fact (Dr. Gill's tweets, the facts on which his comment was based, were included in the Jacobs August 7 Tweet), recognizable as comment (Dr. Jacobs' statement would be properly construed by the reasonable reader as reflecting his conclusion or inference arising from Dr. Gill's embedded tweets), could honestly be made by any person (Dr. Jacobs inference that Dr. Gill was pushing conspiracy theories has a clear linkage to the facts of Dr. Gill's statements that "HCQ doesn't work for greedy BigPharma, politicians abusing power, corrupted WHO/CCP, bought outmedia/academics" which by definition is a conspiracy theory).

157 The Plaintiffs further allege Dr. Jacobs' August 10, 2020 tweet, which attached and quoted from the August 10, 2020 Canadian Broadcasting Corporation article about Dr. Gill entitled "Ontario doctor subject of complaints after COVID-19 tweets" is defamatory. The body of Dr. Jacobs' August 10, 2020 tweet contains only the title of the article, and a direct quote from the article "It's important that physicians recognize the influence they may have on social media, particularly when it comes to public health", included in the article from a spokesperson of the College of Physicians and Surgeons of Ontario. Dr. Jacobs replied to the tweet "The fact that so many people on this thread still believe that the current research supports the use of hydroxychloroquine, when the opposite is true, is exactly why it is so important for physicians to be responsible in what they say on social media".

158 Further, there are no grounds to believe that Dr. Jacobs' August 10, 2020 tweet is defamatory in that it would lower Dr. Gill's reputation in the eyes of a reasonable person. An excerpt of a quote from the CPSO, coupled with a statement that it is important for physicians to be responsible on social media is incapable of bearing the defamatory meaning alleged. The Plaintiffs cannot establish that there are grounds to believe that the defence of fair comment will not succeed.

159 Dr. Jacobs' August 10, 2020 tweet satisfies all elements of the defence of fair comment: (i) Public Interest: it was made on a matter of public interest, addressing physician influence on social media with respect to public health; (ii) Based on Facts: The August 10, 2020 tweet attached the CBC article, providing the full requisite factual backdrop; (iii) Recognisable as Comment: Dr. Jacobs' statement that the fact that many believed HCQ was an effective treatment for COVID-19 reflected why it was so important for physicians to be responsible on social media is clearly recognizable to the "reasonable reader" as comment. Any reasonable reader would understand that Dr. Jacobs shared the CBC article, then provided his opinion and conclusion regarding the article as comment below; (iv) Could honestly be made by any person: Dr. Jacobs' comment in the August 10, 2020 tweet is in agreement with the statement of the CPSO spokesperson mentioned in the article, demonstrating two commentors could honestly come to the same conclusion on the same known facts. (v) Absence of Malice: Dr. Jacobs posted his comment in good-faith, without malice. There are no grounds to believe the fair comment defence has no real prospect of success.

160 The Plaintiffs further claim that a tweet made by Dr. Jacobs on August 12, 2020 is defamatory of Dr. Gill. The Plaintiffs cannot establish there are grounds to believe this claim has substantial merit. For a statement to be defamatory it must refer to the Plaintiff. Dr. Jacobs' August 12, 2020 Tweet does not refer to the Plaintiff, nor did the attached article. No connection was drawn to Dr. Gill in the tweet thread.

161 Dr. Jacobs further asserts a defence of qualified privilege with respect to all three tweets that the Plaintiffs allege to be defamatory. As a physician, Dr. Jacobs has a moral and professional duty to: educate the public to ensure that medical knowledge is appropriately conveyed to facilitate health promotion and disease prevention; interpret information given out by health authorities during emergencies; and to participate in setting the standards of his profession. The public has an interest in receiving that information. There are no grounds to believe that this defence of qualified privilege has no real prospect of success in these circumstances. Indeed, it is a strong defence.

162 Some of the impugned expressions of Dr. Nataros are alleged to be defamatory on the basis that they accuse Dr. Gill of spreading "misinformation", including his contribution to the August 10, 2020 CBC News Video, in which he states.

> This is a threat to me and my practice and my professional integrity here in British Colombia. It is a threat to my 15,000 patients to have a Canadian licensed physician promoting misinformation that is harmful.

163 Further impugned expressions of Dr. Nataros appear to relate to allegations that his statements either encourage the public to lodge a complaint against Dr. Gill, or relate to statements Dr. Nataros made referencing the fact he had felt an obligation to report Dr. Gill to the CPSO. A further Impugned Expression relates to a statement that the "unanimous consensus of #MedTwitter is clear this @doekaurGMD ain't a leader among peers."

164 There are no grounds to believe that the defence of fair comment relied upon by Dr. Nataros has no real prospect of success. Dr. Nataros made these comments: (i) On a matter of public interest: his expressions are addressing the physician regulation and the public health response to the COVID-19 pandemic; (ii) Based on Fact: The existence of the COVID-19 pandemic was broadly known and Dr. Nataros either responds to a Twitter thread, attaches his letter of complaint to the CPSO or the August 10, 2020 CBC Article to the expressions, providing the requisite factual backdrop; (iii) Recognizable as Comment: Dr. Nataros' statements are all recognizable as his opinion. The statement that he "took responsibility for a Colleague's misconduct", expresses his opinion of Dr. Gill's conduct, not a factual statement that there had been a finding of misconduct, (iv) could honestly be made by any person: Given the publicly available health information available at the time, any person could reasonably express the same opinion; (v) Absence of Malice: Dr. Nataros' only motivation in posting the impugned expressions was his concern for patients and the impact of misinformation on the public health response to the COVID-19 pandemic.

165 Several of Dr. Cohen's tweets and expressions between August 6, 2020 and August 10, 2020 are alleged to be defamatory of Dr. Gill. The Plaintiffs cannot meet their burden to show that there are grounds to believe these expressions are defamatory and thus that the claim has any real chance of success, or there are grounds to believe Dr. Cohen has no valid defences.

166 Certain of the impugned expressions of Dr. Cohen's which are alleged to be defamatory of Dr. Gill pertain to statements around Dr. Gill "blocking" people on Twitter. The Plaintiffs cannot meet their burden to show these statements are defamatory. There is no basis to discern that "blocking" someone on Twitter would tend to lower Dr. Gill's reputation in the eyes of a reasonable person. Dr. Cohen's statements use wording such as "blocked nearly every other Ontario Doctor on Twitter" which the reasonable reader would understand to not be a literal statement that nearly every doctor was blocked, but a hyperbolic statement, the sting of which is that Dr. Gill has blocked many Ontario physicians. As such, there are no grounds to believe that Dr. Cohen's defence of fair comment has no real prospect of success with respect to these expressions.

167 Dr. Cohen also further relies on the defence of qualified privilege with respect to all impugned expressions. As a physician, Dr. Cohen believed she has a moral and professional duty to educate the public to ensure that medical knowledge is appropriately conveyed to facilitate health promotion and disease preventions, interpret information given out by health authorities during emergencies, and to participate in setting the standards of her profession. The public has an interest in receiving that information. There are no grounds to believe that this defence has no real prospect of success.

168 The words of Dr. Alam's August 6, 2020 tweet on their face are not defamatory. Dr. Alam expresses her view that the medical evidence on the use of HCQ is "shaky", and that a COVID-19 vaccine is needed. While Dr. Alam's view may differ from that of Dr. Gill, a difference of professional opinion does not constitute defamation. There is nothing in Dr. Alam's tweet that would tend to lower either Plaintiff's reputation in the eyes of a reasonable person. The Plaintiffs cannot establish there are grounds to believe the defamation action as against Dr. Alam for the August 6, 2020 tweet has substantial merit, as the words are simply not capable of bearing a defamatory meaning.

169 The Plaintiffs also cannot establish there are grounds to believe that Dr. Alam has no valid defence. There are no grounds to believe that her defence of fair comment has little prospect of success. Dr. Alam's August 6, 2020 tweet satisfies the test for fair comment: (i) Is made on a matter of public interest: the tweet is addressing the public health response and treatment options with respect to the COVID-19 pandemic; (ii) Based on Fact: The factual underpinning of the Picard Tweet is attached to Dr. Alam's tweet, and the existence of the COVID-19 pandemic was broadly known; (iii) Recognizable as Comment: Dr. Alam's statement that evidence of HCQ is "shaky" and that the need for a COVID-19 vaccine is real reflect Dr. Alam's opinion; (iv) Could honestly be made by any person: Given the publicly available health information available at the time, any person could reasonable person could express the same opinion; and (v) Absence of Malice: The evidence supports that Dr. Alam was not motivated by malice, but by her good-faith belief that an appropriate vaccine is vital to combat the COVID-19 virus.

170 The burden of proof is on the Plaintiffs to show on a balance of probabilities that that (a) they likely have suffered or will suffer harm; (b) that such harm is as a result of the expression established under s. 137.1(3); and, (c) that the corresponding public interest in allowing the underlying proceeding to continue outweighs the deleterious effects on expression and public participation.

171 Although a fully developed damages brief may not be necessary on a s. 137.1 motion, in this case there is simply a complete dearth of any evidence on the motion to show harm, or linking these Defendants' expressions to any of the undefined damages that are claimed by the Plaintiffs.

172 The Plaintiffs' claims of harm are completely undifferentiated. The Plaintiffs fail to even allege specific claims of damage with respect to each individual Defendant or expression, let alone provide any evidence of a causal link of harm or damage arising from each expression.

173 This is particularly problematic in the context of this case, as even if the Plaintiffs were able to establish harm, there are many potential causes of the harm that the Plaintiffs claim to have suffered. Evidence of a causal link of harm arising from the impugned expression is required.

174 Evidence of a causal link between the expression and the harm is especially important, in the circumstances of the present motion, where there may be sources other than these Defendants' expressions that may have caused the Plaintiffs harm, including self-inflicted harm by the Plaintiffs themselves as a result of the professional and public criticism received for controversial statements and media appearances.

175 These allegations appear to be part of a larger tactical campaign in opposition to COVID-19 public health measures, designed to benefit from the publicity of the claim to promote public health and policy views and to silence those who express views contrary to those of the Plaintiffs.

176 The public interest of protecting the expression of these Defendants significantly outweighs any public interest in permitting the proceeding to continue. There are numerous relevant factors at the weighing stage which weigh heavily in favour of protecting their expressions.

177 These Defendants were not motivated by any malice or ill-will towards the Plaintiffs. Rather, the defendant Physicians' expressions were motivated by good-faith efforts to protect the public from misinformation, and provide the public with health information in the context of an unprecedented global pandemic:

(a) Dr. Sharkawy expressed concern that misinformation espoused to the public could result in Canadians choosing not to get vaccinated for COVID-19 or using unapproved treatments for COVID-19 that were not medically accepted. His expression was motivated by a moral duty as a physician to express his views to the public out of concern for public safety;

(b) Dr. Jacobs's expressions were motivated by an intention to inform his followers of appropriate approved treatments for COVID-19, and a belief that properly informing the public could save lives. Dr. Jacobs emphasized the importance that the public receive a clear and consistent message when it comes to public health messaging, as harm to patients can arise when a physician provides an opinion that does not align with information from public health or government;

(c) Dr. Cohen's expressions were motivated by concern about the public health impacts of Dr. Gill's tweets with respect to the need for COVID-19 vaccinations and the use of hydroxychloroquine. Dr. Cohen felt a duty as a physician to offer her views in the public interest.

(d) Dr. Nataros felt a duty as a physician to offer his views to the public and address misinformation about COVID-19. Dr. Nataros' expressions were motivated by concern for public safety arising from the spread of misinformation on COVID-19 treatments and the efficacy of vaccines.

178 The expressions of these Defendants in seeking to address misinformation are intimately tied to the search for truth, a core value underlying freedom of expression. The expression of these Defendants is therefore to be afforded a high weight in the s. 137.1(4)(b) weighing exercise.

179 If this proceeding were allowed to continue, its chilling effects would have an impact well beyond the parties to this case. There is a real risk that the effects of this proceeding will stifle the speech of the Defendants, and deter other physicians, journalist, scientists, and other members of the public from engaging in public discussion and discourse about potential misinformation on matters of public health in the future. The public has a clear interest in discussion and discourse about matters of public health.

180 Even on a generous interpretation of the limited evidence adduced by the Plaintiffs, the harm likely to be or already suffered by the Plaintiffs lies at the very low end of the spectrum as does the public interest in allowing the proceeding to continue. The balancing test produces a result that favours that urged by these Defendants.

181 Accordingly, all claims as against these Defendants should be dismissed.

D. Dr. Van Aerde

182 On August 4, 2020, Dr. Gill tweeted:

> "If you have not yet figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear".

183 Dr. Gill suggests in her Affidavit that this tweet was taken "out of context and distorted", and it was made in response to an announcement made "moments prior" by Dr. Theresa Tam at a press conference. She states this was a "singular 'vaccine Tweet'". And yet, she also posted "[w]e don't need a #SARSCoV2 vaccine" on July 8, 2020, a full month before Dr. Tam's press conference. Her clearly stated public position against COVID-19 vaccines is not affected by context.

184 In another tweet, dated August 6, 2020, which was removed from Twitter for violating its rules, Dr. Gill stated:

> "#Humanity's existing effective defences against #COVID19 to safely return to normal life now includes: -Truth, -T-cell Immunity, Hydroxychloroquine."

185 On August 6, 2020, Dr. Van Aerde, shocked by the anti-vaccine rhetoric of a fellow pediatrician, made the following expressions on Twitter and Facebook (collectively, the "Expressions"):

> "Requesting @Twitter and @TwitterSupport remove account @dockaurg for misinformation against vaccination and in favour of hydroxychloroquine and misrepresenting Canadian physicians."
>
> "Another Twitter account hacked? I am sorry if that is the case, But here is another of your tweets attached with unprofessional lies. As a colleague Pediatrician I have to admit that you are dangerous to children. How do you come up with this? Why Don't you quote evidence?"
>
> "I was blocked too... after I called out the untruths and supported Andre Picard. Some of us have requested Twitter to remove her account. She was trained in Western as Pediatrician. She has tweeted before on bogus treatments, lots of trolls followers. There is a call for her unprofessionalism to be looked at by cspo. Somebody mentioned she is part of our FB community, and I suggest for her to be removed for lack of professionalism and scholarship as per CANMEDS2105."

186 Dr. Gill "blocked" Dr. Van Aerde shortly after these tweets were posted. Blocking on Twitter prevented Dr. Van Aerde from viewing and responding to Dr. Gill's tweets from his own Twitter account.

187 There is no dispute that Dr. Van Aerde is the author of the expressions and that those expressions are captured by the statutory definition of expression under s. 137.1(2).

188 Dr. Van Aerde's expressions relate directly to the COVID-19 global pandemic and information and disinformation about COVID-19. The expressions respond to Dr. Gill's propositions that "we don't need a vaccine", and all we need is "...-Truth, -T-cell Immunity, Hydroxychloroquine".

189 No issue falls more squarely into the definition of a matter of public interest than a global pandemic. The public has a genuine stake in the matter of debates about pandemics and COVID-19 health treatments.

190 To the extent that the content of the expressions made by Dr. Van Aerde are comments, rather than statements of fact, then there are reasonable grounds to believe that fair comment is a valid defence for him.

191 The expressions are based on factual evidence that vaccines are a critical tool to end the pandemic and supported by multiple health agencies and organizations. Any person could honestly express that opinion on those facts. At least 22 other people did, nine of whom are Canadian physicians, as evidenced by this litigation.

192 Dr. Van Aerde's expressions are very likely also protected by a defence of qualified privilege. The occasion here that triggers qualified privilege is the need to respond to an influential physician using her Twitter platform to spread misinformation in the middle of a pandemic. Misinformation about treatments and vaccines could have serious and widespread health consequences. Dr. Van Aerde had a professional, social, and moral duty to respond to Dr. Gill's statements and challenge her views.

193 The Plaintiff has failed to adduce any evidence of a conspiracy. She provides no evidence in her affidavit of a conspiracy. The Statement of Claim makes bald allegations that, because Dr. Van Aerde was on the same Facebook group as other defendants, there is necessarily some conspiracy between them to harm Dr. Gill. She argues that the Defendants, "like a pack of hyenas" coordinated an attack on her without any evidence to support her claim.

194 Dr. Gill also includes negligence as a cause of action in her claim but Dr. Gill's only evidence of negligence is adopting of allegations in her Statement of Claim as sworn facts. A cause of action in negligence is not properly set out in her pleadings. Dr. Gill is really claiming negligence because she was defamed. If she was defamed, the proper cause of action is defamation, which is her only plausible cause of action.

195 The final step involves weighing the harm suffered against the interest in protecting the expression made. Dr. Van Aerde was somewhat harsh in his comments but not gratuitously so and the focus is not on whether the expression should have been more polite. Dr. Gill has suffered no harm as a result of the expressions of Dr. Van Aerde. The imposition of subjective and moralistic limits on debates, and in particular on those of scientists amidst a pandemic, is not in the public interest. When the final comparative weighing step of the test is applied, I consider that the correct result is that all claims against Dr. Van Aerde be dismissed.

E. Dr. Fraser

196 On October 1, 2020, Dr Gill "quote-tweeted" (re-posted, with commentary), her own earlier tweet from September 17, 2020, which read:

> Why is there fear re meaningless "cases"? Up to 90% false+ d/t high PCR cycle thresholds on ppl who are not infectious. Even among the small % of actual true positives: it is good news b/c ICU adms & deaths are at all-time lows. These healthy ppl are contributing to herd immunity

197 Dr Gill's October 1 tweet added the following additional commentary:

> This cannot be stressed enough. Rising "cases" amongst young & healthy ppl, without equal rise in ICU adms or deaths directly as a result of the virus, is very encouraging news: it means we are building natural community/herd immunity which will protect elderly & high-risk groups

198 Dr. Fraser saw Dr. Gill's October 1 tweet and understood it to suggest that Ontario was developing natural herd immunity to COVID-19--a proposition that he considered to be dangerous misinformation about the risk of COVID-19 transmission that could lull Ontarians into abandoning public health measures at a time when infections were on the rise. Dr. Fraser was concerned that Dr. Gill's tweet would undermine public health efforts that aimed to reduce the spread of COVID-19 by encouraging the use of masks and social distancing, and reducing contacts.

199 Dr. Fraser's understanding at the time, based on his review of infection rates in Ontario, was that nowhere near the percentage of the population required to achieve herd immunity had been infected and recovered from COVID-19 as of October 1, 2020. He was concerned that members of the public would read Dr. Gill's tweet and understand that precautions were no longer necessary because the population had achieved, or had nearly achieved, herd immunity. He feared this could cause people to disregard public health guidelines and expose themselves to a higher risk of infection. He was particularly concerned that individuals who read the tweet would be more likely to accept her statement as truthful and authoritative because Dr. Gill's Twitter profile highlights her physician credentials.

200 Dr. Fraser had been closely following reporting of the nascent "second wave" of COVID-19 infections developing in Europe and had observed that Ontario appeared to be lagging a couple of weeks behind but following a similar trend. Of course, a "second wave" of infections in Ontario did ultimately occur, reaching its peak later that fall.

201 Based on these concerns, Dr. Fraser posted a small number of tweets in response to Dr. Gill's October 1 tweet, and in response to her followers who engaged with him subsequently, in an effort to push back against what he considered to be misinformation that could have dangerous repercussions if left unchallenged. As a publicly funded scientist, Dr. Fraser felt that he had a responsibility to voice his concerns so that Dr. Gill's followers and others who saw her tweet would be aware that her views did not represent the consensus in the scientific community.

202 Almost immediately after Dr. Fraser published his first tweet, Dr. Gill blocked him from her Twitter page, making it impossible for him to engage with her. She also "quotetweeted" Dr. Fraser's tweet and referred to Dr. Fraser using the same language about which she complains in this action.

203 The impugned tweets relate to the COVID-19 pandemic, and the dangers of misinformation regarding the risk of transmission and the need for public health measures in response to the pandemic. That is a matter of significant public interest. One can scarcely imagine a topic of greater public interest.

204 The first impugned tweet, which Dr. Fraser posted on October 1, 2020 in response to Dr. Gill's tweet, reads:

> Can you please stop with this herd immunity garbage? What proportion of the population is seropositive at this stage in your opinion? 80%? Or below 5%? This is simply lunatic stuff. I can't believe you are qualified as an MD.

205 Applying the proper approach to determining meanings, the tweet means that the Ontario population had not reached herd immunity to COVID-19 as of October 1, 2020 and there was no reasonable basis to suggest that Ontario had reached or was close to reaching herd immunity. It was therefore irresponsible for Dr. Gill to tell the public that Ontario had reached or was close to reaching herd immunity.

206 The reference to "lunatic stuff" is understood reasonably as a reference to the suggestion that Ontario had reached herd immunity--it does not convey the meaning that Dr. Gill is a lunatic. If it were to be understood as referring to Dr. Gill, it is mere vulgar abuse, an insult that might hurt Dr. Gill's feelings but that is not actionable and would not harm her reputation in the eyes of a right-thinking person.

207 The second impugned tweet was a response Dr. Fraser posted to a tweet from Martin Kulldorff, which defended Dr. Gill after Dr. Fraser's first tweet. Dr. Fraser wrote:

> Let's at least agree that there is a substantial history here of Kulvinder pushing fact-free COVID myths.
>
> I also had anonymous threats to my personal email account for pointing out her skews and misrepresentations. Not the behaviour of a reasonable person I would say.

208 The tweet meant and was understood to mean that prior to her October 1 tweet, Dr. Gill had made claims about COVID-19 that were not grounded in fact. The mention of "anonymous threats to my personal email account" and "Not the behaviour of a reasonable person" meant and were understood to mean that an anonymous supporter of Dr. Gill had made threats to Dr. Fraser's personal email account because Dr. Fraser had pointed out Dr. Gill's misrepresentations of fact. That supporter's conduct was not the behaviour of a reasonable person. That comment was not objectively understood to refer to Dr. Gill herself.

209 Dr. Fraser posted the third and fourth impugned tweets in response to one of Dr. Gill's supporters, who had criticised one of his tweets. The tweets read:

> Dr. Gill was previously reprimanded for spreading untruths about COVID. She was pushing HCQ and suggested vaccine was unnecessary. She suggests that the low deaths SO FAR in Ontario's 2ND wave is due to herd immunity...nonsensical as I said. I stand by my condemnation of her views
>
> And:
>
> the reason I pushed back hard against her fact-free tweets is that this is the second time she is spreading harmful and dangerous views. Last time she was forced to retract her tweets. It is disgraceful that an MD continues to push illogical and wrong views during a pandemic.

210 These tweets mean and were understood to mean that Dr. Fraser understood Dr. Gill had been admonished previously for making inaccurate statements about hydroxychloroquine as a COVID treatment and that vaccines are not needed and that she was forced to retract those tweets and Dr. Gill is again giving the public inaccurate and potentially harmful information about COVID, this time relating to herd immunity. Further, it is unreasonable to suggest that the low deaths in Ontario's second wave as of October 4 are due to herd immunity.

211 Finally, the fifth impugned tweet was a comment Dr. Fraser made in response to a tweet by the Defendant, Marco Prado. It reads:

> Thank you Marco! I feel it is our responsibility as academics to try to push back against dangerous and wrong views that encourage complacency and a false sense of security during this pandemic. If this was the first time Dr. Gill had done this, it could be a mistake. It wasn't.

212 This tweet meant and was understood to mean that academics have a responsibility during the pandemic to speak out when others express views that may lead members of the public to stop taking appropriate precautions and increasing their risk of contracting COVID- 19. Further, Dr. Gill's comments cannot be overlooked as a mistake because on Dr. Fraser's understanding it is not the first time she has published comments during the pandemic that are not based on fact and may have dangerous implications.

213 Even if Dr. Gill were to satisfy the substantial merit requirement, she cannot meet her burden of demonstrating that Dr. Fraser has no valid defence to the claim. Dr. Gill must show there are grounds to believe that Dr. Fraser's defences have no real prospect of success. She must show that none of the defences are legally tenable or supported by evidence that is reasonably capable of belief. There must be a basis in the record and the law, taking into account the stage of the proceeding, to support a finding that the defences do not tend to weigh more favour of Dr. Fraser. Dr. Gill has not met that burden.

214 The comments expressed in the impugned tweets have a nexus to the underlying facts. A person could honestly have made the same comments Dr. Fraser did based on the facts Dr. Fraser knew and as summarised above. Moreover, Dr. Fraser honestly believed in the comments he expressed. He believed that Dr. Gill's tweet suggested Ontario had reached, or was close to reaching herd immunity; that Ontario was in fact not close to COVID-19 herd immunity; and that it was unreasonable and dangerous for a physician to suggest otherwise to the public because it could result in individuals refusing to follow public health measures to reduce the transmission of the virus. Dr. Fraser honestly believed, based on the CBC article, that Dr. Gill had previously posted a tweet containing inaccurate information about COVID-19 and that the tweet had been taken down from Twitter for violating its rules--a public rebuke or reprimand.

215 Dr. Fraser's unchallenged evidence is that he did not act out of any malice or ill-will toward Dr. Gill. Dr. Fraser did not and does not know Dr. Gill and had never interacted with her before his initial tweet in response to her October 1, 2020 tweet. He did not intend to cause any harm to Dr. Gill but his predominant motive was to ensure the public was not swayed by inaccurate, misinformation during a significant public health crisis. His only intention was to provide an opposing informed perspective regarding the appropriate interpretation of public health information relating to COVID-19 for the benefit of Dr. Gill's Twitter followers and for anyone else who became aware of Dr. Gill's October 1, 2020 tweet.

216 Dr. Gill's and Dr. Fraser's tweets were public communications related to the appropriate public health response to a pandemic. At the time, Dr. Fraser perceived that members of the Canadian public were genuinely confused about the risk of transmission of COVID-19 and what precautions were necessary to reduce the risk of transmission of this potentially deadly disease. There is a compelling social interest in attaching privilege to communications such as Dr. Fraser's impugned tweets, which respond to and debate statements made on a public forum relating to pressing matters of public health.

217 To the extent Dr. Gill has suffered any harm, she has not shown any causal link to Dr. Fraser's impugned tweets. There are many potential causes of the harm Dr. Gill claims to have suffered. Dr. Gill herself is the most obvious cause of damage to her reputation. Other potential causes include the comments and criticisms of others. When Dr. Fraser published the impugned tweets, Dr. Gill was already the subject of criticism on social media for spreading misinformation about COVID-19.

218 There is great public interest in protecting Dr. Fraser's expressions which are of substantial importance. He spoke up against what he considered to be misinformation that could lead individuals to ignore public health recommendations and measures designed to mitigate the risk of COVID-19 pandemic. A public health emergency in which informed, knowledgeable experts are stifled from commenting publicly to combat misinformation is a significant threat to the general public interest.

219 When the ultimate balancing test is applied, the interests and factors that might favour allowing this action against Dr. Fraser to continue are easily and far outweighed by the public interest in protecting speech of this nature. Accordingly, all claims against Dr. Fraser are dismissed.

E. Dr. Schwartz, Timothy Caulfield, Dr. Prato and Dr. Fazel

220 On August 6, 2020, Professor Caulfield responded to a tweet posted by André Picard on the same date in which Picard indicated he was shocked to see Dr. Gill tweeting that we do not need a coronavirus vaccine, but rather that we just need T-cell immunity, HCQ, and the truth:

> Incredible. A leading MD spreading #misinformation about vaccines & value of lockdown? Pushing disproven #Hydroxychloroquine?
>
> She has already blocked me (preemptive?), so can't see all. Will @cpso_ca explore? She's involved (leads?) "Concerned Ontario Doctors".

221 Following his above tweet, Professor Caulfield then copied and pasted the following two tweets from Dr. Gill (the "#FactsNotFear tweets"), over which he included the letters "WTF":

> There is absolutely no medical or scientific reason for this prolonged, harmful, and illogical lockdown. #FactsNotFear

222 On August 6, 2020, Professor Caulfield responded to a tweet by Dr. Michelle Cohen regarding the spread of misinformation on social media by tweeting "Go Team".

223 On August 6, 2020, Dr. Fazel responded to the #FactsNotFear tweets as follows:

> I'll just put this here. #VaccinesWork #vaccination #VaccinesforALL [infographic from the Public Health Agency of Canada titled: "Vaccines Work", outlining the efficacy of vaccines for whopping cough, measles, chickenpox, mumps, diphtheria, and polio]

224 On August 6, 2020, Dr. Fazel responded to a tweet by Professor Caulfield of the same date regarding a leading physician spreading misinformation:

> Just like any other profession, unfortunately, even in medicine you have a few rotten apples. This is why it's crucial to improve evidence-based literacy in the community.

225 On August 6, 2020, Dr. Fazel responded to a post by Dr. Gill by tweeting:

> There is a difference between having opposing views that are backed by evidence and spreading misinformation.

226 On July 22, 2020, Dr. Schwartz quoted a tweet regarding a comment by Dr. Anthony Fauci on vaccine antibodies and T-cells, and he added the following:

> Apparently "T-Cell Immunity" is the new rallying cry for anti-science plague enthusiasts who argue that many more people are immune than measured in serosurveys (which measure antibodies).
>
> [thinking emoji] I'd listen to Dr. Fauci [world emoji]'s pre-eminent immunologist on this one

227 Dr. Schwartz subsequently added to that tweet:

> Case in point:
>
> [re-tweet of Dr. Gill's tweet: T-cell immunity, T-cell immunity, T-cell immunity...]

228 On August 6, 2020, Dr. Schwartz responded to a tweet by Mr. Picard which re-posted a tweet that expressed disdain for Picard and support for Dr. Gill, and added a comment that "the trolls [were] out in full force":

> Yes, her army of despicables also attacked me last week when I called her out for her anti-science stance.

229 On August 6, 2020, Dr. Schwartz responded to a tweet from Dr. Jo Kennelly, the late wife of Dr. Frank Plummer, in which Dr. Kennelly indicated that vaccine cell creation and T-cell natural immunity were not mutually exclusive in Dr. Plummer's eyes:

> Except it pains me that she uses his good name in vain to support her anti-science opinions.

230 On August 10, 2020, Dr. Schwartz re-tweeted an article from CBC of the same date, titled "Ontario doctor subject of complaints after COVID-19 tweet".

231 On August 10, 2020, Dr. Schwartz tweeted:

> This pediatrician has consistently espoused misinformation & conspiracy theories at a time when trust in our profession is critically important. She accuses all who call her out of bigotry & corruption & hides behind summer student experience in a respected lab.

232 On October 4, 2020 Dr. Prado responded to a tweet posted by Dr. Andrew Fraser in which Dr. Fraser reported that he received threats from supporters of Dr. Gill to his personal email after challenging Dr. Gill's tweets. Regarding the supporters that threatened Dr. Fraser, Dr. Prado wrote:

> I have no patience with conspiracy theory defenders. My family lives in Brazil. Many people they know had major issues because of COVID and were in the hospital. Some died. You are right, stay strong and keep pushing for scientific facts Andy!

233 Dr. Gill claims against these four Defendants in defamation and conspiracy. She also claims against Dr. Schwartz, Dr. Fazel, and Dr. Prado in negligence.

234 Dr. Gill cannot prove the substantial merit element as she does not have viable causes of action in defamation, negligence, or conspiracy. Dr. Gill cannot prove the "no valid defence" element as the defences of fair comment and qualified privilege advance by these Defendants have sufficient validity. Dr. Gill cannot prove that any damages she may have suffered are sufficiently serious for the interest in permitting the proceeding to continue to outweigh the public interest in protecting the impugned expressions, and therefore she cannot overcome the public interest hurdle.

235 Given that the proceeding arises from expressions made by these Defendants that relate to matters of public interest, the onus shifts to the Plaintiffs to show that there are grounds to believe that the proceeding has substantial merit and that these Defendants have no valid defence.

236 None of the impugned statements of these Defendants are capable of giving rise to the defamatory meanings alleged. Further, those meanings would not have arisen in the minds of reasonable readers. In the "Twitter-sphere" the exchanges would simply be seen as a disagreement between medical professionals in terms that would not be interpreted as defamatory.

237 In the circumstances, Dr. Gill cannot show that there are reasonable grounds to support a finding that these Defendants owed her a duty of care in these circumstances.

238 There are no grounds to believe the conspiracy claim has substantial merit. The statement of claim is deficient and does not disclose a reasonable cause of action as it relates to the claim of conspiracy against the moving parties. Moreover, Dr. Gill has put forward insufficient evidence to support such a claim.

239 Dr. Gill cannot satisfy the court that there are grounds to believe that her claims of defamation, negligence, or conspiracy are legally tenable and supported by evidence reasonably capable of belief such that they have a real prospect of success.

240 For the reasons set out in their detailed Factum at paragraphs 66 through 91, I agree with these Defendants that the Plaintiffs have not shown that their defences of fair comment and qualified privilege lack the necessary prospects of success to permit the action to proceed.

241 When the balancing test is applied to the claims against these Defendants I consider that the comparative interests and considerations are very heavily in favour of the position advanced of these Defendants. Accordingly, all claims made against them are dismissed.

G. Dr. Polevoy

242 Dr. Polevoy is a retired physician now living in the Region of Waterloo, Ontario. He has been an advocate for good patient care and public health for many years. Dr. Polevoy is also an active physician leader with a long history of leadership in specialty associations, and provincial associations.

243 Dr. Polevoy uses his Twitter account as a platform to express his view on a number of topics, including to communicate with the public on health and medicine.

244 The Plaintiffs have claimed damages for alleged defamation on the basis of series of tweets posted between August 6, 2020 and October 21, 2020 similar in nature to those of the other physician Defendants.

245 Dr. Polevoy has adopted the arguments and submissions advanced on behalf of the other Defendant physicians with respect to the nature of his tweets and the available defences to him of fair comment and qualified privilege. In my opinion they apply equally to his tweeted expressions. Further, any communication expressing any complaint or concern about the Plaintiffs that he made to the College of Physicians and Surgeons of Ontario which is the governing body for physicians in the province must be considered to have occurred on an occasion of qualified privilege. Qualified privilege is a strong defence to any claims made by the Plaintiffs of defamation.

246 A consideration of the factors that must be weighed when applying the ultimate balancing test on this motion likewise favours the interest in protecting his right to express himself on matters of public interest. As a result, all claims against Dr. Polevoy in this action are dismissed.

H. Dr. Boozary

247 The only allegations in the Statement of Claim regarding Dr. Boozary are that he published three statements on his public Twitter profile in August 2020 which contain allegedly defamatory remarks concerning Dr. Gill.

248 The following tweets are the allegedly defamatory tweets posted by Dr. Boozary:

> (a) On August 6, 2020:
>
> The war on science is real in Canada- maybe ugliest when it comes from our own MD's. All indebted for the strength/ integrity of science/health journalism as counter force up north.
>
> [attaches Dr. Kulvinder Kaur MDs tweet: if you have not yet figured out that we don't need a vaccine, you are not paying attention #FactsNotFear].
>
> (b) On August 7, 2020:
>
> #IstandWithPicard - we all do. Hate only seems to fuel the bots will just continue to send love/strength to Andre/ seven nation army of science at the front line. Trust in science and each other going to get us thru
>
> (c) On August 9, 2020:
>
> Being blocked by @dockaurG a badge of honour sure but unsettling/win for misinformation that there's still an MD platform of >20k followers amplifying anti-science/anti-vax harm.

249 Dr. Boozary has an interest and is actively involved in the public health response to COVID-19 as a primary care doctor, as an assistant professor at the Dalla Lana School of Public Health, and as a co-lead for the Toronto Region's COVID-19 Homelessness and Shelter Response. Through these roles and in the media, Dr. Boozary has been actively involved in public education. Dr. Boozary has also tweeted throughout the pandemic about emerging scientific research, his view on health policy responses, and how he believes we should be coming together to protect those who are most vulnerable.

250 The proceeding against Dr. Boozary arises from an expression made by Dr. Boozary that relates to a matter of public interest. Dr. Boozary's tweets are expressions. All of Dr. Boozary's tweets relate to the COVID-19 pandemic - particularly about the importance of sharing health science information during the crisis - which is a topic of obvious public interest. At this stage, the court is not assessing the quality of the expression, and so it is not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest ... The question is only whether the expression pertains to any matter of public interest, defined broadly. This is not an onerous burden, and is clearly met in this case.

251 Dr. Boozary's August 6 tweet does not make any defamatory statement about Dr. Gill. Dr. Gill tweeted "we don't need a vaccine", which was counter to prevailing scientific opinion that a vaccine is necessary to reduce mortality and prevent the ongoing spread of COVID-19. Dr. Boozary stated in the August 6 tweet in response, copying Dr. Gill's tweet, "The war on science is real in Canada- maybe ugliest when it comes from our own MD's."

252 Dr. Boozary's tweet does not injure Dr. Gill's reputation. Dr. Gill's own expression has an impact on her reputation in that people reading it may either agree or disagree and people may feel strongly either way. Dr. Gill has also continued to openly broadcast her opinions on the public health response to COVID-19, even where those opinions are contrary to prevailing scientific opinion, and is thus maintaining the reputation that she has created. Dr. Boozary's election to share his own view on the matter, to his much smaller audience, would not affect Dr. Gill's reputation. Those who agree with Dr. Gill might actually support the idea that she is involved in a "war on science" in that they disagree with the prevailing scientific opinion of the importance of vaccines in fighting COVID-19. In short, Dr. Boozary's comments in the August 6 tweet did nothing to lower the reputation of Dr. Gill and are not defamatory.

253 Dr. Boozary's August 7 tweet is also not defamatory. The words of the Tweet do not refer to Dr. Gill. The Tweet is about hateful "bots", which by definition are unidentified Twitter users, and attempts to offer support to

André Picard and scientists at the front line in the pandemic. A reasonable person could not interpret the August 7 tweet to have lowered Dr. Gill's reputation in any way.

254 Finally, the August 9 tweet also is not defamatory. In the tweet, Dr. Boozary did not claim that Dr. Gill is anti-science or anti-vaccine, but rather that she used her large platform to amplify messages that are anti-science and anti-vaccine. He stated his opinion that it was concerning for a medical doctor with so many followers to be amplifying medical information which he considered to be contrary to scientific evidence. The August 9 tweet does not lower Dr. Gill's reputation as anyone familiar with Dr. Gill's Twitter account would be aware of the content she shares and could recognize that Dr. Boozary was stating his own views about that content, not falsely alleging anything against Dr. Gill.

255 Even if Dr. Boozary's tweets were somehow defamatory, then the defence of fair comment applies to them. Thus, the Plaintiffs are unable to meet their burden of showing there are grounds to believe that Dr. Boozary's defence has no real prospect of success.

256 All three of Dr. Boozary's tweets clearly meet the first criteria as they relate to the dissemination of scientific information regarding the COVID-19 pandemic, which is a matter of obvious public interest. The specific issues that Dr. Boozary was tweeting about within the broader rubric of the pandemic - namely, concerns about a medical doctor denying the need for a vaccine and support for health science reporting - are of particular concern during this global crisis.

257 Turning to the other criteria for establishing fair comment for the August 6 tweet, these criteria are met. Dr. Boozary's comment relates to the fact that Dr. Gill tweeted that "we don't need a vaccine"; he embedded Dr. Gill's full tweet as evidence of this fact. The August 6 tweet is recognizable as a comment because "the war on science is real" is a conclusion or observation which is generally incapable of proof. Further, it is a matter of Dr. Boozary's opinion to say it is "ugliest" when this comes from a medical doctor. Any person could honestly hold these views, given the prevailing scientific position that we do need a vaccine to combat COVID-19 and the important role of doctors in assuaging vaccine hesitancy.

258 The other criteria are also met for the August 7 tweet. This tweet does not make any comment about Dr. Gill. Dr. Boozary makes three comments in this tweet: (1) he supports Picard and others on the "front line" in science; (2) we need to trust in science and each other; and (3) hate fuels the "bots". The first two comments are statements of support that require no factual basis.

259 With respect to the third comment, Dr. Boozary's evidence in cross-examination was that he understood the term "bots" to refer to accounts that have no obvious human identity or accountability and are spreading vitriol against individuals not in relation to the subject matter of their tweets but against them personally, such as death threats.

260 The August 7 tweet is a matter of comment and opinion, and a person could honestly express the same opinions on the facts.

261 Finally, the August 9 tweet also meets the other criteria. The facts grounding Dr. Boozary's comments in this tweet are: Dr. Gill blocked Dr. Boozary on Twitter, Dr. Gill is a medical doctor, Dr. Gill had more than 20,000 twitter followers and Dr. Gill tweeted (which is quoted in Dr. Boozary's August 6 tweet) that "we don't need a vaccine". Calling Dr. Gill blocking him a "badge of honour" is a comment, as this is a subjective personal perspective on the known fact. Dr. Boozary also comments subjectively that he considers the existence of her account "unsettling" and a "win for misinformation", which are also clearly opinions.

262 While Dr. Boozary has met the criteria for the defence of fair comment for all three expressions at issue, Dr. Gill has failed to establish that Dr. Boozary was actuated by express malice, an onus which she bears in order to defeat the privilege. Malice relates to the state of mind of the defendant and is ordinarily established through proof that the defendant knew the statement was untrue, was reckless with respect to its truth, did not believe the statements were true, or had some improper motive or purpose. Although Dr. Gill did not plead malice with any specificity, her claim that Dr. Boozary acted maliciously cannot succeed on any of these bases. Dr. Boozary affirmed his belief in the statements and that he made those statements for the purpose of expressing his opinion on the dissemination of public health information, without malicious intent. Dr. Boozary also denied Dr. Gill's unsupported allegation that his tweets were sexist, racist, or misogynistic.

263 In applying the balancing test, Dr. Boozary rightly submits that Dr. Gill has failed to establish both the existence of harm as well as causation - both of which are required under the test.

264 Dr. Boozary's expression has high importance. His tweets related to the spread of scientific information regarding the deadly global pandemic, in the midst of the crisis. Scientific and public health information about COVID-19 is a matter of obvious public interest, because everyone in the public has a substantial concern about this topic in that it affects the welfare of citizens, and in particular there has been considerable public controversy about vaccinations. This interest far outweighs any interest that could support allowing the action against him to proceed.

265 An application of the final balancing test results in a determination in Dr. Boozary's favour. All claims against him in this action are dismissed.

I. The Pointer Group Incorporated

266 On October 19, 2020 Dr. Gill delivered a notice of libel pursuant to section 5 of the *Libel and Slander Act* to The Pointer concerning an article published by The Pointer on August 13, 2020 (the "Article"). The libel notice alleged that the Article contained defamatory statements about Dr. Gill.

267 On October 22, 2020, The Pointer responded to the libel notice and denied that the Article was defamatory.

268 The Article, published on August 13, 2020, reports on:

- (a) Tweets published by Dr. Gill on August 4, 5, 6 and 12, 2020, which appear in the Article in their entirety and which express her views that lockdowns are unwarranted and promotes the use of hydroxychloroquine as a treatment for the virus;
- (b) Twitter's removal of Dr. Gill's tweet on August 6, 2020, because it violated Twitter's policies. The August 6, 2020 tweet is set out in the Article even though it was removed on Twitter. That tweet promoted T-cell immunity (herd immunity) and hydroxychloroquine as humanity's effective defences against COVID-19;
- (c) Dr. Gill defending the use of a hydroxychloroquine and promoting it as "effective in the fight against COVID-19";
- (d) A complaint made to the College of Physicians and Surgeons of Ontario ("CPSO") about Dr. Gill's tweets;
- (e) The fact there are medical studies that have questioned the use of hydroxychloroquine as a treatment for COVID-19;
- (f) Health Canada's position that it does not support the use of hydroxychloroquine to prevent or treat COVID-19 without a prescription and warning Canadians about false and misleading claims; and
- (g) Concerns expressed by Dr. David Juurlink, head of clinical pharmacology and toxicology at the University of Toronto, regarding Dr. Gill's tweets including that her advice in her tweets is dangerous.

269 Dr. Juurlink's comments in the Article are not the subject of Dr. Gill's claim and Dr. Juurlink is not a defendant in this action.

270 The Article reports on Dr. Gill's own tweets, which are publicly available and are repeated verbatim in the

Article. The Article also accurately reports that there are research and statements from public authorities that have contradicted Dr. Gill's views and that other members of the medical community do not support her views, have made complaints about her public statements and are concerned about the impact those statements will have on members of the public. There is nothing in the Article that is not true.

271 Dr. Gill appears to have asserted that she did not make the statements attributed to her, and that the statements as reported were distorted and taken out of context. The Article simply reports on her tweets and does not take them out of context.

272 Dr. Gill knowingly tweeted about the pandemic, despite the controversial nature of her views, and knowing that they would be subject to public criticism and media reports. The Article is a fair and accurate report about Dr. Gill's tweets and the controversy created by them, and is based on true underlying fact.

273 The public has an interest in receiving competing viewpoints to those expressed publicly by Dr. Gill. Information on whether Dr. Gill's opinions expressed in her tweets are disputed is important to public debate and information about COVID-19 and potential treatments.

274 The Pointer states that attempts to contact Dr. Gill for comment were made before publishing the Article, but she did not respond, nor did she follow up after publication of the Article. Before the Article was published, among other things, The Pointer sent an email to Dr. Gill at the email address: concernedontariodoctors@gmail.com, the email address for Concerned Ontario Doctors, but received no reply.

275 In her affidavit sworn June 14, 2021 Dr. Gill asserted for the first time that The Pointer did not attempt to contact her before publishing the Article. She did not complain about this in her libel notice or in her Statement of Claim. In response to the libel notice, The Pointer wrote, among other things, that it had attempted to contact Dr. Gill for comment before publishing the Article. Dr. Gill did not dispute this.

276 The Article contains references to four reliable sources: Dr. Juurlink, Health Canada, Health Link BC, and an extensive study by the New England Journal of Medicine on the efficacy of hydroxychloroquine for treatment of COVID-19.

277 Dr. Gill claims that The Pointer did not engage in responsible journalism because it simply repeated the defamation of others without verification or competent investigation and echoed the defamation of the other Defendants. However, I agree with the arguments advanced by the Pointer that:

(a) There was no repetition of defamation of others. The Article contained quotations from an interview The Pointer conducted with Dr. Juurlink. Dr. Juurlink is not a named defendant. The quotation in the Article from Dr. Juurlink is a statement of his opinion and it is a reasonable comment of his concerns about Dr. Gill's tweets. The Article is reporting his concerns, which are shared by other members of the medical community; and

(b) There was no echoing of the defamation of the other defendants. The sole reference to another defendant in the Article was an indirect reference to the fact "the CBC [i.e. Radio Canada] reported Dr. Alex Nataros... filed a complaint with the [CPSO] for an "egregious spread of misinformation."" The article quotes from a tweet made by Dr. Nataros in response to Dr. Gill's tweets, which is part of Dr. Gill's claim. However, one quote of one tweet by one other defendant does not constitute a general repeating or echoing the defamation of others. As noted, the action was discontinued against Radio Canada.

278 The Article therefore bears all of the features of a strong responsible journalism defence.

279 Journalists at large must have the freedom to responsibly report on the COVID-19 pandemic, including Dr. Gill's comments and the criticism of them, irrespective of whether Dr. Gill has a valid basis to assert that lockdowns are ineffective or that hydroxychloroquine is effective against COVID-19. The media must be permitted to report responsibly on comments that affect the public and which are a matter of public interest.

280 The Plaintiffs should not be permitted to stifle public discourse and participation in public health debates caused by their own public comments.

281 In my view, the Plaintiffs have failed to discharge their onus of showing that The Pointer's defence of responsible journalism has very little chance of succeeding. In fact, I consider that the evidence entirely contradicts such a conclusion and that The Pointer has a very strong defence available to it.

282 Further and finally, when the balancing test is ultimately applied, it results in an assessment very much in favour of The Pointer and the public interest concerns it has advanced. As a result, the claims against it in this action must be dismissed.

J. Alheli Picazo

283 The action against Picazo is based on four tweets she posted to her Twitter account. The first three comprised a "thread" or series of tweets posted on August 6, 2020, prompted by a tweet from the Defendant, André Picard earlier that day. Picard's tweet embedded two tweets dated August 4 and 6, 2020 from Dr. Gill that read as follows:

> "If you have not yet figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear"
>
> and
>
> "#Humanity's existing effective defences against #COVID19 to safely return to normal life now:
>
> -The Truth
>
> -T-cell immunity
>
> -Hydroxychloroquine"

284 In the first tweet in Picazo's impugned August 6, 2020 thread, Picazo wrote, "Her behaviour and tweets throughout the pandemic have been grossly irresponsible, to say the least. I would have no faith in her as a doctor for anything." Embedded in this tweet was an image of another tweet Dr. Gill sent on August 4, 2020, stating, "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown. #FactsNotFear". Picazo's tweet also embedded a tweet by Bronca, which itself contained an image of the two tweets published by Dr. Gill set out at the previous paragraph.

285 Picazo's second tweet stated, "This is unprofessional, imo." "Imo" is a well-known acronym for "in my opinion". That tweet embedded images of, and was a comment on, two additional tweets of Dr. Gill, which read:

> "#COVID19 Defined By
>
> "Absolute power corrupts absolutely"
>
> "A lie told often enough becomes truth"
>
> "Cancer of bureaucracy is destroying medicine"
>
> "Media's most powerful entity on earth: power to make the innocent guilty & to make the
>
> guilty innocent - control minds of masses""
>
> and
>
> ""If you're not careful, newspapers will have you hating the ppl who are oppressed & loving the ppl who are doing the oppressing" 2020: frontline MDs silenced/censored for speaking the truth & upholding HippocraticOath [sic] while media invokes fear & "journalists" propagate lies"

286 The third tweet in Picazo's thread stated, "There is an abandonment of science happening here, she just doesn't seem to be able to recognize the culprit", which was a comment on a tweet by Dr. Gill that stated:

> "My heart is broken watching #COVID19Canada unfold. Absolutely broken watching our govts embrace quackery & abandon science. Broken hearing endless political/media lies. Broken watching govts violate our freedom/rights. Broken from govts allowing Cdns to die when we can save them."

287 The final tweet by Picazo that Dr. Gill alleges was defamatory was posted on October 20, 2020. That tweet was part of a series of tweets Picazo wrote regarding the renaming of Sir John A. MacDonald Hall at the Queen's University Faculty of Law, which was a news story at that time. Picazo was responding to comments made by Queen's Law professor Bruce Pardy that were critical of the proposal to remove the name. Picazo wrote, "What's more threatening to Canadians than the re-naming of a building? Covid denialism and promoting bad science and fringe theories/figures. #cdnpoli". That tweet contained embedded images of four other tweets from various accounts, including one from Dr. Gill that promoted the use of HCQ.

288 Numerous articles and scholarly resources have been tendered by the various Defendants that make clear that Dr. Gill's views on the use of lockdowns as a public health measure, the proximity of reaching her immunity, the efficacy and safety of HCQ as a treatment for COVID-19, and the necessity of a COVID-19 vaccine run contrary to the generally accepted views of the scientific and medical community.

289 To satisfy the requirements of s. 137.1(3), the moving party must demonstrate on a balance of probabilities that (i) the proceeding arises from an expression made by the moving party and that (ii) the expression relates to a matter of public interest. These requirements are easily satisfied in the case as against Picazo which arises from the four tweets referred to.

290 Dr. Gill has claimed in defamation and also alleged conspiracy. There are no grounds to believe that either of these claims has a real prospect of success. Further, there are no grounds to believe that Picazo's defences of justification and fair comment have no real prospect of success.

291 Picazo's impugned comments were that Dr. Gill's tweets: (a) were grossly irresponsible; (b) were unprofessional; (c) constituted an abandonment of science; (d) contained bad science; and (e) contained fringe theories.

292 Although Dr. Gill further claims that Picazo said she engaged in "COVIDdenial". Picazo's October 20, 2020 tweet, which referred to "Covid denialism and promoting bad science and fringe theories/figures", was directed at Bruce Pardy, not at Dr. Gill. Picazo's tweet embedded four tweets (only one of which was a tweet of the Plaintiffs) that had been previously retweeted by Bruce Pardy. Reading this tweet in context, the meaning, as far as it relates to Dr. Gill's tweet, is that it was Bruce Pardy who was promoting bad science and fringe theories. Dr. Gill's tweet that was embedded in Picazo's October 20, 2020 tweet simply attached an article promoting the use of HCQ to treat COVID-19, and so the meaning (as it relates to Dr. Gill) is that the use of HCQ to treat COVID is "bad science" and a "fringe theory".

293 In my view, these comments were not defamatory. The thrust of Picazo's comments is that Dr Gill's tweets promoted ideas and theories related to lockdowns, HCQ, and vaccines that contradicted the generally accepted medical and scientific consensus and that the tweets were, for that reason, irresponsible and unprofessional. Prior to August 6, 2020, Dr. Gill already had a reputation as an advocate of controversial opinions regarding the COVID-19 pandemic. Picazo's comments regarding Dr. Gill's tweets contain the same conclusions that a reasonable person would have reached. Picazo's tweets simply affirmed Dr. Gill's self-positioning as a bold, advocate willing to "tell it like it is" in the face of (in Dr. Gill's view) misinformation being spread by the government, public health authorities, and the mainstream media.

294 The content and tone of Picazo's tweets were mild and measured relative to the highly charged online discourse surrounding the COVID-19 pandemic and, in particular, to the way in which Dr. Gill expresses herself on Twitter.

295 Picazo's impugned comments also attract a strong fair comment defence. They relate to a matter of public interest. They are based on fact, i.e., the underlying tweets from Dr. Gill that Picazo was referring to and are embedded in Picazo's tweets. These tweets, and the other tweets of Dr. Gill are publicly available on her Twitter page for the world to see.

296 Picazo's comments are recognizable as comment and are expressly framed as such, and constitute an opinion that a person could honestly express on the proved facts. It is Picazo's unchallenged evidence that she was expressing her honestly held opinion that Dr. Gill's statements about COVID-19, vaccines and public health measures were inaccurate, irresponsible, and unprofessional for a medical doctor to be making, that they created a potential risk to public health, and that they ran counter to the prevailing views on these issues as expressed by public health authorities.

297 The Plaintiffs have failed in their onus of demonstrating that the defence of fair comment has little or no application to Picazo's expressions. In my view, the record shows that a very strong defence in that regard is available to her.

298 Further, Dr. Gill has failed to demonstrate or particularize any overt acts by Picazo in furtherance of the alleged conspiracy, to explain how Picazo acted in concert with other Defendants, or to set out particularized allegations of damages suffered as a result of the conspiracy. The conspiracy claim fails to meet the "substantial merit" test and should be dismissed on this basis alone.

299 Finally, an application of the ultimate balancing test very much favours Picazo and the interests and values that she has argued must be protected. Accordingly, I conclude that all claims in this action against her ought to be dismissed.

K. Bruce Arthur

300 On August 6, 2020, Arthur saw a tweet by André Picard, whom he follows on Twitter, which embedded the following August 4, 2020 tweet by Dr. Gill:

> "If you have not figured out that we don't need a vaccine, you are not paying attention. #FactsNotFear"

301 Arthur was concerned by this tweet because it contradicted the public health advice he had become aware of over the previous months. He was particularly concerned that the tweet had been made by a physician.

302 Arthur then reviewed Dr. Gill's Twitter account, and saw the following tweets:

a) "There is absolutely no medical or scientific reason for this prolonged, harmful and illogical lockdown."

b) "Current status of #COVID19 99.9% Politics, Power, Greed & Fear. 0.1% Science & Medicine."

c) "#Humanity's existing effective defences against #COVID19 to safely return to normal life now: -The Truth - T-cell Immunity - Hydroxychloroquine."

303 Arthur observed that Dr. Gill's tweets had been retweeted many, many times.

304 Arthur also observed that Dr. Gill had tweeted about André Picard, accusing him of having been appointed by Trudeau to the COVID-19 Impact Committee "to drive the political WHO narrative." This tweet had resulted in a barrage of negative online vitriol directed at Picard.

305 After learning that Dr. Gill had blocked him from being able to view her Twitter page, Arthur tweeted the following:

> I don't boast about being blocked, but this one is a badge of honour, from a Canadian doctor who is spreading dangerous misinformation, and who unleashed a troll farm at @picardonhealth, one of the finest public service journalists in Canada. What a disgrace.
>
> [Screenshot of Twitter message showing he had been blocked]
>
> Now, let's wait and see which media outlet her a platform. It'll be telling.

306 This single tweet is the sole subject of the defamation claim against Arthur.

307 The expression at issue relates to a matter of public interest - namely, the COVID-19 pandemic and ensuing public health response. The public interest nature of the expression should not be in dispute on this motion, particularly since Dr. Gill herself has extensively tweeted about this topic.

308 When determining whether a statement has a defamatory meaning, attention must be given to the mode of communication, context, and all surrounding circumstances. As a platform, Twitter allows for an open exchange of ideas and invites users to engage with the views of others. By making controversial statements on this very public platform, Dr. Gill implicitly invited members of the public to respond to her views.

309 Arthur's tweet cannot bear the defamatory meanings ascribed to it by Dr. Gill. It does not call her a conspiracy theorist, it does not call into question her mental stability, and it says nothing about her ability to care for her patients. It merely states Arthur's own view that her publicly-available tweets include dangerous misinformation about COVID-19, and that the spreading of this misinformation and her related accusations hurled at Picard were a "disgrace".

310 There is no evidence that the Arthur tweet lowered Dr. Gill's reputation. Her tweets were available for the public to see. Any reasonable member of the community could immediately look at her Twitter page and discern for themselves whether they agreed with Arthur's assessment of her tweets.

311 Dr. Gill has fostered a reputation for herself as an outspoken and controversial advocate against public health advice on COVID-19 measures, and the mainstream media's coverage of COVID-19. Public health authorities have deemed anti-vaccine and anti-lockdown rhetoric to be "misinformation". Therefore, Arthur's characterization of Dr. Gill's tweets as "misinformation" likely served only to solidify her stance as a crusader against public health advice and the mainstream media, a reputation she herself created.

312 Arthur's tweet also attracts a strong defence of fair comment on a matter of public interest. It was on a matter of obvious public interest. It was based in fact, as it directly responded to Dr. Gill's Twitter posts about vaccines, lockdowns, hydroxychloroquine and the overall COVID-19 public health response, which she does not dispute making. The tweet expressed an honestly held opinion that many other Defendants in this litigation shared. There is no credible suggestion or evidence that it was motivated by malice.

313 Arthur's tweet is also recognizable as comment. Arthur was reacting to the fact that Dr. Gill had blocked him on Twitter, and tweeted that it being blocked was a "badge of honour" due to his opinion that she was "spreading dangerous misinformation" and had unfairly criticized Picard. The final words, "What a disgrace", shows that Arthur was only expressing his opinion and personal observation of Dr. Gill's actions on Twitter.

314 Dr. Gill has not put forward any real evidence of any harm caused to her by Arthur's single tweet, or of any reputational or other harm at all.

315 In any event, any potential harm arising from the impugned expressions is outweighed by the importance of allowing citizens to freely express themselves via social media platforms on what will be the defining public health issue of our time. An application of the ultimate balancing test to these facts requires that all claims against Arthur be dismissed.

Conclusion

316 For these reasons, the motions brought by the Defendants are granted, and all claims against them in these proceedings are hereby dismissed.

Costs

317 Given the position taken on behalf of the Plaintiffs by their counsel in response to the suggestion made by some of the Defendants that the Plaintiffs' claims were being maintained with the possible benefit of third party funding, I did not consider it necessary or appropriate to refer to it in the above reasons as it did not form any part of the applicable analysis. However, I should indicate to the parties that approach taken in that regard is without prejudice to the entitlement of any party to refer to such issue if there is a proper basis for doing so when making submissions on costs.

318 If the parties cannot agree on the subject of costs, written submissions may be delivered by the Defendants for my consideration within 30 days of the date of this decision. Written submissions may be delivered by the Plaintiffs within 30 days thereafter.

E.M. STEWART J.

End of Document

Mancuso v. Canada (Minister of National Health and Welfare), [2014] F.C.J. No. 732

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: January 21, 2014.

Judgment: July 16, 2014.

Amended Judgment: November 3, 2014.

Docket: T-1754-12

[2014] F.C.J. No. 732 | [2014] A.C.F. no 732 | 2014 FC 708 | 242 A.C.W.S. (3d) 788 | 460 F.T.R. 25 | 2014 CarswellNat 2540

Between Nick Mancuso, The Results Company Inc., David Rowland, Life Choice Ltd (Amalgamated from, rolled into, and continuing on business for, and from, E.D. Modern Design Ltd. and E.G.D. Modern Design Ltd.), and Dr. Eldon Dahl, and Agnesa Dahl, Plaintiffs, and Minister of National Health and Welfare, Attorney General of Canada, Minister of Public Safety and Emergency Preparedness, Royal Canadian Mounted Police, and Her Majesty the Queen in Right of Canada, Defendants

(184 paras.)

Case Summary

Commercial law — Trade regulation — Food and drugs — Natural health products — Enforcement — Motion by defendants to strike plaintiffs' action challenging constitutionality of Food and Drugs Act and Natural Health Products Regulations or to proceed only against Federal Crown allowed in part — Cross-motion by plaintiffs to stay enforcement of certain provisions of Act and Regulations dismissed — Damages claim, allegations of malicious intent and improper purpose, and Charter infringement claims struck for failing to plead material facts, failing to disclose reasonable cause of action or abuse of process — Corporate plaintiffs could not maintain s. 7 Charter claim — Federal Crown only proper defendant.

Constitutional law — Canadian Charter of Rights and Freedoms — Availability of Charter protection — Corporations — Motion by defendants to strike plaintiffs' action challenging constitutionality of Food and Drugs Act and Natural Health Products Regulations or to proceed only against Federal Crown allowed in part — Cross-motion by plaintiffs to stay enforcement of certain provisions of Act and Regulations dismissed — Damages claim, allegations of malicious intent and improper purpose, and Charter infringement claims struck for failing to plead material facts, failing to disclose reasonable cause of action or abuse of process — Corporate plaintiffs could not maintain s. 7 Charter claim — Federal Crown only proper defendant.

Constitutional law — Constitutional proceedings — Practice and procedure — Pleadings — Motion by defendants to strike plaintiffs' action challenging constitutionality of Food and Drugs Act and Natural Health Products Regulations or to proceed only against Federal Crown allowed in part — Cross-motion by plaintiffs to stay enforcement of certain provisions of Act and Regulations dismissed — Damages claim, allegations of malicious intent and improper purpose, and Charter infringement claims struck for failing to

plead material facts, failing to disclose reasonable cause of action or abuse of process — Corporate plaintiffs could not maintain s. 7 Charter claim — Federal Crown only proper defendant.

Motion by the defendants to strike the plaintiffs' action challenging the constitutionality of the Food and Drugs Act and Natural Health Products Regulations or to allow the action to proceed only against the Federal Crown. Cross-motion by the plaintiffs to stay the enforcement of certain provisions of the Act and Regulations pending the outcome of the action. The plaintiffs were users, manufacturers or distributors of products that fell within the definition of natural health product, including dietary food supplements, nutritional food supplements and vitamins. They alleged the federal government did not have constitutional authority to regulate natural health substances, the Act and Regulations infringed their rights under the Charter, and they had suffered damages as a result of Charter breaches and tortious conduct by government officials in enforcing the Act and Regulations. The plaintiff Dahl challenged enforcement actions under the Act that led to criminal convictions against him.
HELD: Motion allowed in part; cross-motion dismissed.

Certain claims for relief were struck as overly broad. The plaintiffs' damages claim and allegations of malicious intent and improper purpose or bad faith in relation to enforcement actions against them were also struck with leave to amend to state conduct under the provisions of the Act and Regulations that was clearly wrong, in bad faith or an abuse of power. Several paragraphs were struck for failing to plead sufficient material facts to support the assertions made. Other paragraphs were struck as vexatious or because they disclosed no reasonable cause of action. The Charter claim was struck as it did not outline how any asserted rights were infringed and thus disclosed no reasonable cause of action. The bulk of the pleadings respecting Dahl were struck as an abuse of process as they were an attempt to re-litigate the validity of actions related to the previous criminal proceedings. Dahl could not use his unchallenged convictions to demonstrate unconstitutionality. There was no reasonable chance of success that his malicious prosecution claim would succeed. The corporate plaintiffs could not bring a proactive challenge to the Act and Regulations on s. 7 Charter grounds as they had no procedural protections under s. 7. Their claim of s. 2(b) Charter breaches had not been pleaded with sufficient detail to allow adjudication. The defendant Ministers and RCMP were not proper defendants. The federal Crown was the only proper defendant in the action.

Statutes, Regulations and Rules Cited:

Canadian Bill of Rights, R.S.C. 1985, App. III, s. 1(c)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2, s. 2(a), s. 2(b), s. 7, s. 8, s. 9, s. 11(b), s. 15, s. 24(1)

Constitutional Act, 1867, s. 92(7), s. 92(13), s. 92(16)

Constitution Act, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 24, s. 52

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 5(2), s. 6(1)

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.), s. 153(a), s. 159

Federal Court Rules, SOR/98-106, Rule 64, Rule 181, Rule 221, Rule 221(1)(a), Rule 221(a), Rule 221(c), Rule 221(d), Rule 221(f)

Federal Courts Act, R.S.C. 1985, c. F-7, s. 17, s. 18(3)

Food and Drugs Act, R.S.C. 1985, c. F-27, s. 2, s. 3(1), s. 3(2)

Natural Health Products Regulations, SOR/2003-196, s. 44, s. 63, s. 83, s. 87, s. 91, s. 93, s. 94, s. 98, s. 108, s. 115

Counsel

Rocco Galati, for the Plaintiffs.

Sean Gaudet and Andrew Law, for the Defendants.

[Editor's note: Amended reasons were released by the Court on November 3, 2014. The changes were not indicated. This document contains the amended text.]

JUDGMENT AND REASONS

RUSSELL J.

INTRODUCTION

1 The Plaintiffs have brought an action challenging certain provisions of the *Food and Drugs Act*, RSC, 1985, c F-27 [Act] on constitutional grounds, challenging the *Natural Health Products Regulations*, SOR/2003-196 [Regulations] on constitutional grounds and as exceeding the authority delegated by the Act, and claiming damages based on alleged Charter breaches and tortious conduct in the implementation and enforcement of the Act and the Regulations. This judgment relates to two motions brought in the context of that action. The Defendants have brought a motion to strike the Statement of Claim [Claim] in its entirety, or in the alternative to strike certain paragraphs that amount to the bulk of the Claim (paragraphs 1(a), 1(b), 1(c), 1(e), 2 - 29, 34, 36 and 37-100). They also seek to amend the Claim to remove all of the Defendants except Her Majesty the Queen in Right of Canada. The Plaintiffs have brought a cross-motion seeking to stay the enforcement of s. 3(1) and (2) of the Act and large portions of the Regulations pending the outcome of the action.

BACKGROUND

2 The Plaintiffs are present or past users, manufacturers or distributors of products that fall within the definition of "natural health product" as set out in the Regulations [natural health products], which they describe as naturally occurring dietary food supplements, nutritional food supplements and vitamins. They challenge the validity and the enforcement of the Regulations and certain sections of the Act on a number of grounds, including that:

> the federal government does not have the constitutional authority to regulate natural health substances under the division of powers set out in the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, App II, No 5 [Constitution Act 1867];
>
> Parliament never intended the definition of "drug" in the Act to apply to natural health products and therefore the Regulations exceed the authority delegated by the Act; and
>
> the enactment and enforcement of the Regulations and the application of certain sections of the Act to natural health products have infringed their rights under ss. 2(a), 2(b), 7, 8, 9 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [Charter].

3 The Plaintiffs also allege that they have suffered damages as a result of these alleged Charter breaches as well as heavy-handed and tortious conduct by government officials and the Royal Canadian Mounted Police [RCMP] in enforcing the Act and the Regulations.

4 With respect to the constitutional division of powers, the Claim states that Parliament has the jurisdiction to regulate any product that has a potential health risk, but Parliament cannot extend this jurisdiction to products which pose no or a *de minimis* health risk, so that the Regulations are therefore *ultra vires* the jurisdiction of Parliament (Claim, at para 16(h)).

5 The Plaintiff Nick Mancuso [Mancuso] is a Canadian actor who says that he has, throughout his life, relied heavily on dietary food supplements and vitamins as a conscious, informed choice regarding his health. He views the free choice to use these products as part of his belief system in terms of how to maintain good health and "in general, with respect to his bodily and psychological integrity." He resists the notion that the state can "arbitrarily and selectively dictate" what dietary supplements or vitamins can be sold to him, and alleges that restrictions on the sale of natural food products and the communication of health claims about them violate his rights under ss. 2(a), 2(b), 7 and 15 of the Charter and have caused him mental distress.

6 The Plaintiff David Rowland [Rowland] is an advocate of "alternative" medicine who says that he has been involved for many years with the development of natural health products. A line of dietary supplements developed by Rowland -- the Vitamost(R) line -- are or were distributed by The Results Company Inc [the Results Company], another Plaintiff described as "a small family owned business." Rowland and the Results Company allege that the product and site licensing regime imposed by the Regulations -- the National Products Number [NPN] licensing scheme -- has severely restricted the sale of these supplements. They say the NPN regime is "oppressive and totally unnecessary" because the products are safe, and that the Regulations are "unconstitutional and ultra vires the Act."

7 Rowland and the Results Company allege that Health Canada has refused licences for some of their products and has withheld approval for others, causing a steep decline in their business. They allege that the NPN regime is a form of censorship that prohibits the sale of natural health products and decides which health claims can be made about them, prohibiting "all other true claims." They say that "[i]n no other industry are suppliers prevented from telling their customers the truth about what their products do." They also allege that the enforcement of the Regulations has been "excessive and abusive," employing "para-military methods of enforcement." They allege that they have suffered damage to reputation and economic losses, and Rowland alleges breaches of his rights under ss. 2, 7 and 15 of the Charter "as claimed and articulated with respect to Nick Mancuso."

8 The Plaintiff Eldon Dahl [Dr. Dahl] has been involved in importing, exporting, preparing and distributing natural health products since purchasing an existing health food store in West Vancouver in 1984. He says he is qualified as a Naturopathic Physician. The Plaintiff Agnesa Dahl [Mrs. Dahl] is his wife, and the Plaintiff Life Choice Ltd [Life Choice] is their company, which was formed from the amalgamation of companies they previously owned or controlled (E.D. Modern Design Ltd and E.G.D. Modern Design Ltd). The Dahls and the predecessor companies of Life Choice have been subject to enforcement action under the Act and the Regulations on a number of occasions, including searches and seizures dating back to 2001. In 2004, Dr. Dahl and his then company (E.D. Internal Health) were charged with 42 counts of violating the *Customs Act*, RSC, 1985, c 1 (2nd Supp.) [Customs Act] and the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. Dr. Dahl and E.D. Internal Health were found guilty on 33 counts and received a conditional sentence and fines: *R v Dahl*, 120998, March 26th 2004 (BC Prov Ct) [*R v Dahl #1*]; *R v Dahl*, [2004] B.C.J. No. 3072, 120998-C3, May 26, 2004 (BC Prov Ct) [*R v Dahl #2*]. In early 2010, the Dahls and their company, E.G.D. Modern Design Ltd, were charged with 33 counts of violating the Act and the CDSA. The charges against the Dahls were stayed due to delay in January 2013, while E.G.D. Modern Design pleaded guilty on 11 counts (including 8 under the Act) and was sentenced to pay fines totalling $125,250: *R v Dahl*, 2013 ABQB 54 [*R v Dahl #6*]; trial excerpt from *R v Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, [2013] A.J. No. 89, 100237221Q3 (Alta QB) [*R v Dahl #7*] at pp. 52-104 (Defendant's Motion Record, at 559-611).

9 The Dahls allege violations of their rights under ss. 7, 8 and 9 of the Charter in connection with the searches and seizures preceding the charges outlined above, which they characterize as excessive and abusive, including a "heavily armed raid" resulting in the seizure of products and a search of their home in which they allege they were unlawfully detained and a gun was pointed at Mrs. Dahl's chest. They allege that Dr. Dahl was "falsely convicted" in 2004, and that they were "falsely and maliciously charged [...] and prosecuted" beginning in 2010 "for the possession and sale of perfectly safe, natural products... [which] are arbitrarily, vaguely, and overly-broadly treated as 'drugs' and falsely and maliciously enforced as such." They say that Dr. Dahl has an unwarranted criminal record "for not only something he was not responsible for, but also due to the ultra vires, unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials" (emphasis in original). The Dahls and Life Choice also allege that Health Canada issued unfounded Health Warning Bulletins on its website regarding safety concerns with Dr. Dahl's and E.G.D. Modern Design's products, without notifying them, and has refused to remove these warnings even after the products were proven to be safe.

10 The Dahls state that they have suffered loss of reputation, mental distress, and financial losses as a result of these events. In addition to the alleged breaches of ss. 7, 8 and 9 of the Charter, the Dahls claim that they "have also had their Charter rights, as consumers, manufacturers, and distributors, personally breached under ss. 2, 7 and 15 of the Charter for the same reasons and rationale as set out with respect to Nick Mancuso and David Rowland."

11 Finally, the Claim states that in addition to the various constitutional breaches alleged by the "biological" Plaintiffs, the corporate Plaintiffs claim breaches of the following Charter and constitutional rights:

a) the right to freedom of expression and communication as guaranteed under s. 2 of the Charter;

b) the procedural safeguards of s. 7 of the Charter in the context of (quasi) criminal prosecution and regulatory scheme;

c) the right to equality, as a structural imperative of the underlying principle of the *Constitution Act, 1867* as enunciated by the Supreme Court of Canada in *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 [*Winner*] , which right, above and beyond s. 15 of the Charter, is also involved by the biological Plaintiffs.

12 The Defendants argue that the Claim should be struck in its entirety without leave to amend. Should any portion of it proceed, they say that the only proper Defendant is Her Majesty the Queen in Right of Canada. The Plaintiffs argue that not only should the Claim proceed but, in addition, the Court should stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action.

ISSUES

13 The issues that arise in this proceeding are:

1. Should the Claim, or any portion of it, be struck?
2. If the Claim is struck, should the Court grant leave to amend it?
3. If any portion of the Claim is permitted to proceed, who are the proper defendants?
4. Should the Court stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action?

ARGUMENTS

Defendants' Motion to Strike the Claim

Arguments of the Defendants

14 The Defendants argue that the Claim should be struck in its entirety without leave to amend. They say it is in fact three separate claims combined together into one unduly complex, prolix and convoluted pleading that is so undefined and broad in scope as to be judicially unmanageable. They also argue that it does not meet the basic rules of pleading in that it fails to set out a concise statement of the material facts relied upon, is replete with bald allegations and colourful rhetoric, and pleads evidence instead of material facts in many instances. The Defendants say it is not possible for them to answer the allegations contained in the pleading by preparing a statement of defence.

15 The Defendants also argue that the Plaintiffs are asking the Court to make findings inconsistent with previous findings made by other courts in different proceedings, and are attempting to re-litigate matters that were, or ought to have been, raised in earlier proceedings. As such, they say the Claim is an abuse of process. In addition, the Defendants argue that the corporate Plaintiffs are asserting violations of Charter provisions they are not entitled to invoke, all of the Plaintiffs are seeking prerogative relief (specifically orders in the nature of prohibition) that cannot be obtained in an action, and the Claim names improper and unnecessary parties.

16 The Defendants acknowledge that, for the purposes of this motion, the allegations set out in the Claim are deemed to be proven unless they are incapable of proof. They state that the test for striking out pleadings under Rule 221(1)(a) of the *Federal Court Rules*, SOR/98-106 [Rules] is whether it is plain and obvious, assuming the facts pleaded to be true, that the claim discloses no reasonable cause of action - that is, it has no reasonable prospect for success: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 18 [*Hunt*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]. They also point out that Rule 221 states a number of other grounds upon which a pleading in an action may be struck:

> 221.(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> (a) discloses no reasonable cause of action or defence, as the case may be,
>
> (b) is immaterial or redundant,
>
> (c) is scandalous, frivolous or vexatious,
>
> (d) may prejudice or delay the fair trial of the action,
>
> (e) constitutes a departure from a previous pleading, or
>
> (f) is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.

17 The Defendants state that the present motion relies upon subrules 221(a), (c), (d), and (f).

18 With respect to the argument that the Claim is scandalous, frivolous and vexatious (Rule 221(c)) and will delay the fair trial of the action (Rule 221(d)), the Defendants say that the Claim fails to meet the basic rules of pleading, is based upon bald assertions that are unsupported by any material facts and, taken as a whole, is a lengthy and disorganized diatribe in favour of de-regulation of the production, distribution, sale and consumption of natural health products.

19 The purpose of pleadings, the Defendants argue, is to clearly define the issues in dispute and give fair notice of the case to be met by the other side. Pleadings establish a landmark by which the parties and the court can determine the relevancy of evidence, both on discovery and at trial: *Sivak v Canada*, 2012 FC 272 at para 11 [*Sivak #2*]. Pleadings that are irrelevant, immaterial, redundant, argumentative and/or inserted for colour should be struck pursuant to Rule 221(c), and a pleading should also be struck as scandalous where it contains unfounded and inflammatory attacks on the integrity of a party: *Sivak #2*, above, at para 89; *George v Harris*, [2000] OJ No 1762 at para 18, 97 ACWS (3d) 225 [*George*].

20 The Defendants note that there are four basic requirements of pleading. Every pleading must: (a) state facts and not merely conclusions of law; (b) include material facts; (c) state facts and not the evidence by which they are to be proven; and (d) state facts concisely in a summary form: *Carten v Canada*, 2009 FC 1233 at para 36, aff'd by 2010 FC 857. A plaintiff is required to plead with sufficient particularity the constituent elements of every cause of action raised, and cannot plead bare assertions without supporting facts, as this may prejudice the trial of the action: *Simon v Canada*, 2011 FCA 6 at para 18 [*Simon*]; *Merchant Law Group v Canada (Revenue Agency)*, 2010

FCA 184 at para 34 [*Merchant Law*]; *Johnson v Canada (Royal Canadian Mounted Police)*, 2002 FCT 917 at paras 24-25 [*Johnson*].

21 The Defendants point to examples of what they characterize as bald assertions unsupported by any material facts in paragraphs 6, 7, 16(t), 16(y), 35 and 36 of the Claim. They state that these are "merely examples" and that it is impossible for them to respond to "bald, vague, over-generalized, bombastic assertions." They argue that the Claim does not set out concise statements of material facts in support of recognizable causes of action in law, and is therefore not a proper pleading.

22 With respect to the allegations of Mancuso (paragraphs 24-30 of the Claim), the Defendants say that while he claims that the regulatory schemes enforced by Health Canada officials have curtailed and eliminated the availability of "many" of the "safe products" that he seeks to consume, he has not identified any specific dietary food supplements and vitamins to which he has been denied access. In addition, while he alleges that the current regulatory scheme violates his rights under ss. 2(a), 2(b), 7 and 15 of the Charter, he has failed to plead the constituent elements of the Charter violations he asserts.

23 With respect to the claim of a s. 2(a) violation, the Defendants say that Mancuso has failed to plead the prohibition of any practice or line of conduct with a nexus to a religious belief or morality to which he subscribes, which is required to establish a breach of s. 2(a) of the Charter: *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56. Rather, he simply asserts a preference for certain dietary food supplements and vitamins. Without more, the Defendants argue, Mancuso's s. 2(a) claim presents no reasonable prospect of success.

24 The Defendants say Mancuso's allegations regarding freedom of expression under s. 2(b) of the Charter are similarly deficient. Although the Supreme Court of Canada has adopted a wide definition of "expression," Mancuso has not pleaded any personal attempts to make or receive prohibited expressive activity.

25 The Defendants say that Mancuso has also failed to properly plead a violation of s. 7 of the Charter. He must show that there is a deprivation of life, liberty or security of the person that is inconsistent with a principle of fundamental justice. He has failed to indicate any health product necessary to his bodily and/or psychological integrity that is made unavailable to him by effect of the legislation he seeks to invalidate. As such, there is no basis upon which to find a deprivation of life, liberty or personal security. Furthermore, Mancuso does not assert any discordance with a principle of fundamental justice.

26 Finally, the Defendants say that Mancuso's allegation of a breach of s. 15 of the Charter presents no reasonable prospect of success as he has not pleaded disadvantage based on a prohibited or analogous ground. Mancuso alleges discrimination based on choice of food, dietary supplements and vitamins. This is not a prohibited ground under s. 15 and has not been recognized or pleaded as an analogous ground of discrimination.

27 With respect to the breaches of ss. 2, 7 and 15 alleged by Rowland and Dr. and Mrs. Dahl, the Defendants argue that since these Plaintiffs rely entirely upon Mancuso's facts in support of these allegations, they have pleaded no material facts upon which it might be found that *their* rights have been violated. In addition, their claims suffer from the same deficiencies present in Mancuso's.

28 The Defendants also argue that the declarations sought by the Plaintiffs are so broad and undefined in scope as to be judicially unmanageable, which is reason alone to conclude that these portions of the Claim have no chance of success: *Chaudhary v Canada (Attorney General)*, 2010 ONSC 6092 at para 17. The Plaintiffs seek sweeping declarations invalidating "the entire scheme and enforcement" of the Regulations. This request is so sweeping and imprecise as to be entirely unworkable. The Plaintiffs also ask that the Court read down the definition of "drug" in s. 2 of the Act to exclude natural health products, but the requested declaration is so vague and imprecise that the Court would be unable to define with precision the scope of any constitutional invalidity or to provide meaningful guidance to the parties. The Defendants say that the Court should not issue sweeping declarations within a factual vacuum.

29 The Defendants also argue that the Plaintiffs' action for damages has no reasonable prospect of success. An action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at para 81 [*Mackin*]; see also *Vancouver (City) v Ward*, 2010 SCC 27 at para 39 [*Ward*]; *Schachter v Canada*, [1992] 2 SCR 679 at para 89 [*Schachter*]. Canadian courts, including the Federal Court, have relied upon *Mackin* to strike statements of claim where s. 24(1) damages are sought for the enforcement of legislation that was constitutionally valid at the time of enforcement: *Zündel v Canada*, 2005 FC 1612, aff'd 2006 FCA 356 [*Zündel*]; see also *Perron v Canada (Attorney General)*, [2003] 3 CNLR 198, [2003] OJ No 1348 at paras 55-56.

30 Furthermore, the Defendants say that damages are not available for the application of a law that was constitutionally valid at the time of enforcement. Absent conduct that is in bad faith or an abuse of power, public officials are entitled to a sphere of civil immunity in respect of the acts that give effect to valid grants of statutory authority, and this immunity applies even where that grant of authority is subsequently declared unconstitutional. There are no retroactive remedies under s. 24(1) of the Charter: *Mackin*, above, at para 78; *Schachter*, above, at para 89. Since the Plaintiffs have not pleaded with any particularity any allegations of bad faith or abuse of power, even assuming the extensive constitutional invalidities they allege, the Plaintiffs would not be entitled to any damages. The Crown's actions fall squarely within the immunity.

31 The Defendants argue that the claims of Dr. Dahl, Mrs. Dahl and Life Choice should be struck in their entirety because they are an abuse of process. The rule against collateral attack protects against attempts to challenge judicial decisions in previous proceedings. This is complemented by the doctrine of abuse of process in situations where a plaintiff accepts the legal force of a judicial order, but contests the correctness of that order and/or the factual findings underlying it for the purposes of a different proceeding with different legal consequences: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63 [*CUPE*] at paras 33-34. Canadian courts have routinely struck out civil actions where a plaintiff seeks a judicial finding different from a finding made by a trial judge in a prior criminal proceeding: *Demeter v British Pacific Life Insurance Co (1985)*, 13 DLR (4th) 318, 7 OAC 143 at paras 6-7 (CA); *Wolf v Ontario (Attorney General)*, 2012 ONSC 72 at paras 56-7 [*Wolf*]; *Sauvé v Canada*, 2010 FC 217 [*Sauvé*], aff'd in part by 2011 FCA 141.

32 The Plaintiffs are asking the Court to revisit the legality of the searches conducted by authorities on March 31, 2004 and January 15, 2009, the correctness of the 2004 and 2013 convictions, and the factual findings underlying those convictions. Dr. Dahl and E.D. Internal Health unsuccessfully challenged the validity of three search warrants under s. 8 of the Charter in the 2004 criminal proceeding (*R v Dahl #1*, at para 10), and the Plaintiffs also unsuccessfully challenged the legality of the January 15, 2009 searches in the Alberta Court of Queen's Bench: trial excerpt from *R v Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, 100237221Q3 (Alta QB) [*R v Dahl #5*], March 20, 2012 cross-examination on Voir Dire at pp. 40-41 (Defendant's Motion Record, at pp. 345-346). They now seek to re-litigate the constitutional validity of these same searches. In addition, they allege that they were "falsely and maliciously charged" in the latter proceeding, despite the guilty plea of E.G.D. Modern Design Ltd, with Dr. Dahl acting as principal. The Defendants argue that the entirety of paragraphs 40-41 of the Claim is premised on the assertion that, contrary to the findings of two trial judges and a plea of guilty, these Plaintiffs were subject to unlawful searches and have been wrongfully convicted. This Court would be unable to grant the remedies sought without first making findings on criminal liability, the constitutionality of police searches and/or the admissibility of evidence in a criminal proceeding that are inconsistent with prior findings made in the Plaintiffs' criminal trials. This would undermine the principles of consistency, finality and integrity in the administration of justice, and this portion of the Claim should therefore be struck out in its entirety as a collateral attack and abuse of process.

33 The Defendants argue further that the case law clearly establishes that corporations do not possess rights under s. 7 or s. 15 of the Charter. While corporations can rely on s. 2(a) of the Charter in defence to a criminal charge, that provision cannot be used as a sword by a corporate plaintiff in civil proceedings: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at para 101; *Peter Hogg, Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada Ltd., 2007) at 59-12.

34 The Defendants also argue that the Plaintiffs are not entitled to seek an injunction and prohibition by way of an action, as these remedies can only be obtained on application for judicial review: *Federal Courts Act*, RSC 1985, c F-7, s. 18(3) and *Burton v Canada*, [1996] FCJ No 1059 at para 22, 65 ACWS (3d) 20 (FCTD).

35 Should any portion of the Claim proceed, the Defendants argue that it should only continue against Her Majesty the Queen. The three named Ministers and the RCMP are not proper or necessary parties. The Claim discloses no material facts alleging any wrongdoing on the part of the named Ministers, the Minister of National Health and Welfare does not exist, naming the Attorney General of Canada is redundant, and the RCMP is not a suable entity: *Mandate Erectors and Welding Ltd v Canada*, [1996] FCJ No 1130, 118 FTR 290 at paras 19-21 (TD) [*Mandate Erectors*]; *Cairns v Farm Credit Corp*, [1992] 2 FC 115 (TD) at para 6 [*Cairns*]; *Sauvé*, above, at para 44.

Arguments of the Plaintiffs

36 The Plaintiffs respond that the Claim should not be struck, and that the named Defendants are all proper parties to the action.

37 The Plaintiffs note that the facts pleaded in the Claim must be taken as proven for the purposes of this motion: *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735; *Nelles v Ontario* (1989), 60 DLR (4th) 609 (SCC) [*Nelles*]; *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441; *Hunt*, above; *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*]; *Trendsetter Ltd v Ottawa Financial Corp* (1989), 32 OAC 327 (CA) [*Trendsetter*]; *Nash v Ontario* (1995), 27 OR (3d) 1 (Ont CA) [*Nash*]; *Arsenault v Canada*, 2009 FCA 242 [*Arsenault*]. A claim should be struck "only in plain and obvious cases where the pleading is bad beyond argument" (*Nelles*, above, at 627), or where it is "'plain and obvious' or 'beyond doubt'" that the claim will not succeed (*Dumont*, above, at 280; *Trendsetter*, above). The fact that a claim is novel or raises a difficult point of law is not a justification for striking it: *Hunt*, above, at 990-91); *Nash*, above; *Hanson v Bank of Nova Scotia* (1994), 19 OR (3d) 142 (CA); *Adams-Smith v Christian Horizons* (1997), 14 CPC (4th) 78 (Ont Gen Div); *Miller (Litigation Guardian of) v Wiwchairyk* (1997), 34 OR (3d) 640 (Ont Gen Div). Matters not fully settled by the jurisprudence should not be decided on a motion to strike: *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* (1991), 5 OR (3d) 778 (CA). Indeed, the Plaintiffs say that, in order to succeed in striking a claim, the Defendants must produce a "decided case directly on point from the same jurisdiction demonstrating that the very same issue has been squarely dealt with and rejected": *Dalex Co v Schwartz Levitsky Feldman* (1994), 19 OR (3d) 463 (Gen Div). Finally, the Court should be generous with respect to the drafting of the pleadings, permitting amendment before striking: *Grant v Cormier -- Grant* (2001), 56 OR (3d) 215, [2001] OJ No 3851 (CA); *Toronto-Dominion Bank v Deloitte Haskins & Sells* (1991), 5 OR (3d) 417, [1991] OJ No 1618 (Gen Div).

38 The Plaintiffs argue that the Defendants improperly teeter-totter between asserting that certain facts are not "facts" because they are bald conclusions without evidentiary foundation on the one hand, and on the other hand that facts pleaded are not properly "*facts*"because they constitute "evidence." This is an attempt to selectively excise facts from the Claim, contrary to this Court's guidance: *Liebmann v Canada (Minister of National Defence)*, [1994] 2 FC 3 (TD) at para 20 [*Liebmann*].

39 The Plaintiffs also argue that the Defendants confuse the declaratory relief sought with the tort damages portion of the Claim, and ignore the fact that, in the main, the Claim seeks declaratory relief. The Plaintiffs say that they are seeking: 1) in the main, declaratory relief as to the various provisions of the Regulations (Claim, at paras 1(a)(i)-(xi), 1(b)(i)-(v), 1(c) and 1(d)); 2) injunctive relief or relief in the nature of prohibition (Claim, at paras 1(e)(i) -- (iv)); and 3) monetary compensation by way of damages (Claim, at paras 2(a) -- (d)).

40 The Plaintiffs say that declaratory relief goes to the crux of the constitutional right to judicial review: *Dunsmuir v New Brunswick,* 2008 SCC 9 [*Dunsmuir*] at paras 27-31; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 757; *Canada v Solosky*, [1980] 1 SCR 821 at 830; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 134, 140, 143 [*Manitoba Metis Federation*]. Under Rule 64, declaratory relief may be sought in the Federal Court "whether or not any consequential relief is or can be claimed." It has been held that declaratory relief can be sought in an action under s. 17 of the *Federal Courts Act*: *Edwards v Canada* (2000), 181 FTR 219, 94 ACWS (3d) 922; see also *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44. Furthermore, "[t]he constitutionality of legislation has always been a justiciable issue": *Thorson v Canada (Attorney General)*, [1975] 1 SCR 138 at 151; *Manitoba Metis Federation*, above, at para 134.

41 The Plaintiffs do not dispute the rules of pleading asserted by the Defendants, but argue that the Claim does not suffer from the deficiencies alleged. They say that the Defendants take various assertions of fact out of context as examples of improper pleading, and seek to improperly colour the factual pleadings in their entirety on that basis. In so doing, the Defendants are not taking the Claim as pleaded, but are re-configuring it to suit their own ends, contrary to the clear direction of the Federal Court of Appeal in *Arsenault*, above, at para 10. The facts alleged must be read in their context and taken as proven.

42 With respect to the claims of Mancuso, the Plaintiffs say that, contrary to the Defendants' assertions, the Claim sets out (at paragraphs 28, 29 and 30(a) and (b)) that Mancuso has been deprived of products and published information on those products by virtue of the Regulations and their enforcement, thereby infringing his rights under ss. 2, 7 and 15 of the Charter. The Defendants' complaints do not rise above a request for particulars, which the Plaintiffs say are provided in Mancuso's affidavit in the present motion record. The Plaintiffs argue that Mancuso's s. 7 claims are supported by the jurisprudence (*Singh v Canada (Minister of Employment and Immigration*), [1985] 1 SCR 177; *R v Morgentaler*, [1988] 1 SCR 30; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519; *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, and that while his s. 15 claim is arguably novel, it cannot be said that it is "plain and obvious" that it cannot succeed: *Dumont*, above, at p. 280.

43 The Plaintiffs say that the same arguments apply with respect to the Charter claims of Rowland, Dr. Dahl and Mrs. Dahl, and that the Dahls have additional claims under ss. 2, 7 and 15 of the Charter arising out of the manner in which the search warrants were executed, the fact that out-dated health advisories concerning their products have not been removed, and other facts alleged in the Claim.

44 With respect to the argument that the declarations sought are "unmanageable and imprecise," the Plaintiffs argue that each declaration sought is, in and by itself, precise, clear and discreet. The only "broad-sweeping" declaration sought, they say, is that dietary food supplements and vitamins cannot to be treated as "drugs" under the Act, which relief is well-founded and backed by facts as to the essential differences between a "food" and a "drug."

45 As to the purported inability to claim damages in an action that also seeks relief under s. 52 of the *Constitution Act, 1982*, the Plaintiffs argue that *Mackin*, above, is not as absolute as the Defendants suggest when it comes to damages arising from unconstitutional subordinate Regulations, and the Defendants' position has been bluntly rejected by the Supreme Court in *Manitoba Metis Federation*, above, at para 134. Furthermore, the notion that damages under s. 24(1) are not available for the application of a law that was constitutionally valid at the time of enforcement does not cover enforcement that was in excess of, and an abuse of, authority, and bad faith and abuse of authority have been pleaded.

46 The Plaintiffs argue that the Dahls' claims are not collateral attacks, and that the doctrines of *res judicata* and abuse of process do not apply because the judicial forum is different and the issues are different. Specifically, the criminal proceedings did not deal with the declaratory relief sought and the claim of damages for abusive and excess enforcement methods. Dealing with the Defendants' assertions about the relief sought and evidence led at the criminal trials is the purview of the trial judge in the present action and should not be dealt with on a motion to strike. The Plaintiffs argue that the present situation involves different judicial proceedings with different jurisdictions dealing with different grounds and remedies, not a collateral attack, and that recent Supreme Court jurisprudence rejects the Defendants' position on this issue: *Dunsmuir*, above; *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*]; *Canada (Attorney General) v McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 [*Parrish & Heimbecker*]; *Nu-Pharm Inc v Canada (Attorney General)*, 2010 SCC 65 [*Nu-Pharm*]; *Canadian Food Inspection Agency v Professional Institute of the Public Service of*

Canada, 2010 SCC 66; *Manuge v Canada*, 2010 SCC 67 [*Manuge*]; *Sivak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 402 [*Sivak #1*].

47 With respect to the Charter claims of the corporate Plaintiffs, the Plaintiffs argue that while corporations do not have the same rights afforded to biological persons under ss. 7 and 15, they can invoke s. 2 Charter rights, s. 7 procedural rights in the context of a (quasi) criminal scheme, and s. 7 fundamental justice rights against overbroad or impermissibly vague legislation: *R v Heywood*, [1994] 3 SCR 761 [*Heywood*]; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 [*Nova Scotia Pharmaceutical*]. They say that the only Charter relief claimed by the corporate Plaintiffs here is: 1) the void for vagueness and over-breadth doctrines under s. 7, which a corporation has the right to invoke since corporations are subject to the criminal provisions set up by the Regulations (*Nova Scotia Pharmaceutical*, above); and 2) the right to "commercial speech" under s. 2(a) and (b) of the Charter (*RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald (1995)*]; *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*]; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 [*Rocket*]). They argue that corporations have a right to seek declaratory relief and obtain constitutional remedies with respect to the application and enforcement of statutes governing them: *Winner v SMT (Eastern) Ltd*, [1951] S.C.R. 887 [*Winner*]; *RJR-MacDonald (1995)*, above.

48 Furthermore, while the corporate Plaintiffs are not entitled to invoke the equality provisions of s. 15 of the Charter, they argue that they are entitled to invoke "the equality provisions of the underlying constitutional imperative [of] equality of treatment": Donald A MacIntosh, *Fundamentals of the Criminal Justice System*, (Agincourt: Carswell, 1989); *Winner*, above; *Bolling v Sharpe*, 347 U.S. 497 (1954); *Canada v Schmidt*, [1987] 1 SCR 500.

49 With respect to the Defendants' argument that they are not entitled to the injunctive relief claimed, the Plaintiffs argue that nothing prevents the Court from granting injunctive relief in the course of, and ancillary to, an action (*Toth v Canada (Minister of Employment and Immigration)* (1988), 6 Imm LR (2d) 123 (FCA) [*Toth*]; *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 [*Metropolitan Stores*]; *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald (1994)*]), and that nothing prevents the Court from granting relief "in the nature" of prohibition and/or injunction under s. 24(1) of the Charter.

50 With respect to the proper parties to the action, the Plaintiffs argue that while Her Majesty the Queen is normally the only Defendant in claims against the government, in cases dealing with constitutional issues this Court has determined that others can be personally named: *Liebmann*, above, at paras 51-52. Furthermore, the determination of the standing of parties is not best done at the stage of a motion to strike: *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13 [*Apotex*].

Plaintiffs' Motion for an Interim Injunction

51 As noted above, the Plaintiffs have filed a cross-motion seeking to stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action. The parties agree that the test on such a motion is that set out in *Toth*, above (see also *RJR-MacDonald (1994)*, above, at pp. 333-334; *Metropolitan Stores*, above). That is, the Plaintiffs must establish that:

a) They have raised a serious issue for trial;

b) They would suffer irreparable harm if the provisions are not stayed; and

c) The balance of convenience favours the granting of a stay.

52 The parties disagree on whether that test is met in the present circumstances.

Arguments of the Plaintiffs

53 The Plaintiffs say they have raised serious issues for trial in their claim. They argue that the threshold for this element of the test is low (*RJR-MacDonald (1994)*), above, at para 50), and that such a stay is obtainable as against regulatory provisions as well as executive action: *Toth*, above; *Metropolitan Stores*, above; *RJR-MacDonald (1994)*, above. They argue that the action presents the following serious issues, among others:

(a) That the definition of "drug" in s. 2 of the Act is overly-broad and thus violates s. 7 of the Charter (citing *Heywood*, above, at paras 48-51);

(b) That the doctrine of overbreadth and others apply under s. 7, as tenets of fundamental justice, to all legislative provisions whether criminal, civil, administrative or other (citing *Nova Scotia Pharmaceutical*, above);

(c) That the Regulations with respect to natural health products are *ultra vires* the Parliament of Canada and unlawfully intrude on the exclusive jurisdiction of the Provinces over civil rights, property, food, health and matters of a merely private and local nature (citing the Constitution Act, 1867, s. 92(7), (13) and (16), *Schneider v British Columbia*, [1982] 2 SCR 112 at 142; *RJR-MacDonald (1995)*, above at para 32; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 24; *Reference Re Securities Act*, 2011 SCC 66), and is beyond the Federal government's criminal law power;

(d) That the Regulations are *ultra vires* the Act as they go beyond the intent and meaning of the enacting legislation;

(e) That the definition of "drug" in the Act is void for vagueness in that it encompasses any and all food and dietary supplements and / or vitamins and herbs (citing *Heywood*, above; *Nova Scotia Pharmaceutical*, above); and

(f) That s. 3(1) and (2) of the Act violate the Plaintiffs' rights under s. 2(a) and (b) of the Charter and s. 1(c) of the *Canadian Bill of Rights* (citing *Irwin Toy*, above; *Rocket*, above; *RJR-MacDonald (1995)*, above).

54 The Plaintiffs also submit that they will suffer irreparable harm if the statutory provisions are not stayed. Physical and psychological integrity is protected as a s. 7 right, and "commercial free speech" is protected under s. 2(a) and (b), and the ongoing infringement of these rights is not compensable through damages. Where a serious issue has been established and there is a potential Charter breach, irreparable harm is made out as such breaches are assumed not to be compensable through damages: *RJR-MacDonald (1994)*, above, at paras 60-61.

55 As to the balance of convenience, the Plaintiffs argue that the provisions sought to be stayed do not deal with any health and safety issues, and that in the history of the natural health products at issue, there has been no serious injury or death attributed to them. With respect to the public interest, the Plaintiffs point to the Supreme Court's analysis in *RJR-MacDonald (1994)*, above, at paras 62-67, affirming that that the public interest is a "special factor" to be considered in constitutional cases, but noting that "the government does not have a monopoly on the public interest" and it is open to both parties in an interlocutory proceeding involving the Charter to rely upon considerations of the public interest.

Arguments of the Defendants

56 The Defendants argue that the Plaintiffs have not raised a serious issue to be tried, largely on the basis of their argument on the motion to strike that the Claim as a whole is frivolous and vexatious. Where this is the case, they argue, no serious issue is raised: *RJR-MacDonald (1994)*, above, at p. 337.

57 With respect to irreparable harm, the Defendants say that the Federal Court of Appeal has repeatedly stated that speculative harm is not irreparable harm (*Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12 [*Information Commissioner*]; *International Longshore and Warehouse Union*, *Canada v Canada (Attorney General)*, 2008 FCA 3 at paras 25, 33), and argue that the harm alleged by the Plaintiffs is speculative. For example, while Mancuso identifies three products "eliminated from the market" allegedly due to the licensing scheme being challenged, he also states in his affidavit that he uses these products "regularly and commonly." He also fails to identify any medical condition from which he suffers that will deteriorate or worsen unless a stay is granted; his claims to mental and physical distress are unspecified. Thus, the Court is left to speculate as to the nature of the harm that will result. The harms alleged by Rowland are similarly speculative. Moreover, the business income losses he alleges are compensable through damages if the Plaintiffs are successful, and thus by definition they do not constitute irreparable harm: *RJR-MacDonald (1994)*, above, at p. 341. The Defendants note that the law on damages for a Charter breach has developed substantially since *RJR-MacDonald (1994)*, such that it should no longer be assumed that alleged Charter breaches cannot be remedied through damages: see *Ward*, above.

58 Finally, with respect to the balance of convenience, the Defendants note that the public interest has central importance in assessing the balance of convenience in Charter cases (*RJR-MacDonald (1994)*, above, at p. 343), and argue that legislation is presumed to serve the public interest, even in the face of a constitutional challenge: *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9 [*Harper*]. In most cases, they say, this presumption is determinative on a motion for an interlocutory injunction, which will only be granted based on alleged unconstitutionality in "clear cases": *Harper*, above, at para 9. It is rare for a claim alleging constitutional invalidity to meet this threshold for at least two reasons: 1) the extent and meaning of the rights guaranteed by the Charter are often ambiguous, particularly where the constitutionality of the impugned provisions has not been previously litigated; and 2) it remains open to the government to justify a breach of those rights based on s. 1 of the Charter (*Metropolitan Stores*, above, at paras 42, 44). At the interlocutory stage, the Defendants argue, a reviewing court is simply not in an adequate position to assess the merits of a reasonable limitation argument.

59 In this case, the Defendants argue, the impugned provisions have the purpose of protecting the health and well-being of Canadians by prohibiting the advertising and labelling of drugs for serious diseases and by regulating the manufacturing, labelling, advertising and sale of natural health products. Even the temporary staying of these provisions would deprive officials of tools that Parliament and the Governor in Council have enacted to protect the health and safety of the public. Thus, in advance of any finding of unconstitutionality, the balance of convenience must favour the maintenance of validly-enacted legislation, and the Plaintiffs' motion for an injunction must be dismissed.

60 In addition, the Defendants argue, the Plaintiffs have provided no compelling basis to rebut the presumption that the balance of convenience favours the continued operation of the challenged laws. Financial loss is not sufficient to bring a claim within the small minority of cases where the interlocutory staying of legislation can be justified: *Evangelical Fellowship of Canada v Canadian Musical Reproduction Rights Agency*, [1999] FCJ No 1391, [2000] 1 FC 586 (FCA) at para 32. There is no basis here to find that the public interest is served by granting a stay of the impugned legislation.

ANALYSIS

Motion to Strike

The Law

61 There is no disagreement between the parties as to the rules and principles applicable in a motion to strike. The disagreement arises over their application to the facts of this case.

62 This motion is brought under subrules 221(a), (c), (d) and (f). The Defendants say that the Claim does not satisfy the basic rules of pleading. They say it is scandalous, frivolous and vexatious, that it will prevent the fair and effective trial of the action, and that at least in part it constitutes a collateral attack on judicial decisions rendered in other proceedings. They say that the Claim is so deficient that it should be struck in its entirety.

The General Challenge

63 As the Defendants point out, the Claim constitutes a challenge to the Act and the Regulations.

64 In oral argument, the Plaintiffs have told the Court that they are only challenging the NPN and safe licensing aspects of the Act and Regulations as well as the overly broad definition of "drug" found in s. 2 of the Act that allows any food, dietary food supplement, nutritional food derivative, or vitamin to be classified as a drug for purposes of the legislation, even when such substances do not pose a health risk. The Plaintiffs say that they do not wish to challenge the health and safety aspects of the legislative scheme. The basic assertion is that food, dietary food supplements and vitamins should be classified as food, and not drugs, and that the enforcement and inspection system to which they are subject should be akin to the food inspection and enforcement system, and not the pharmaceutical and/or prohibited drug system.

65 It seems to me that these objectives are adequately and clearly embodied in the CLAIM section of the Claim along with the legal ramifications and basis for the relief being sought. The issue is whether the balance of the Claim is sufficiently compliant with the rules of pleading. In other words, does the Claim plead with sufficient particularity the constituent elements of each cause of action or legal ground raised, and does it provide a sufficient factual basis in an appropriate and summary form?

66 The Defendants, however, feel that at least portions of the CLAIM section should be struck for several reasons:

a) The claims are too broad and abstract. The substances at issue are not specified (apparently some 55,000 substances are presently regulated);

b) 1(a)(viii) is a repetition of 1(a)(i);

c) 1(a)(ix) lacks the specificity required of pleadings. The Defendants need to know the names of the officials involved, and the time and places of the violations at issue;

d) 1(a)(x) is too abstract and requires the material facts related to the Plaintiffs;

e) 1(a)(xi) is likewise too abstract and needs materials facts related to the Plaintiffs.

67 As regards 1(a) of the CLAIM section, the Plaintiffs are merely stating in a general way the relief they are seeking and the basis for that relief. There is no need to state the specifics here if they can be found in the balance of the Claim. In my view, 1(a)(viii) is not a repetition of 1(a)(i) because it states a different legal basis for declaring the definition of "drug" to be void.

68 As regards 1(b) of the CLAIM section, the Defendants raise the following concerns:

a) 1(b)(i) is too broad and unmanageable. It says the "entire scheme and enforcement, [...] is unconstitutional in breaching section 7 of the Charter in its reverse onus enforcement [...]";

b) 1(b)(ii) is likewise too broad and unmanageable. Specifics are required. The usual way to attack a scheme of enforcement is by way of judicial review of a particular administrative decision under the Act, rather than by way of an action;

c) 1(b)(iii) raises the same concerns;

d) 1(b)(iv) is too broad because it requires the Court to declare that anyone can eat what they want without restriction by the State.

69 My reading of these paragraphs in the CLAIM section is that 1(b)(i) only deals with the "reverse onus" aspect of enforcement and that 1(b)(ii) only deals with over breadth with respect to NPN licensing and compliance costs. Hence, I see nothing inappropriate about these paragraphs.

70 As regards 1(b)(iii), it seems to me that the reference to a "large number of persons" is a problem because it is unnecessarily broad and unmanageable. However, the intent may be that the discrimination occurs "against any person, who, like the individual Plaintiffs, have a preference [...]. "Hence, the final seven lines of 1(b)(iii) should be struck with leave to amend.

71 I also agree that 1(b)(iv) is much broader than what the Plaintiffs say is their purpose in bringing this claim. I don't see how the Court could possibly, on the facts pleaded, deal with a request for such a broad declaration, or how the Defendants could defend. Hence, this paragraph should also be struck with leave to amend.

72 As regards 1(c) of the CLAIM section, the Defendants complain that the Plaintiffs are asking the Court to review the whole scheme for classification, inspection and enforcement of food, dietary food supplements and vitamins and declare how it should be regulated. I agree with the Defendants that this is far beyond what is required in the present case, or indeed the power of the Court. It would involve the Defendants and the Court in a broad inquiry (there are presently 55,000 approved health products) and in a broad-ranging policy discussion as to how such products are best regulated. Even if this were an appropriate role for the Court to assume - which it is not (see *Friends of the Earth v Canada (Governor in Council)*, [2009] 3 FCR 201 at paras 25, 33, 36, 39-40, 45 aff'd 2009 FCA 297; *Canadian Union of Public Employees v Canada (Minister of Health)*, 2004 FC 1334 at para 40) -- the pleadings do not, when read as a whole, provide any factual basis for such a broad declaration. Paragraph 1(c) should be struck.

73 As regards 1(e) of the CLAIM section, the Defendants have the following complaints:

a) The prerogative relief of prohibition and injunction is not available in an action;

b) 1(e)(i) is too broad and a declaration of invalidity is sufficient;

c) With respect to 1(e)(ii), there is nothing in the Claim that provides a factual or legal basis for an interference with NAFTA, GATT, the WTO, and related agreements, policies regulations, and rulings;

d) 1(e)(iii) asks for a general prohibition that goes will beyond the issues and facts set out in the Claim;

e) 1(e)(iv) is far too broad in that it refers to "any advertising" and it should be made clear that the intent is to deal with sections 3(1) and 3(2) of the Act.

74 I see no reason to rule at this stage that the prerogative remedies are not available in an action. See my decision in *Sivak #1*, above, at paras 36-44. In *Manuge*, above, one of the companion cases to *Telezone*, above, the plaintiff sought declarations of invalidity (on both Charter and administrative law grounds), constitutional remedies and damages or restitution in the context of an action, and the Supreme Court raised no concerns with this approach in ruling that the claim should be permitted to proceed in the Federal Court: see *Manuge*, above, at paras 1, 9-10 and 17-24. In the companion case of *Nu-Pharm*, above, the Supreme Court raised no concern that the plaintiff sought injunctive relief along with damages in the same claim before this court. In *Ward v Samson Cree Nation*, [1999] FCJ No 1403, 247 NR 254 (CA), the Court of Appeal found that a claim for declaratory relief could be added to a claim for damages through an amendment to the statement of claim, though the majority and minority differed on the basis for doing so. See also *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215 at paras 49-50 and 54.

75 In both *Manuge* and *Telezone*, the Supreme Court noted that there is "a residual discretion to stay an action if it is premised on public law considerations to such a degree that [...] 'in its essential character, it is a claim for judicial review with only a thin pretence of a private wrong'": *Manuge*, above, at para 18, quoting *Telezone*, above, at para 78. It is not enough, however, for a defendant to claim that some of the matters at issue would be amenable to judicial review. If there are valid causes of action pleaded -- which an amended statement of claim may yet disclose in this matter -- this suggests there is more than a thin pretence of private wrong and the plaintiff will normally be permitted to pursue the action: *Manuge,* at paras 19-21; *Telezone,* at para 76.

76 Paragraph 1(e)(i) is too broad in that it refers to paragraph 1(c) which has been struck, but I don't see that the references to paragraph 1(a) or (b) cause a problem. Consequently, the reference to paragraph 1(c) should be struck from paragraph 1(e)(i).

77 I agree with the Defendants' objections to paragraph 1(e)(ii), (iii) and (iv). The relief requested here goes well beyond what the facts and law pleaded in the rest of the Claim can support. Consequently, these paragraph should be struck.

The Damage Claims

78 The Defendants say that the damages claims have no reasonable prospect of success and that the Plaintiffs are improperly seeking relief under both s. 24(1) of the Charter and s. 52(1) of the *Constitution Act, 1982*.

79 Relying upon *Mackin*, above, and Justice Hughes' decision in *Zündel*, above, the Defendants say that, absent conduct that is in bad faith or an abuse of power, damages are not available where a plaintiff seeks civil remedies arising from the application of a law that was constitutionally valid at the time of enforcement.

80 The Plaintiffs say that *Mackin* is not absolute, and does not prevent damages for unconstitutional subordinate regulations. Further, they say that *TeleZone*, and *Sivak #1*, both above, make it clear that the Plaintiffs can seek declaratory relief and damages together. They argue that *Mackin* does not cover the situation where damages are not barred by the expiry of a limitation period, and does not prevent a claim for damages where enforcement has occurred in excess and abuse of authority, or in bad faith, as pleaded in the present case.

81 I agree that the rule in *Mackin* is not absolute. As the Supreme Court explained in *Ward*, above at para 39, the consequence of *Mackin* is that a claim for damages for state conduct pursuant to a statute that was valid at the time will be struck unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power." The rule of law demands that duly enacted laws be enforced until declared invalid, and in the absence of "threshold misconduct" as just described, no claim for damages under s. 24(1) of the Charter (or any other claim for damages) will result from that enforcement if the law is subsequently declared invalid: *Ward*, above, at paras 39, 41; *Mackin*, above, at paras 78-79. The Court in *Mackin* went on to say (at para 81):

> [81] In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the Constitution Act, 1982.
>
> [Emphasis added]

82 I see nothing in *Mackin* that suggests the application of the above principles is in any way dependent on whether or not damages are barred by the expiry of a limitation period. That is a separate issue.

83 The Plaintiffs do plead that methods of enforcement of the Act and the Regulations are in excess and are an abuse of authority at paragraphs 19-21, and make further allegations of malicious intent and improper purpose or bad faith in relation to enforcement actions against the Dahls and their company at paragraph 92. However, each of these pleadings must be struck for reasons I will outline further below. If the Plaintiffs wish to maintain an action for damages arising from the enforcement of the portions of the Act and the Regulations which they claim are *ultra vires* and unconstitutional, they will need to plead, in a manner that conforms to the rules of pleading, state conduct under those provisions that was "clearly wrong, in bad faith or an abuse of power."

The Facts

84 The Defendants say that paragraph 6 of Claim offends the rules of pleading because it makes general, unsupported assertions about natural health products that "have been safely consumed for centuries, in various forms, without regulations, prohibition, nor enforcement as 'drugs', prior to 1985-2005."

85 I agree that this is little more than an unsupported assertion and, in its present form, it is not possible for the Defendants to answer. The Defendants need to know at least:

a) What specific products are referred to;

b) When and where they have been consumed;

c) By whom have they been consumed;

d) In what forms have they been consumed.

86 Paragraph 6 should be struck for failure to plead sufficient material facts to support the assertion made.

87 Paragraph 7, likewise refers in a general way to "draconian tactics usually reserved for dangerous, armed criminals and terrorists." There are insufficient facts pleaded to support this broad assertion or to save it from being scandalous and vexatious, and, in its present form, it is impossible to defend against without investigating every instance of enforcement. The Defendants are also being asked to examine, and the Court to rule on, the erroneous classification of "any and all 'foods' as 'drugs'." As there appear to be, according to Defendants' counsel, some 55,000 substances to deal with, this is simply unworkable for the Defendants and the Court. It seems to me that some specific substances and foods are required together with the facts to support the basic assertion of arbitrary selection. Paragraph 7 should be struck.

88 Paragraph 8 is similarly problematic. It is not clear whether the Plaintiffs are asserting that the Defendants have selected and prohibited the sale of prunes, or have prohibited health claims for prunes, chamomile and oregano, or whether they are saying this could happen. And there is no indication of how these examples are connected to anything that the Plaintiffs might have suffered. Paragraph 6 refers to the Plaintiffs as consumers, producers, distributors and vendors, but unless the Defendants know which dietary food supplements and vitamins they produce, distribute, sell and consume, it is impossible to know if any of what may be hypothetical examples are reasonable or have any relevance for the Plaintiffs. Paragraph 8 should be struck for these reasons.

89 Paragraph 9 may or may not be a reasonable hypothesis. Without specific instances, or the material facts as to the erroneous classification and arbitrary selection of all foods and substances presently classified, the Defendants cannot defend these assertions or answer hypothetical examples.

90 The Plaintiffs appear to be avoiding specific foods and substances because they wish to have all natural health products declared foods and freely available, with the right to claim health benefits, without restraint. But they are not providing the material facts required on all natural health products to support why this is justified and allow the Defendants to answer the case and the Court to adjudicate it. Nor are they explaining or providing the facts to connect all natural health products to them.

91 In my view, then, paragraphs 6, 7, 8, and 9 have to be struck.

92 The Defendants object to paragraph 10 of the Claim as being argument and not facts. In my view, this paragraph contains a statement of the facts upon which the Plaintiffs rely to distinguish dietary food supplements from drugs. I see nothing improper with this paragraph.

93 The Defendants also object to paragraph 11 as unsupported assertion and argument. There is no fact stated with respect to any particular health product and the Court is being asked to draw a single conclusion about all natural health products. In my view, however, this paragraph is a statement about Health Canada's approach to enforcement and the reasons why the Plaintiffs consider such an approach to enforcement to be inappropriate. I don't see why the Defendants should have any difficulty in answering this paragraph. It either describes Health Canada's approach to enforcement or it doesn't.

94 The Defendants object to paragraph 12 of the Claim as having no relevance and for not being connected to any of the Plaintiffs, and because no declaration is sought with regard to Schedule F of the Regulations. In my view, however, this paragraph does no more than provide specific facts to show that dietary food supplements are listed together with pharmaceuticals and are treated in the same way. These are facts to support the Plaintiffs' claim that natural health products are dealt with inappropriately under the Act and the Regulations. This paragraph is simple to answer. These substances either are listed, or are not listed, in Schedule F.

95 The Defendants object to paragraph 13 as being argument, bare legal conclusions and too wide-ranging in that it refers to every dietary food supplement and every drug. It seems to me that the paragraph is an attempt to explain and provide the facts to support the Plaintiffs' principle proposition that natural health products should not be listed and treated in law like drugs because drugs have different properties and propensities from natural food products. The only sentence I can see as objectionable occurs in 13(g) and reads "we have, in Canada, an alarming growth of these diseases termed 'iatrogenic' (physician caused)." This is objectionable because there are no facts pleaded to support what is a bare conclusion and a matter of opinion. It is also irrelevant to the factual comparison between drugs and natural food products. Like "Death is the most permanent side effect of all" in 13(d), it is inserted for colour and to promote natural food products at the expense of pharmaceuticals. This sentence should be struck.

96 The Defendants also object to paragraph 14 as being too broad and as involving a policy debate about what products should be regulated by Health Canada, which the Court cannot decide. They also argue that it contains bare conclusions and assertions rather than material facts. I have to disagree with the Defendants. Once again, the paragraph is a statement of the material facts upon which the Plaintiffs rely to distinguish "nutrients" from drugs, and these facts are recited to support their argument that nutrients should not be regulated like drugs, which in turn gives rise to the relief that is requested. I do not see this as requiring the Court to decide policy. The issue for the Court will be whether, as a result of natural food products being regulated in the way they are, have the Plaintiffs established a right to the relief they seek on the basis of the forms of action and breaches of rights which they allege?

97 The Defendants say that paragraph 15 is improper for a number of reasons:

a) It deals with Dr. Dahl's past convictions under the CDSA and has nothing to do with the relief being sought in this claim in relation to the Act and the Regulations;

b) 15(f) does not plead facts;

c) 15(g) is colourful in its assertion that RCMP officers "have guns drawn every time when they raid vitamin suppliers." This is a fact the Plaintiffs cannot possibly know.

98 In general, I agree with the Defendants on most of these points and, as I point out later, I also agree that the bulk of the pleadings with respect to Dr. Dahl have to be struck as an abuse of process, and the remainder must be struck for other reasons. I see nothing wrong, however, with the subparagraphs (a), (b), (c) and (h) and find that they can be separated from the other subparagraphs. It is my view that only subparagraphs (e), (f), and (g) should be struck.

99 The Defendants object to paragraph 16 as containing unmanageable bald assertions, unsupported by material facts. The Plaintiffs concede that paragraph 16 probably belongs, for the most part, in the CLAIMS sections. I think the best approach, then, is to strike paragraph 16 in its entirety so that the Plaintiffs can correct the problem by way of amendment. However, I also point out the following:

a) There is a significant amount of overlap with the CLAIMS as already set out and the Plaintiffs should ensure that repetition does not occur;

b) Moving paragraph16(f) to the CLAIMS section will not cure the problem because these are material facts pleaded to support the assertion;

c) The kind of assertion that is found in paragraph16(g) involves a general inquiry into all of the natural health products being regulated and is not connected to the individual Plaintiffs. It is more argument than pleading;

d) The kind of bald assertion found in paragraph16(m) about "confusion" is unacceptable without the specifics. As pleaded, it is nothing more than an opinion or argument;

e) The same goes for paragraphs 16(s), (t), (u);

f) Paragraph 16(y) again refers to "Draconian methods of enforcement" as though they are ubiquitous and routine, but there are insufficient materials facts to support such an assertion.

If the Plaintiffs intend to re-draft paragraph 16 for inclusion elsewhere in the Claim, these problems should be born in mind.

100 Paragraph 17 of the Claim alleges that the Government specifically designed the regulations to be cost prohibitive for and to eliminate small producers, distributors etc. Legislative purpose could be relevant to some of the constitutional analysis, including the division of powers issues (if found to be economic regulation of a specific industry, it would presumptively fall under the provincial power over property and civil rights). On the other hand, if this allegation is meant to establish bad faith, then it offends the rules of pleading because bad faith has to be pleaded with more particularity, per *Merchant Law*, above. I think the Plaintiffs must amend the pleading to clarify this point, and to plead the allegation with sufficient particularity if it is intended to establish bad faith, before they can be permitted to pursue such a claim through discovery and at trial.

101 The Defendants object to paragraph 18 of the Claim as being too broadly worded as a general attack on the regulatory scheme of the Act and the Regulations that is not connected to any material facts pleaded. It contains unsupported general conclusions -- 18(b) -- and applies to all applications - 18(c) -- under the scheme.

102 In my view, paragraph 18 is an attempt to provide material facts to support a general assertion that the regime under the Act and the Regulations is vague, overly-broad and arbitrary. This is necessary background for the Plaintiffs specific complaints:

a) 18(a) is a clear statement of fact;

b) 18(b) is a straight statement of fact about what qualifications are required of any decision-maker. It does not require an assessment of every decision and every official;

c) 18(c) is a statement of fact about how any application is assessed and that science plays no part and no reasons are given;

d) 18(d) is likewise a statement of fact;

e) 18(e) is likewise a statement of fact;

f) 18(f) is unacceptable as a bald, unsupported assertion and requires specific facts;

g) 18(g) is a summary of the character and impact of the facts previously pleaded but it is laden with argument.

I agree with the Defendants that these facts about the administration of the regime may not avail the Plaintiffs in the relief they seek for reasons of relevance to the Plaintiffs' own experience with the system. But at this stage, apart from 18(f) and 18(g), I don't think they can be struck as inadequate pleading. My conclusion is that 18(f) and 18(g) must be struck but that the balance of paragraph 18 can remain.

103 This highlights a general challenge in evaluating the pleadings. In effect, we have two separate claims:

a) Claims for relief based upon individual experience; and

b) A general attack on the scheme of the Act and the Regulations.

In some cases, the same facts may go toward both. This is not prohibited. In general, it is sufficient for a party to plead the material facts and counsel is then at liberty to present in argument any legal consequences which the facts support: see *Conohan v The Cooperators*, [2002] 3 FC 421, 2002 FCA 60. I have attempted to be sensitive to this and to evaluate facts pleaded in relation to more than one type of claim or cause of action where they could reasonably be seen as relevant. Still, the Plaintiffs bear the responsibility of pleading the material facts in a manner that discloses a cause of action recognized in law, and it is inevitable that the manner of pleading will affect whether a claim is recognizable or not. The pleadings play an important role in providing notice and defining the issues to be tried, and the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action: see *Johnson*, above, at para 25. Rather, "[e]ach constituent element of each cause of action must be pleaded with sufficient particularity": *Simon*, above, at para 18.

104 The Defendants object generally to paragraphs 19-21 of the Claim as being bare general assertions without supporting facts. As noted above, these paragraphs (and paragraphs 19 and 21 in particular), amount to a pleading that the Defendants' enforcement actions were an abuse of authority and/or conducted in bad faith. Thus, the Court must bear in mind the guidance of the Court of Appeal in *Merchant Law*, above, at para 34-35:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; Vojic v. Canada (M.N.R.), [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
>
> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, i.e., deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

105 Paragraph 19 is drafted as though the enforcement methods complained of are the same in every case of enforcement and are always an excess or abuse of authority carried out for the same purpose in each case. The Plaintiffs cannot possibly know this, and it is telling that they only refer to one example in their own case (the experiences of the Dahls). A claim that does not plead sufficient material facts for the defendant to know how to answer is a vexatious pleading (*Kisikawpimootewin v Canada*, 2004 FC 1426; *Murray v Canada* (1978), 21 NR 230 (FCA)), nor can an action be brought on speculation hoping that sufficient facts will be obtained during discovery to substantiate the pleadings (*AstraZeneca Canada Inc v Novopharm Ltd,* 2009 FC 1209, aff'd 2010 FCA 112; *Sivak #2*, above, at paras 30-31). The appropriateness of enforcement procedures as well as their purpose can only be assessed and adjudicated by knowing the full facts and context of each individual case. That is an impossible action to mount and to defend when there must be thousands of instances. As drafted, this is a colourful assertion unsupported by the facts as pleaded. It has to be struck.

106 Paragraph 20 has similar problems. It asserts a general practice but cites no specific instances. Whether or not this is a general and invariable practice is a fact that can be defended, but it need not go further than that. If it is not a general and invariable practice then the Defendants need not make or address specific instances unless the Plaintiffs have pleaded specific instances correctly. Hence, I think it needs to be made clear by the Plaintiffs whether what they refer to here is something mandated by the Act or the Regulations, or conduct set out in some administrative policy of directive, or whether they are referring to what individual officials have chosen to do that is either in breach of the Act or the Regulations or not required for the purposes of the regime. If the Plaintiffs intend this as a statement of what all officials do then they need to plead the facts to show that it always occurs (which seems impossible to me) or individual instances of this having happened that the Defendants can answer and the

Court can adjudicate. Paragraph 20 as presently drafted should be struck so that these matters can be clarified by amendment.

107 Paragraph 21 has the same problems as paragraph 19. It asserts conduct that occurs in all instances and which the Plaintiffs cannot know, the Defendants cannot defend, and the Court cannot manage or adjudicate without knowing the full facts and context of each instance. In addition, it alleges that Health Canada officials repeatedly engaged in a practice of misleading the RCMP, which is a serious allegation of bad faith that would need to be pleaded with much greater particularity to avoid being vexatious: see *Merchant Law*, above, at paras 34-35, and Rule 181. This paragraph should be struck.

108 The Defendants object to paragraphs 22 and 23 of the Claim on the grounds that Rowland is attempting to use the doctrine of reasonable expectations as a sword in a context where, even if the facts pleaded are true, all he is saying is that his personal expectations were not met. I agree that the doctrine of reasonable expectations (or legitimate expectations as it is sometimes called) cannot be used in this way and that no valid basis is pleaded and no reasonable cause of action is set out in these paragraphs. See *Mackin*, above, at para 83. As the Supreme Court has consistently held, "[t]he doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker": *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 SCR 249, 2002 SCC 11 at para 78; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 26; *Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 SCR 525 at paras 58-59. None of the Plaintiffs could have any legitimate expectation that the Government of Canada would change the Regulations or take any other action based on a public announcement by a Minister of the Crown that he intended to follow the recommendations of a Parliamentary Committee. Paragraphs 22 and 23 should be struck.

109 The Defendants make extensive objection to Mancuso's Charter claims as set out in paragraphs 24 to 30 of the Claim:

(a) The claims pleaded by Mancuso are similarly composed of bald assertions of *Charter* infringements unsupported by materials facts. Mancuso pleads that the entirety of the "current scheme" violates his rights under sections 2, 7 and 15 of the *Charter*. Mancuso fails to specify the health product(s) that are not made available to him as a result of the *Food and Drugs Act* or the *Natural Health Product Regulations*, or that he has unsuccessfully taken steps to obtain any such products.

(b) Mancuso also fails to plead the constituent elements of the *Charter* violations he asserts. Section 2(a) of the *Charter* protects the single integrated concept of "freedom of conscience and religion". To successfully establish a breach of section 2(a), a claimant must demonstrate that he/she has a practice or belief, having a nexus with religion or secular morality, which calls for a particular line of conduct. Mancuso has failed to plead the prohibition of any practice or line of conduct with a nexus to religious beliefs or morality to which he ascribes. He simply asserts a preference for certain dietary food supplements and vitamins. Without more, his section 2(a) claim presents no reasonable prospect for success.

(c) The plaintiff's allegations relating to freedom of expression under section 2(b) of the *Charter* are similarly deficient. Although the Supreme Court of Canada has adopted a wide definition of expression, Mancuso has not pleaded any personal attempts to make or receive prohibited expressive activity.

(d) To establish a breach of s. 7, a claimant must demonstrate a deprivation that is inconsistent with a principle of fundamental justice. Mancuso has failed to indicate any health product necessary to his bodily and/or psychological integrity that is made unavailable to him by effect of the legislation he seeks to invalidate. As a result, there is no basis upon which to find a deprivation of life, liberty pr personal security. Moreover, he does not assert any discordance with a principle of fundamental justice.

(e) Finally, Mancuso's allegation of invalidity pursuant to s.15 of the *Charter* presents no reasonable prospect for success as the alleged discrimination does not fall within the purview of s.15. To succeed on a section 15 claim, a claimant must establish disadvantage on a prohibited ground or analogous characteristic. Mancuso alleges discrimination on the basis of his choice of food, dietary (food) supplements, and vitamins. This is not a prohibited ground under s.15 of the *Charter*, nor has it been recognized, or pleaded, as an analogous ground of discrimination.

(f) Given the above-noted absence of material facts, the entirety of Mancuso's allegations of *Charter* invalidity should be struck as presenting no reasonable prospect for success.

110 All I can do is agree with the Defendants. We simply don't have any facts about what Mancuso has relied upon, or any difficulties he has experienced in accessing particular natural health products. If Mancuso has, throughout his life, heavily relied upon dietary food supplements and vitamins then, presumably he has not been prevented from accessing them. His general views about freedom of choice with respect to health don't tell the Defendants or the Court how any asserted rights have been infringed. These paragraphs present no reasonable cause of action and should be struck in their entirety.

111 Paragraphs 31 to 39 provide the basis for the claims of Rowland and the Results Company. The Results Company is claiming damages, and Rowland claims personal damages as well as a breach of his ss. 2, 7 and 15 Charter rights as claimed and articulated with respect to Mancuso, at paragraph 30 of the Claim.

112 For reasons already given, I have already held that Mancuso has not articulated or appropriately pleaded any basis for a breach of Charter rights. This means, inevitably, that neither has Rowland, so that Rowland's Charter right claims must be struck.

113 Rowland says that he, "as a consumer, producer, as well as a distributor of these products, further claims, personally, damages in loss of income and reputation, derived from the Results Company [...]." No cause of action is pleaded to ground Rowland's claim except "the Defendants officials arbitrary, excess and abuse of authority in the enforcement of the Act and Regulations." If this is intended as a tort claim, the constituent elements of the tort need to be set out and pleaded appropriately; otherwise there is no way of knowing, defending or adjudicating this aspect of the claim. Hence, Rowland's personal damages claims should be struck for revealing no reasonable cause of action.

114 The Results Company's claims do mention specific products and plead facts related to the company's dealings with Health Canada. Some of the complaints involve specific dealings between the company and Health Canada, and some of them allege some kind of conspiracy or policy by Health Canada to force small companies out of business in order to favour and support large pharmaceutical companies. Some of these assertions are very broad and are supported by very few facts, if any.

115 This portion of the Claim appears to support counsel for the Plaintiffs' oral assertion that the Plaintiffs' real concern is the NPN licensing and site licensing aspects of the regulatory scheme under the Act and the Regulations. However, the personal claims of Mancuso, Rowland and the Dahls suggest that counsel is not being entirely accurate in this regard.

116 In addressing the Results Company's claims it is often difficult to disentangle fact and substance from some of the broad, unsupported and often colourful assertions that are made.

117 I see nothing wrong with paragraphs 31 to 33. The problems begin at paragraph 34 which seems intended to provide a factual basis for the assertion regarding "the Defendants' officials' excessive and abusive enforcement of these (unconstitutional and ultra vires the Act) Regulations [...]." So the Results Company appears not to be basing its claim for damages upon the regulatory and enforcement scheme per se, but upon its "excessive and abusive enforcement." It is hard to see, then, how the Results Company's experiences can be said to support the general declaratory relief sought in paragraph 1 of the CLAIMS section. However, it is not entirely clear from paragraph 34 that "excessive and abusive enforcement" is the real issue because paragraph 34 begins with the words "As a result of Health Canada's oppressive and totally unnecessary Natural Products ("NPN") product licensing scheme, The Results Company Inc. is quickly being put out of business and may not survive past the end of 2012."

118 When I read the whole of paragraph 34, some of it appears to be about the NPN product licensing scheme per se, yet the sentence that immediately precedes the subparagraphs says that those subparagraphs are meant to ground the "effect of the Defendants' officials' excessive and abusive enforcement." This aspect of the claim can neither be defended nor adjudicated until this issue is clarified.

119 Subparagraph 34(b) attributes a drop in sales "entirely to Health Canada's discriminatory NPN licensing scheme under which Health Canada has refused licences for some Vitamost(R) products, has withheld licenses for others, and made it cost prohibitive even to apply for licenses for most products in the Vitamost(R) line."

120 If these matters were so vital to the Results Company's future, one has to wonder why the decisions in question where not subjected to judicial review, though of course this is not a pre-requisite to bringing an action for damages: see *Telezone*, *Nu-Pharm*, *Parrish & Heimbecker*, all above. However, without the specifics as to which licenses have been refused or withheld, and the costs associated with each application, it is not possible to defend or adjudicate this aspect of the Claim.

121 Subparagraph 34(c) alleges, in effect, that Health Canada has used the NPN licensing scheme to favour "mass merchandisers" at the expense of "small family businesses" so that there is "no more level playing field, due to Health Canada." Is this meant to suggest a deliberate policy by Health Canada, a conspiracy by Health Canada Officials, or simple ignorance as to effects of the licensing scheme? This claim goes will beyond the Results Company and whatever it may have suffered. There are no facts to support such general allegations and, as it stands, this broad claim cannot be defended or adjudicated. It reads like someone's opinion rather than a factual pleading.

122 I see nothing wrong with subparagraph 34(d) which appears to provide a specific example of excessive or abusive enforcement that can be defended and adjudicated.

123 Subparagraph 34(e) is deficient and should be struck because no facts are provided to support what is a bald assertion. In order to defend and adjudicate this allegation, it would be necessary to know, at least, the following:

a) What are the products in the Vitamost(R) line apart from Advaya(R) which is mentioned in 34(f);

b) Which of them are innovative and why?

c) For which of the products has the Results Company experienced discrimination and what form did that discrimination take?

d) Which specific ingredients or combination of ingredients have not been documented by the sources deemed acceptable to Health Canada, who are those sources, and how has this prevented the licensing of a formulation on the Vitamost(R) line?

124 Advaya(R) is the only specific example given in paragraph 34(f). The Plaintiffs say that they cannot comply with the Health Canada requirement and list "the exact quantity of each ingredient" because this would "reveal proprietary information protected by patent." Patents do not protect undisclosed proprietary information. The patent monopoly is given in return for public disclosure of the invention. So this makes no sense. However, the main complaint appears to be that:

> Health Canada does not allow any of the many health claims for Advaya(R) that the Results Company has been able to verify by means clinical trials and symptom surveys, all of which claims are compliant with U.S. guidelines for dietary supplements.

It isn't clear here whether the Results Company is objecting to a particular decision or decisions of Health Canada that have prevented such health claims - in which case the facts would be needed to ground the claim that such decision is excessive or abusive -- or whether the Results Company is saying that the Act and/or the Regulations prevent such claims -- in which case the Plaintiffs need to plead how this translates into a cause of action.

125 Paragraph 34(g) does not say which Vitamost(R) formulas are at issue. More importantly, however, it alleges general discrimination through NPN licensing "against complex formulations." No facts are pleaded to say whether such "discrimination" is deliberate or is simply a function of the way the system works for all complex formulations, and there is nothing to explain how this translates into a cause of action for damages that the Defendants can defend.

126 Paragraphs 34(h) to 34(k) express little more than disagreement with the need for testing in Canada, and Health Canada's approach. The opinion is expressed that finished product testing and stability testing is unnecessary. This appears to be what the Results Company means by something that is "oppressive and totally unnecessary."

127 The difficulty is that an opinion that simply questions the need for Health Canada's approach to testing is not the basis for any form of action, and the constituents of any form of action are not pleaded. Is this conspiracy, negligence or a malicious tort? Until the facts are pleaded and joined with the constituents of same form of action that justifies a damages claim, these paragraphs remain nothing more than a difference of opinion over the need for testing.

128 Much the same can be said of paragraphs 34(c) to (t).

129 As a way of summarizing what the whole of paragraph 34 amounts to in law, the Plaintiffs say in paragraph 34(s) that:

> Both NPN licensing and the DIN registration scheme that it replaces are forms of censorship which both prevents new products from coming to market and restricts the sales of those which are permitted to be sold. Health Canada decides which health claims it will allow for each product and prohibits all other true claims -- including those referenced by textbooks, clinical studies, and even testimonials sworn by affidavit. This censorship is an insidious way of limiting public access to high quality formulas by restricting both the formulators who create these products and the entrepreneurs who bring them to market. In no other industry are suppliers prevented from telling their customers the truth about what their products do. Because Vitamost(R) products are innovative, 25 years of censorship has severely limited their sales. Customers only find out about these unique supplements by word of mouth, since TRC is prevented from advertising the benefits of taking Vitamost(R) formulas;

130 If the Plaintiffs are alleging "censorship" as the legal basis of their claim and the form of action they are pursuing, then they need to show how "censorship," in law, gives rise to a cause of action. That is, they must set out the material facts they are using the label "censorship" to describe in a manner that matches the constituent elements of a cause of action that they are entitled to bring: *Simon*, above, at para 18.

131 If the Plaintiffs are simply seeking damages as relief under s. 24(1) of the Charter, then they need to plead the facts that will support the accusations of bad faith or abuse of power by public officials: see *Ward*, above, at para 39; *Mackin*, above, at paras 78-79. The same applies to civil causes of action: simply enforcing a statute and regulations that were valid at the time will not give rise to a cause of action (*Mackin,* at para 78), and there is no cause of action for legislating or failing to legislate in a manner that is adverse to a party's interests or may cause them to incur losses: see *Welbridge Holdings Ltd v Greater Winnipeg*, [1971] SCR 957; *Mahoney v Canada*, [1986] FCJ No 438, 4 FTR 259 (FCTD); *Kwong Estate v Alberta*, [1978] AJ No 594, 96 DLR (3d) 214 (ABCA).

132 I see nothing in paragraph 34 that pleads facts to establish "excessive and abusive enforcement" as opposed to the simple enforcement of what is, in the Plaintiffs' opinion, an "oppressive and totally unnecessary [...] licensing scheme."

133 All in all, I see nothing pleaded in paragraph 34 that sets out a concise statement of material facts that could support a recognizable cause of action in law.

134 There is nothing in paragraphs 35 and 36, which attempt to summarize the Plaintiffs position, that saves the pleadings from the problems I have identified above. As drafted, with the exception of subparagraph 34(d) (addressed above) and the background information provided in paragraphs 31-33 and 35, the whole of section C of the Claim is little more than the personal views of Rowland and his company, the Results Company, that the NPN licensing scheme is unnecessary and has not allowed him to make the profits he would like to have made, because it discriminates in favour of larger companies who are better able to meet the costs involved.

135 Consequently, it is my view that paragraphs 31 to 39 of the Claim should be struck.

136 The Defendants object to the claims of Dr. Dahl, Ms. Dahl and Life Choice as an abuse of process and as a collateral attack upon judicial decisions made in previous proceedings.

137 The Defendants allege that:

> Dahl, Mrs. Dahl and Life Choice Ltd. ask this Court to revisit the legality of the searches conducted by authorities on March 31, 2004 and January 15th 2009, the correctness of their 2004 and 2013 criminal convictions, and the factual findings underlying those convictions. For example:
>
> (a) In their 2004 criminal proceeding, Dahl and E.D. Internal Health unsuccessfully challenged the validity of three search warrants pursuant to s.8 of the *Charter*. The plaintiffs now seek to re-litigate the constitutionality of these search warrants and the actions taken under their authority.
>
> (b) In the 2013 criminal proceedings, E.G.D. Modern Design Ltd., with Dahl acting as principal, pleaded guilty to eleven charges under the *Food and Drugs Act* and the *Controlled Drugs and Substances Act*. Despite their guilty plea, the plaintiffs allege in this action that they were falsely and maliciously charged.
>
> (c) The plaintiffs unsuccessfully challenged the legality of the January 15th 2009 searches in the Alberta Court of Queen's Bench. The plaintiffs plead in this proceeding that these searches were contrary to sections 7, 8 and 9 of the *Charter*.
>
> On a generous and fair reading, the entirety of paragraphs 40-101 of the statement of claim is premised on the assertion that, contrary to the findings of two trial judges and their own pleas of guilt, these plaintiffs were subject to unlawful searches and have been wrongly convicted. This court would be unable to grant the remedies sought by the plaintiffs in this action without first making findings on criminal liability the constitutionality of police searches and/or the admissibility of evidence in a criminal proceeding that are inconsistent with prior findings made in the plaintiffs' criminal trials. Because such findings would necessarily undermine the principles of consistency, finality, and integrity in the administration of justice, this portion of the statement of claim should be truck in its entirety as a collateral attack and abuse of process.

138 Paragraphs 40 to 55 provide background information about the Dahls, some of their business endeavours and four encounters with Health Canada. It seems to me that the description of the first four encounters with Health Canada provides no information that is relevant to the relief sought in this action, but the Defendants have conceded that, on their own, these paragraphs are inoffensive.

139 The facts pleaded by the Dahls provide the only possible factual basis found in the Claim for excessive and abusive enforcement and, indirectly at least, highlight the poverty of the rest of the pleadings on this issue.

140 The Plaintiffs go on to describe a search that took place in March 2001 that led to criminal conviction in 2004, and a search in January 2009 that led to criminal conviction in 2013.

141 Dr. Dahl says that, as a result of the first criminal proceedings, he:

> Now has a criminal record for not only something he was not responsible for, but also due to the *ultra vires*, unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials.

142 The convictions stemming from the 2001 investigation were under three different statutes. Dr. Dahl's company, E.D. Internal Health Ltd, pleaded guilty to sixteen charges under the Act and the Regulations and received a fine of $5,600: see *R v Dahl #2*, above, at para 18. The 42 charges that went to trial were all under the Customs Act and the CDSA. These charges related to importing anabolic steroids or their derivatives and mis-describing these goods on customs forms. The Plaintiffs say some of these substances are not considered anabolic steroids and are not controlled in the United States and should not be in Canada, but as it stands they are listed in Schedule IV (s. 23) of the CDSA. Dr. Dahl and E.D. Internal Health Ltd were found guilty after trial on 33 counts under ss. 153(a) and 159 of the Customs Act and ss. 5(2) and 6(1) of the CDSA (*R v Dahl #1*, above). Dr. Dahl received a conditional sentence and fines totalling $116,360, and E.D. Internal Health Ltd received fines totalling $232,720.

143 There is nothing pleaded that shows why the convictions under the Customs Act and the CDSA have any relevance to the present Claim. Based on the pleadings, the validity and enforcement of those statutes is not at issue. Only the 16 convictions resulting from the guilty pleas of E.D. Internal Health under the Act and the Regulations could have any possible relevance here.

144 Dr. Dahl complained of breaches of s. 8 of the Charter at the trial before Justice Lytwyn who found no violation of s. 8: see *R v Dahl #1*, above, at para 10. If Dr. Dahl disagreed with this finding, he could have appealed Justice Lytwyn's decision. He cannot now come before this Court and have these searches re-examined with a view to finding a breach of s. 8 of the Charter.

145 Dr. Dahl complains that he now has a criminal record for something he was not responsible for. However, E.D. Internal Health accepted responsibility for the 16 charges under the Act and the Regulations through its guilty pleas, and a competent Court found that Dr. Dahl and E.D. Internal Health were responsible for 33 additional offences under the Customs Act and CDSA. He cannot now come before this Court and ask for the same issues to be re-determined.

146 Dr. Dahl also says that due to the 2004 trial, he now has a criminal record "due to the ultra vires unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials." There are two components to this allegation: that the Regulations are *ultra vires* and unconstitutional, and that their enforcement leading up to the trial and convictions in 2004 were abusive and excessive.

147 In large measure, the claim of abusive enforcement amounts to an attempt to re-litigate the validity of the three search warrants related to the 2004 criminal proceeding. As I have already noted above, their constitutionality has already been decided by Justice Lytwyn. The attempt to re-litigate that issue here is, if not strictly speaking a collateral attack on the legal effect of the 2004 convictions, certainly an abuse of the Court's process that should not be permitted to proceed: see *CUPE*, above, at paras 33-55; *Wolf*, above, at paras 54-57.

148 While the Plaintiffs refer to *TeleZone*, above, and its companion cases to argue that the collateral attack and abuse of process doctrines should not apply where the forum is different and the issue to be decided is different, those cases do not avail the Plaintiffs here. They dealt with the question of whether an administrative decision must first be challenged through judicial review before an action for damages can be brought based on the consequences of those decisions. The Supreme Court found that such a detour was not necessary, nor were the actions in question collateral attacks on the administrative decisions in question. In so finding, the Court emphasized the differences between the nature and purpose of judicial review on the one hand and proceedings to determine civil liability on the other (see *TeleZone*, above, at paras 20-31, 60-68). Thus, the Plaintiffs are not wrong to suggest that differences in the nature of the issues at stake can affect the application of the collateral attack and abuse of process doctrines. However, none of these cases suggested that matters squarely decided in previous criminal court proceedings can be re-litigated by the party against whom those matters were decided in future civil proceedings in which they seek to obtain damages. In my view, this scenario goes to the very heart of the abuse of process doctrine, in that it would bring the administration of justice into disrepute, and cannot be permitted for the reasons stated in *CUPE*, above.

149 The Plaintiffs also plead at paragraph 70 under the heading "Post March 21, 2001" that:

> After the investigation, all of Dr. Dahl's Canadian shipments were stopped from entering Canada. Customs sent everything for inspection or held them up. His only alternative was to close his Canadian business. He ended up selling his stock and exclusive product lines at cost and also his warehouse.

If this is intended to be an allegation of excessive enforcement so as to ground a claim for damages, it is not properly pleaded. On the most generous reading, it can be seen as an attempt to plead a claim in negligence, but the Plaintiffs have not pleaded what duty or standard of care was owed to them and how it was breached. Even if it could be established that the customs officials in question owed a private law duty of care to the Plaintiffs, which is a steep hill to climb (see *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79; *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562, 2001 SCC 80), they have not pleaded any facts that could be taken as a breach of that duty. There is nothing to suggest that customs official were doing anything other than carrying out their statutory duties reasonably and in good faith. Likewise, the allegation cannot ground a claim for malicious prosecution as there is no indication that a prosecution resulted from these alleged customs enforcement activities, let alone that this was done without reasonable cause and was motivated by malice: see *Nelles v Ontario*, [1989] 2 SCR 170. A claim of misfeasance in public office would require a pleading that a public office holder engaged in deliberate and unlawful conduct in his or her capacity as a public officer, and was aware both that their conduct was unlawful and was likely to harm the Plaintiff: *Odhaviji Estate v Woodhouse*, [2003] 3 SCR 263 at paras 22-23, 28 [*Odhaviji Estate*]. None of this has been pleaded here with respect to the actions of customs officials. Thus, paragraph 70 should be struck.

150 As regards the alleged legal invalidity of the Regulations, both as being *ultra vires* the Act and unconstitutional, I do not see how the 2004 convictions have any bearing on that claim. As already noted above, the convictions under the Customs Act and CDSA are irrelevant, and any attempt to impugn the 16 convictions of E.D. Internal Health under the Act and the Regulations is an abuse of the Court's process: see *CUPE*, above, at paras 33-55; *Wolf*, above, at paras 54-57. The time to challenge those charges based on the purported legal invalidity of the Regulations was before entering guilty pleas on behalf of E.D. Internal Health.

151 Dr. Dahl says he is not questioning the fact of his convictions; he says, however, that this does not prevent him from attempting to show in these proceedings that the Regulations under which E.D. Internal Health was convicted were unconstitutional. I agree, but Dr. Dahl cannot use the fact of the unchallenged convictions to demonstrate unconstitutionality, which he is trying to do. The argument appears to be that the Regulations and the scheme of the Act are so absurd that they led to Dr. Dahl's criminal convictions in 2004. They certainly did not lead to the convictions under the Customs Act and CDSA, and the unchallenged convictions under the Act and the Regulations are not a factual basis for the unconstitutionality of the Regulations. Moreover, the notion that Dr. Dahl is not attempting to impugn the 2004 convictions through the present Claim is belied by pleadings that attack the factual underpinnings of those convictions -- including that certain evidence "went unnoticed by the Trial Judge" (para 72), and that Dr. Dahl "was charged with products that were never actually in his possession" (para 74) -- and the allegation that Dr. Dahl was "falsely convicted in 2004" (para 98).

152 Dr. Dahl appears to be arguing that the Regulations are making criminals out of innocent people, but if he has been convicted he is not an innocent person. He simply feels that the offences he was convicted of should not be offences. Without more, this is not a ground for unconstitutionality.

153 If the Court is intended to see the convictions as part of the harm flowing from the allegedly invalid Regulations, then the principles from *Mackin*, above, apply. Setting aside the claims about excessive searches, already dealt with above, the Plaintiffs have not pleaded the kind of threshold misconduct (i.e. conduct that is "clearly wrong, in bad faith or an abuse of power") that would be necessary to create the possibility of damages following a declaration of invalidity: see *Mackin*, above, at paras 79-82; *Ward*, above, at paras 39-40.

154 The second search and seizure took place in January 2009 and this led to charges in January 2010. Dr. Dahl, Mrs. Dahl and their company, E.G.D. Modern Design Ltd, were each charged with 33 regulatory and criminal offences under the Act, the CDSA, and their respective Regulations: *R v Dahl #6*, above at para 3. The trial commenced on March 19, 2012, and two defence applications were heard, including an unsuccessful challenge to four of the six searches based on s. 8 of the Charter. However, due to the late disclosure of certain documents by the Crown, the trial was adjourned and there were difficulties rescheduling it within a reasonable time. The resulting delay infringed the Dahls' rights under s. 11(b) of the Charter, and the charges against them were stayed. However, Justice Jeffrey of the Court of Queen's Bench found that the Charter considerations applied differently to a corporate defendant: unlike for individual defendants where security of the person considerations such as prolonged anxiety and stigma figured prominently, with respect to corporate defendants, s. 11(b) serves exclusively to protect the right to a fair trial. There was no evidence that E.G.D. Modern Design's ability to make full answer and defence had been impaired, and the charges against that company were permitted to proceed: see *R v Dahl #6*, above, at paras 9, 14-15.

155 Ultimately, E.G.D. Modern Designs Ltd, with Dr. Dahl acting as principal, pleaded guilty to 11 charges, eight under the Act and Regulations, and three under the CDSA. Regarding the eight offences under the Act and the Regulations, the company was fined $2,500 for each of five of these offences, and the maximum $5,000 each for the remaining three since they revealed "an intent to consciously organize and operate surreptitiously, wilfully circumventing the law after having experienced the effect of being caught once before": *R v Dahl #7*, above, at p. 94 (Defendant's Motion Record, at p. 601). The Court made an explicit finding that Dr. Dahl was the controlling mind of the corporate defendants convicted in both 2004 and 2013 (*R v Dahl #7*, above, at p. 93 (Defendant's Motion Record, at p. 600):

> In both cases, the senior officer or representative of the corporation was the same, Mr. Eldon Dahl. In each case he was the controlling mind.
>
> A corporation faces criminal liability for the criminal acts of its representatives. Here, each corporation, the old 2004 corporation, E.D. Internal Health, and now the entity before me, E.G.D. Modern Design Ltd., were directed and controlled by the same individual.

156 As noted above, Dr. Dahl, Mrs. Dahl and E.G.D. Modern Design Ltd unsuccessfully challenged the search warrants and their execution in the proceeding in the Court of Queen's Bench in Alberta: *R v Dahl #5*, above, at pp. 176-192 (Defendant's Motion Record, at pp. 481-497). Justice Jeffrey reviewed the whole process of the search of the Dahls' home and the reasons for the entry with guns drawn and found as follows:

> Here, the police did not depart from the knock and announce approach. They drew their weapons rather then keeping them holstered, that is all. They did not escalate the entry into a dynamic entry. [page 188, lines 25-28]
>
> In my view, in the heat of the moment and the uncertainty of what they might face, the apparent lack of cooperation justified the police considering whether they had misread the Dahls. Some of the alleged offences here did involve the *Controlled Drugs and Substances Act*, not matters some might consider of lesser severity such as the other charges under the *Food and Drugs Act*. Investigations and searches associated with alleged offences under the *Controlled Drugs and Substances Act* can be met with violence. Weapons are not uncommon in these contexts. [page 188, lines 34-40]
>
> Here, the police did not do anything else that escalated the entry other than draw their guns to help ensure their own safety. I do not find this manner of conduct of the search warrant at Number 19 unreasonable in the circumstances and dismiss the application to exclude evidence resulting from the search here. [page 189, lines 33-36]

157 In the present proceedings, the Dahls say the search of their home was unconstitutional, that they were unlawfully detained during that search, and that they were falsely and maliciously charged.

158 E.G.D. Modern Design Ltd pleaded guilty to eight charges under the Act and Regulations and another three under the CDSA. Dr. Dahl was the principal who entered these pleas and was found to have been the directing mind of the corporation with respect to the alleged illegal conduct. Under these circumstances, there is no reasonable prospect of succeeding on a claim of malicious prosecution. The Plaintiffs would not only have to establish that the proceedings concluded in their favour, but that they were instituted without reasonable cause and were motivated by malice: see *Nelles*, above; Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at p. 67. Dr. and Mrs. Dahl had the charges against them stayed, which could be seen as a termination of the proceedings in their favour. The Plaintiffs have alleged that the Defendants' enforcement actions had an improper purpose of driving small entities out of the natural health products industry (see para 92(i) of the Claim). However, given that E.G.D. Modern Design pleaded guilty to11 of the charges, with Dr. Dahl confirming to the Court on its behalf that it was admitting the essential elements of each of the offences (see *R v Dahl # 7*, above, at p. 90), and given the Court's finding that Dr. Dahl was the directing mind whose illegal and criminal conduct gave rise to the company's criminal liability, there is no possibility of establishing that there was a lack of reasonable and probable cause for the Defendants to pursue the prosecution. Moreover, the allegation of malice is not properly pleaded because it is a bald allegation with no supporting material facts presented: see *Merchant Law*, above, at paras 34-35. The allegation of malicious prosecution and all of the accompanying allegations to malicious intent and being "falsely and maliciously charged" and "falsely and maliciously prosecuted" in paragraphs 92-93 must be struck.

159 Moreover, given that the legality of the search of the Dahl's home was explicitly ruled upon by Justice Jeffrey in this proceeding, which resulted in guilty verdicts against one of the Plaintiffs based on guilty pleas entered by Dr. Dahl as the corporation's principal, the attack on the constitutionality of that search in this proceeding is an abuse of process that must be struck: *CUPE*, above, at paras 33-55. The court made an explicit finding that the search of the Dahl's home was lawful and carried out in a reasonable manner in the circumstances: see *R v Dahl #5*, above, at pp. 176-189.

160 Like the 2004 convictions, the 2009 convictions of E.G.D. Modern Design Ltd are not relevant to the alleged invalidity of the impugned Regulations. The time to challenge these charges based on the purported unconstitutionality of the Regulations was before entering guilty pleas on behalf of E.G.D. Modern Design Ltd.

161 Two further allegations by the Dahl's require brief comment. Arguably, each discloses a potential cause of action, but both must nevertheless be struck from the present Claim.

162 The Dahls allege unlawful detention "contrary to ss. 7, 8 and 9 of the Charter" during the search of their home (para 92(c)). Section 9 of the Charter provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." The Plaintiffs plead at paragraph 90 of the Claim that:

> [Dr. Dahl] and his wife sat in their living room for 11 hours and were prevented from moving or seeing the Health Canada agents search the entire residence. When questioned if they were under arrest, Dr. Eldon Dahl was told that they were just being "detained" and not to move...

There is jurisprudence holding that the lawful authority to detain is not necessarily implied in the lawful authority to search and seize granted by a search warrant, and a detention in these circumstances may be arbitrary, especially if it is prolonged: see for example *R. v Douglas*, 2012 SKQB 250. The Defendants have not pointed to any explicit ruling on this point by the Alberta courts, and accepting the facts as pleaded, I cannot say at this stage that a claim on this basis, either in tort or based on s. 9 of the Charter, has no reasonable chance of success.

163 There is also the matter of the warnings allegedly published by Health Canada about the Plaintiffs' products. They allege at paragraphs 81-84 of the Claim that Health Canada published two warnings, on August 21, 2008 and September 3, 2008 respectively, alleging that the products of Dr. Dahl and E.G.D. Modern Design were contaminated with bacteria and unsafe, and has refused to remove these warnings from its website even though the products were later licensed as "proven safe" by the Defendants' officials. The Plaintiffs have not pleaded deliberate unlawful conduct so as to ground a claim of misfeasance in public office (see *Odhavji Estate*, above), but read generously, these pleadings could reveal a claim for negligence. Even if this is so, however, it is not a claim that can be considered by this Court as currently pleaded.

164 The problem with both of these claims is that, at least as pleaded, they have no connection whatsoever with the content of the Act or Regulations that are challenged in this proceeding. Not only does this present practical problems for the discovery process and any eventual trial of the action, which would inevitably be disjointed, but there is a more fundamental problem relating to the jurisdiction of this Court. As Justice MacKay observed in

Mandate Erectors, above, at para 15, the second part of the jurisdictional test set out in *I.T.O. - International Terminal Operators Ltd. v Miida Electronics Inc. et al.*, [1986] 1 SCR 752, 28 DLR (4th) 641 [*ITO*] states that in order for the Federal Court to have jurisdiction, there must be an "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction." In removing the named ministers from the style of cause, he found that they could not be sued in their representative capacity, were not sued in their personal capacity, and if they had been, the claims would have been in tort and would have been outside the jurisdiction of this Court. Certain other named defendants were also removed as defendants, as the Court found that the federal laws implicated in the claim were not essential to the disposition of the claims made against them within the terms of the *ITO* test: *Mandate Erectors*, above, at paras 18-19.

165 I find the same is true in the present case. The Dahls have not demonstrated in their pleadings that there is anything about the challenged Act and Regulations that is essential to the disposition of their claims of unlawful detention or negligence in warning the public about their products. These are distinct tort (and perhaps Charter in the former case) claims that have nothing to do with a federally enacted law, and nothing to do with the broader challenge the Plaintiffs are trying to make to the Act and Regulations in their Claim. If the Dahls' wish to pursue those allegations, they must do so in a provincial superior court. They may encounter limitation issues, but that is of no concern here.

166 It may be that these allegations are not intended to ground independent causes of action, but are instead intended to indicate damages suffered as a result of the impugned provisions of the Act and Regulations, or state misconduct in relation to those instruments that could permit a damages claim despite the principles stated in *Mackin*. If so, then the Plaintiffs need to plead some connection between the impugned provisions of the Act and Regulations and the allegedly unlawful conduct.

167 For the above reasons, paragraphs 56-93 of the Claim, and any references to wrongful conviction, malicious prosecution, false advisories, or unlawful searches appearing elsewhere in the Claim in reference to the allegations in those paragraphs must be struck. Paragraphs 40-55 seem inoffensive, but they do not disclose any cause of action either on their own or in connection with any other remaining portions of the Claim, and should be struck on that basis.

168 There follows a series of paragraphs in which the Dahls describe the losses they and their companies have suffered as a result of the alleged unlawful conduct of the Defendants (see paras 95-101). However, each of the causes of action that could ground a claim to damages has been struck above. Since I have decided to grant leave to amend the Claim, I think the most prudent course is to strike these paragraphs and allow the Plaintiffs to amend them in accordance with the amended causes of action.

169 In paragraph 97(g) of the Claim, Dr. Dahl and Mrs. Dahl also assert that they have "had their Charter right [...] personally breached under ss. 2, 7, and 15 of the Charter for the same reasons and rationale as set out with respect to Nick Mancuso and David Rowland."

170 As I have already ruled that Mancuso and Rowland have not pleaded the facts required to establish such breaches, it follows that there are no material facts pleaded to establish breaches of the Dahls' ss. 2, 7, and 15 Charter rights.

The Charter Claims of the Corporate Plaintiffs

171 The final portion of the Claim relates to allegations of Charter breaches by the corporate Plaintiffs, which are The Results Company Inc and Life Choice Ltd, the latter being the successor company to E.D. Modern Design Ltd and E.G.G. Modern Design Ltd. The Plaintiffs plead the following in this regard at paragraph 102 of the Claim:

> The Plaintiffs state, for the sake of clarity, that while the within Statement of Claim clearly sets out which Charter and constitutional breaches are involved, as being infringed, with respect to the biological Plaintiffs, the corporate Plaintiffs also claim the following Charter and constitutional rights have been breached:

(a) the right to freedom of expression and communication as guaranteed under s. 2 of the Charter;

(b) the procedural safeguards of s. 7 of the Charter in the context of (quasi) criminal prosecution and regulatory scheme;

(c) the right to equality, as a structural imperative of the underlying principle of the Constitution Act, 1867 as enunciated by the Supreme Court of Canada in *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, which right, above and beyond s. 15 of the Charter, is also involved by the biological Plaintiffs.

172 With respect to the s. 7 claim, the Supreme Court has consistently held that the word "everyone" in s. 7 of the Charter does not include a corporation. Corporations do not have s. 7 rights because the protected interests -- life, liberty and security of the person -- are attributes of natural persons and not artificial persons: see at *Irwin Toy,* above, at paras 94-96; *Dywidag Systems International, Canada Ltd. v Zutphen Brothers*, [1990] 1 SCR 705 at paras 6-7 [*Dywidag Systems*]; Hogg, above, at p. 47-5. Without a deprivation of one of these protected interests, the principles of fundamental justice -- or "procedural safeguards of s. 7 of the Charter" as the Plaintiffs refer to them -- do not come into play. At a minimum, corporations cannot obtain relief on s. 7 grounds under s. 24(1) of the Charter, because s. 24(1) provides remedies for those whose rights have been violated: *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 37 [*Big M*]. On the other hand, a corporation can defend against a criminal or regulatory charge on the basis that the law under which it has been charged violates the Charter rights of individuals (including their s. 7 rights), and is therefore constitutionally invalid: see *Big M,* at paras 37-43 (regarding s. 2(a) of the Charter), and *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at paras 21-26 per Lamer CJ and Sopinka J, with Gonthier, Stevenson and Iacobucci JJ expressing agreement at para 236 [*Wholesale Travel*]. Does this mean that corporations can also launch a proactive challenge to the constitutional validity of a law on s. 7 grounds when they are not defending against a criminal or quasi-criminal charge? The Supreme Court has said they cannot, in *Dywidag Systems*, above, at para 7:

> [6] There can now be no doubt that a corporation cannot avail itself of the protection offered by s. 7 of the Charter. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the majority of this Court held that a corporation cannot be deprived of life, liberty and security of the person and cannot therefore avail itself of the protection offered by s. 7 of the *Charter*. At page 1004 it was stated:
>
> > [...] it appears to us that [s. 7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.
>
> [7] It is true that there is an exception to this general principle that was established in Big M Drug Mart, supra, where it was held that "[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid" (pp. 313-14). Here no penal proceedings are pending and the exception is obviously not applicable.
>
> [Emphasis added]

The Plaintiffs point out that corporations have been permitted to seek declarations of constitutional invalidity by bringing motions before the Court, citing the example of *RJR-MacDonald (1995)*, above. That case dealt with the constitutional division of powers and s. 2(b) of the Charter, from which corporations can benefit in a more direct fashion (see below). Having been referred to no contrary authority, I conclude that the question of whether a corporation can bring a proactive challenge to a law on s. 7 grounds has been settled by *Dywidag Systems*, above, and the corporate Plaintiffs cannot bring such a challenge here. I would note in passing that this conclusion does not necessarily prevent the Plaintiffs from advancing their argument that the impugned provisions are unconstitutionally vague should they choose to do so (see paragraph 16 of the Claim, struck above with leave to amend), since this argument could be relevant under s. 1 of the Charter should they establish a breach of another Charter provision: see *Nova Scotia Pharmaceutical*, above, at paras 39-40.

173 Moreover, even if *Dywidag Systems*, above, was not conclusive authority on this point, the Plaintiffs have not pleaded a challenge in the nature of *Big M* or *Wholesale Travel*, both above, arguing that the impugned provisions are invalid because they violate the rights of individuals. Rather, the corporate Plaintiffs appear to be claiming procedural protections under s. 7 in complete abstraction from the question of whether anyone's s. 7 rights are violated. It is clear that such an argument has no chance of success, as the procedural protections under s. 7 come into play only where an infringement of life, liberty or security of the person has been established: see *Main Rehabilitation Co v Canada*, 2004 FCA 403 at paras 4-5.

174 The situation is quite different with respect to the corporate Plaintiffs' claim that their "right to freedom of expression and communication as guaranteed under s. 2 of the Charter" has been breached. The jurisprudence establishes that commercial speech, including that of corporations, is protected under s. 2(b) of the Charter, though perhaps enjoying weaker protection than other forms of speech that are closer to the core of what the provision was intended to protect: see *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at paras 45-60; *Irwin Toy*, above; *Rocket*, above; *RJR-MacDonald (1995)*, above; *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610. Since most legislative limitations on protected expression will infringe s. 2(a), the analysis in most cases comes down to whether the limitations in question are reasonable limits that can demonstrably justified under s. 1 of the Charter.

175 The claim that the corporate Plaintiffs enjoy a "right to equality, as a structural imperative of the underlying principle of the Constitution Act, 1867" amounts to an appeal to unwritten constitutional principles, which have been discussed by the Supreme Court in a number of cases. It is not entirely clear whether the Plaintiffs are advancing "equality" as an independent principle or as a component of the rule of law. They cite Donald MacIntosh, citing in turn A. V. Dicey, who expressed the view that "equality before the law" is a component of the rule of law: see MacIntosh, above, at p. 7. Whether and in what circumstances such unwritten principles can be used as a basis for invalidating legislation on constitutional grounds remains a debatable point: see *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 845 (Patriation Reference); Hogg, above at 15-53, discussing *Mackin*, above; c.f. *British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473 at paras 59-60. It is not a point that needs to be decided at this stage of these proceedings, in part because it is not clear whether this is the position the Plaintiffs are advancing. They say they are entitled to equality, as a structural imperative of the underlying principle of the *Constitution Act*, 1867, but they do not tell the Court or the Defendants how that right has been breached, or what remedies should flow. Is this part of the challenge to the impugned portions of the Act and Regulations, or specific actions of the executive branch in enforcing them, or both? How exactly have their purported rights to equality been breached? The Plaintiffs don't say.

176 The same absence of a factual foundation affects the claim under s. 2(b) of the Charter. How exactly have the rights of the corporate Plaintiffs to freedom of expression been infringed? There are glimmers of this earlier in the Claim (see paragraph 16(b), (p), (q), (r) and (w) and paragraph 34 (s)), but in my view, the alleged breaches of the corporate Plaintiffs' s. 2(b) Charter rights have not been pleaded with sufficient detail to allow the Court to adjudicate the matter. As the Supreme Court found in *MacKay v Manitoba*, [1989] 2 SCR 357 the presentation of a factual foundation is essential to the proper adjudication of Charter issues.

Proper Defendants

177 The Defendants say that Her Majesty the Queen in Right of Canada is the only proper defendant in this action. This is because the Claim discloses no material facts alleging any wrongdoing on the part of the named Ministers. Also, the Minister of National Health and Welfare does not exist, the naming of the Attorney General of Canada is redundant, and the RCMP is not a suable entity (see *Sauvé*, above, at para 44).

178 The Plaintiffs disagree and refer the Court to *Liebmann*, above, at paras 51-52 as well as *Apotex*, above, at para 13.

179 I do not see the relevance of either of these cases. *Liebmann* added Her Majesty the Queen as an additional defendant and decided that the debate about the appropriateness of granting injunctive relief against officers of the Crown "when that injunction operates against them in their representative capacity only as opposed to against them in their personal capacity" was irrelevant in that particular case because "the challenge is a constitutional one" in which "the Court has jurisdiction pursuant to section 24 of the Constitution Act, 1982 to grant whatever remedies are appropriate in the circumstances."

180 In the present case, there is nothing in the Claim, even before portions of it are struck, that involves the Minister of Public Safety and Emergency Preparedness, or which explains how the Minister of National Health and Welfare (who does not exist) and the RCMP (who cannot be sued) can have any relevance or standing in a constitutional challenge, or why it is necessary to name the Attorney General of Canada in addition to the Crown in order to obtain relief under s. 24 of the Constitution Act, 1982. Ministers cannot be sued in their representative capacity, and there is no indication that they are being sued in their personal capacity: *Cairns*, above, at para 6; *Merchant Law*, above, at paras 19-21.

181 *Apotex*, above, merely says that it "is not always appropriate for motions to strike to be the context to make a binding decision on a question of standing, [...]," rather "a judge should exercise her discretion as to whether it would be appropriate in the circumstances to render a decision on standing or whether a final disposition of the question should be heard with the merits of the case."

182 It is my view that Her Majesty the Queen in Right of Canada is the only proper defendant in this action and that the other named defendants must be struck.

The Stay Motion

183 For obvious reasons, given my decision on the Defendants' strike motion, the Court cannot grant the Plaintiffs a stay of the operation of s. 3(1) and (2) of the Act, and the stipulated sections of the *Natural Health Products Regulations*. The Plaintiffs have yet to disclose a serious issue to be tried and so cannot satisfy the cumulative, tri-partite test established in *RJR-MacDonald (1994)*, above.

184 However, because the issue of a stay may arise again, following amendments to the Claim, I think it might help if I also point out that, on the present record before me for a stay, I would not have been able to grant it even had the Plaintiffs established a serious issue to be tried. I say this for the following reasons:

a) There is no convincing, non-speculative evidence of irreversible harm established on a balance or probabilities. See *Information Commissioner*, above, at para 62. As the Defendants point out, Mancuso identifies products eliminated from the market but he also says that he uses these products regularly and commonly. Mancuso also leaves his claims to mental and physical distress unspecified and unsubstantiated. In addition, the harm referred to by Rowland is either vague and speculative or it is quantifiable business losses.

b) The evidence presented by the Plaintiffs (and the weakness of their case for serious issue is inevitably significant here) does not overcome the presumption that the Act and the Regulations serve the public good, so that the balance of convenience favours the Plaintiffs. See *Harper*, above at para 9. As the Defendants point out, even a *prima facie* Charter breach leaves it open to the Crown to justify that breach under s. 1 of the Charter (and it is difficult to see how the Court could assess this issue at an interlocutory stage such as the present), and even a temporary staying of the legislative and regulatory provision in question could impact the well-being of Canadians in general in serious ways and in advance of any finding of constitutionality. The evidentiary record before me provides little to support such a serious interference with the wording of the Act and the Regulations.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Claim is struck in accordance with my reasons pursuant to s. 221 of the *Federal Court Rules*.
2. The Plaintiffs are hereby granted leave to amend their Claim within 30 days of the date of this order, unless otherwise extended by the Court.
3. All Defendants are hereby struck from the style of cause except Her Majesty the Queen in Right of Canada.
4. The Defendants may move to strike any amended Claim.
5. The Plaintiffs' motion for a stay is dismissed.
6. The parties may address the Court on the issue of costs for these two motions, and should do so in writing within 30 days of the date of this order.

RUSSELL J.

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Mancuso v. Canada (Minister of National Health and Welfare), [2015] F.C.J. No. 1245

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

Stratas, Rennie and Gleason JJ.A.

Heard: September 9, 2015.

Judgment: October 27, 2015.

Docket: A-365-14

[2015] F.C.J. No. 1245 | [2015] A.C.F. no 1245 | 2015 FCA 227 | 259 A.C.W.S. (3d) 661 | 476 N.R. 219 | 2015 CarswellNat 5213

Between Nick Mancuso, the Results Company Inc., David Rowland, Life Choice Ltd. (Amalgamated From, Rolled Into, and Continuing on Business for, and From, E.D. Modern Design Ltd. and E.G.D. Modern Design Ltd.) and Dr. Eldon Dahl, and Agnesa Dahl, Appellants, and Minister of National Health and Welfare, Attorney General of Canada, Minister of Public Safety and Emergency Preparedness, Royal Canadian Mounted Police, and Her Majesty the Queen in Right of Canada, Respondents

(46 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Appeal by plaintiffs and cross-appeal by defendants from order striking statement of claim dismissed — Plaintiffs were comprised of individuals and companies who consumed, distributed and produced natural health products — They challenged enactment of legislative scheme regulating such products, alleging Charter breaches, lack of legislative competence, and tortious conduct in course of enforcement — Judge appropriately struck whole of claim — Unobjectionable portions required fresh pleading stating material facts in support — Accepted claims could not proceed to trial in absence of material facts, which were required to assess legislative competence.

Commercial law — Trade regulation — Food and drugs — Natural health products — Appeal by plaintiffs and cross-appeal by defendants from order striking statement of claim dismissed — Plaintiffs were comprised of individuals and companies who consumed, distributed and produced natural health products — They challenged enactment of legislative scheme regulating such products, alleging Charter breaches, lack of legislative competence, and tortious conduct in course of enforcement — Judge appropriately struck whole of claim — Unobjectionable portions required fresh pleading stating material facts in support — Accepted claims could not proceed to trial in absence of material facts, which were required to assess legislative competence.

Constitutional law — Constitutional proceedings — Practice and procedure — Pleadings — Appeal by plaintiffs and cross-appeal by defendants from order striking statement of claim dismissed — Plaintiffs were comprised of individuals and companies who consumed, distributed and produced natural health products — They challenged enactment of legislative scheme regulating such products, alleging Charter

breaches, lack of legislative competence, and tortious conduct in course of enforcement — Judge appropriately struck whole of claim — Unobjectionable portions required fresh pleading stating material facts in support — Accepted claims could not proceed to trial in absence of material facts, which were required to assess legislative competence.

Appeal by the plaintiffs and cross-appeal by the defendants from a judgment striking the appellants' statement of claim. The appellants were comprised of consumers, distributors and producers of natural health products. They commenced an action challenging the constitutional authority of Parliament to enact a scheme for the regulation of the production and sale of natural health products, including vitamins, and dietary and nutritional food supplements. Alternatively, the appellants challenged the statutory authority that authorized the regulations, and pled various Charter violations and tortious conduct by government officials in the administration and enforcement of the scheme, supporting a claim for damages. They sought declarations of invalidity and a stay of the enforcement of the legislation and regulations. A Federal Court order struck the statement of claim. The plaintiffs appealed and the defendants cross-appealed to the extent that it was an error not to strike the claim in its entirety.
HELD: Appeal and cross-appeal dismissed.

The cross-appeal was unnecessary, as the ruling of the Federal Court judge clearly intended to strike the whole of the statement of claim with leave to file a fresh as amended claim eliminating the defects. The judge accepted the plaintiffs could seek declarations of invalidity on constitutional and administrative law grounds with claims for damages and restitution. The judge appropriately struck the whole of the claim for failure to meet the requirement of pleading material facts. No material facts were pled to support the claims of Charter violations by the individual appellants. The corporate plaintiffs were unable to maintain a s. 7 Charter claim under the prevailing circumstances. The tort claims were supported by bald assertions rather than material facts. The notion that the appellants could proceed to trial on the basis of the unobjectionable portions of the pleading was rejected, as the Court required a sense of the law's reach in order to define the contours of legislative and constitutional competence to assess whether the legislation was ultra vires. With respect to the claims arising from enforcement, the judge erred in characterizing the claims as a collateral attack, but correctly identified them as an abuse of process.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(a), s. 2(b), s. 7, s. 8, s. 9, s. 15, s. 24(1), s. 52

Constitution Act, 1867, s. 91(27)

Controlled Drugs and Substances Act, S.C. 1996, c. 19,

Federal Courts Rules, Rule 174, Rule 221, Rule 221(f)

Food and Drugs Act, R.S.C., 1985, c. F-27, s. 2

Natural Health Products Regulations, S.O.R. 2003-196,

Appeal From:

Appeal from a judgment of the Federal Court dated July 16, 2014, Docket Number T-17-54-12 (2014 Fc 708).

Counsel

Rocco Galati, for the Appellant.

Sean Gaudet, Andrew Law, for the Respondent.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

RENNIE J.A.

1 This appeal and cross-appeal arise from a judgment dated July 16, 2014 of the Federal Court striking the appellants' statement of claim: 2014 FC 708. In brief, the appellants commenced an action challenging the constitutional authority of Parliament to enact a scheme for the regulation of the production and sale of natural health products, including vitamins, and dietary and nutritional food supplements. In the alternative, if the scheme is constitutional, the appellants challenge the statutory authority that authorizes the regulations, and plead various Charter violations and tortious conduct by government officials in the administration and enforcement of the scheme. The appellants seek declarations of invalidity and a stay of the enforcement of the legislation and regulations.

2 The Federal Court, per Justice James Russell (the judge) granted the defendants' motion to strike. The appellants appeal the order striking the statement of claim. Should the Court find that the judge did not strike the claim in its entirety, the respondents have filed a cross-appeal, contending that it was an error not to do so.

3 For the reasons that follow, I would dismiss the appeal and cross-appeal.

I. The Statement of Claim

4 The plaintiffs plead in their statement of claim that they are consumers, distributors and producers of "natural health products" in Canada. They include both natural persons and corporations. "Natural health products" are regulated as "drugs" as defined by section 2 of the *Food and Drugs Act* (R.S.C., 1985, c. F-27) (*FDA*), and the *Natural Health Products Regulations*, SOR 2003-196 (the *Regulations*), non-compliance with which attracts regulatory and criminal consequences.

5 In their statement of claim, the plaintiffs plead that Parliament does not have the legislative competence, under section 91(27) of the *Constitution Act*, *1867*, to regulate natural health substances. They plead that Parliament's competence is confined to the regulation of substances that pose a health risk and does not extend to the regulation of substances that pose no health risk, or little health risk, like natural health products. In the alternative, they say that the *Regulations* defining a "drug" are overbroad and that Parliament did not intend the definition of "drug" in section 2 of the *FDA* to include natural health products, and therefore the *Regulations* exceed the authority delegated by the *FDA*.

6 They also plead that the *Regulations* as a whole, and specific provisions such as the prohibition on the production and sale of a "natural health product" without a "Natural Product Number" or NPN, violate subsections 2(a), 2(b), and sections 7, 9 and 15 of the Charter. Section 8 violations are also said to arise from various searches and seizures to which some of the plaintiffs were subject under the *FDA* and the *Regulations* and the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19).

7 The plaintiffs also plead that in the implementation and enforcement of this regulatory scheme, agents and officials of the defendants committed torts related to the exercise of state authority, including malicious prosecution and misfeasance in a public office. They seek damages for lost profits, loss of reputation, mental distress, punitive and exemplary damages, as well as damages under subsection 24(1) of the Charter. They seek to have the action determined by a jury trial.

II. Analysis

A. *Standard of review*

8 The decision of this Court in *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 instructs that the usual appellate standard of review applies to decisions of a trial judge in matters of pleadings and therefore that conclusions on questions of fact and questions of mixed fact and law that are suffused by fact can only be interfered with if there is a palpable and overriding error. Conclusions on questions of law and questions of law that may be extracted from questions of mixed fact and law attract no deference and are reviewed on a standard of correctness.

9 I am satisfied that the judge identified and properly applied the governing principles applicable to a motion to strike and that no reviewable error arises in his conclusion that the statement of claim did not comply with the rules of pleading.

B. *Preliminary issue - The scope of the decision below*

10 The first paragraph in the judge's judgment provides that "The Claim is struck in accordance with my reasons pursuant to s. 221 of the *Federal Court Rules*." The appellants contend that this should be interpreted as meaning that the claim is struck, subject to the parts of the reasons which allowed some paragraphs to stand. I do not think there is any merit to this argument. The judge intended that the whole claim be struck and the plaintiffs be permitted to file a "fresh as amended statement of claim" that eliminated the defects existing in the pleading before him.

11 I agree that the judge found certain paragraphs of the claim unobjectionable. He accepted, for example, that the plaintiffs could, in an action in the Federal Court, obtain declarations of invalidity on both constitutional and administrative law grounds along with claims for damages and restitution. He also accepted that the facts pleaded in relation to the general attack on the *vires* of the scheme might also bear on the claims for individual relief. Further, he accepted that certain paragraphs and subparagraphs of the claim were also unobjectionable (see, for example, subparagraphs 1(a), 1(b), 1(d), and 1(e)(i) and paragraphs 2, 3, and 18).

12 However, the appellants' interpretation of the judgment is not supported by its plain language-- "the claim is struck." Further, the judge's reasons leave no doubt that the judge struck the claim in its entirety. He found that the claim invited a broad ranging policy discussion as to whether, and how, natural health products should be regulated. On multiple occasions he adverted to the inability of the defendants to plead in defence, given the scope or breadth of the assertions and the lack of underlying material facts or particularity, and in addressing costs, the judge characterized the pleading as "very unwieldy and non-compliant." Given the number of paragraphs and subparagraphs struck and their distribution throughout the claim, the residue would be a disjointed and difficult read and entirely lacking in any material fact.

13 Although some paragraphs seeking declaratory relief were not mentioned as explicitly being struck, these comments must be read in light of the judge's extensive consideration of the requirement of a factual matrix as prerequisite to the determination of constitutionality. The judge found that the plaintiffs were seeking to impugn the whole scheme for the classification, inspection and enforcement of food, dietary food supplements and vitamins. He noted that the pleading did not particularize which of the 55,000 natural food products were in issue and made no link between the products and the plaintiffs. He concluded that the pleadings did not provide a factual foundation for such a broad declaration.

14 The argument that the judge allowed the declaratory component of the claim to continue is also inconsistent with the appellants' own memorandum of fact and law which concedes at paragraph 21 that "the Court erred in striking the claim in its entirety."

15 In the result, the cross-appeal is unnecessary and should be dismissed.

C. *The requirement of material facts*

16 It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."

17 The latter part of this requirement -- sufficient material facts -- is the foundation of a proper pleading. If a court allowed parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues. The proper pleading of a statement of claim is necessary for a defendant to prepare a statement of defence. Material facts frame the discovery process and allow counsel to advise their clients, to prepare their case and to map a trial strategy. Importantly, the pleadings establish the parameters of relevancy of evidence at discovery and trial.

18 There is no bright line between material facts and bald allegations, nor between pleadings of material facts and the prohibition on pleading of evidence. They are points on a continuum, and it is the responsibility of a motions judge, looking at the pleadings as a whole, to ensure that the pleadings define the issues with sufficient precision to make the pre-trial and trial proceedings both manageable and fair.

19 What constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. The plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

20 The requirement of material facts is embodied in the rules of practice of the Federal Courts and others: see *Federal Courts Rules*, Rule 174; Alta. Reg. 124/2010, s. 13.6; B.C. Reg. 168/2009, s. 3-1(2); N.S. Civ. Pro. Rules, s. 14.04; R.R.O. 1990, Reg. 194, s. 25.06. While the contours of what constitutes material facts are assessed by a motions judge in light of the causes of action pleaded and the damages sought, the requirement for adequate material facts to be pleaded is mandatory. Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112.

D. *Pleading of Charter violations*

21 There are no separate rules of pleadings for Charter cases. The requirement of material facts applies to pleadings of Charter infringement as it does to causes of action rooted in the common law. The Supreme Court of Canada has defined in the case law the substantive content of each Charter right, and a plaintiff must plead sufficient material facts to satisfy the criteria applicable to the provision in question. This is no mere technicality, "rather, it is essential to the proper presentation of Charter issues": *Mackay v Manitoba*, [1989] 2 S.C.R. 357 at p. 361.

22 In respect of all of the Charter allegations, the judge found that the plaintiffs did not identify any specific natural health product to which they had been denied access, nor how that denial related to the rights might be protected by the Charter provisions raised. For example, a violation of subsection 2(a) requires that the claimant's practice or belief have a nexus with a religious belief or practice or secular morality: *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47, at p. 56. Here, no material facts were pleaded supporting the proposition that the plaintiffs had such a practice or belief that was in any way connected with their consumption or sale of natural health products. Similarly, insofar as the plaintiffs assert infringement of their freedom of expression, no material facts were pleaded as to communications that the plaintiffs intended to send or receive that were interfered with by the regulatory scheme, a prerequisite for a violation of subsection 2(b).

23 With regard to the section 7 claims, the plaintiffs need to plead material facts to support the claim that restrictions on the availability of natural health products interfered with either their security of person or liberty. Again, as the judge noted, the plaintiffs did not identify any particular products to which they have been denied access or how any such denial might have risen to the level of a section 7 violation. A section 7 infringement typically engages a fundamental life choice or issues inherently related to personal well-being: *Re B.C. Motor*

Vehicle Act, [1985] 2 S.C.R. 486; *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In the absence of a pleading of a specific regulated drug to which the plaintiffs have been denied access, or a description of how the plaintiffs use of it has been constrained in a manner that engages section 7 interests, the defendant would be left guessing as to the scope of the case it has to meet to respond to the section 7 infringement.

24 Similarly, to establish a violation of section 15, a claimant must first establish that the basis on which he or she claims to have been discriminated against is either an enumerated or an analogous ground within the scope of section 15. While the appellants plead that choice in food, supplements and vitamins is an analogous ground, they did not plead any facts in support of this claim, or facts in support of the other elements of a section 15 violation, such as how the regulation of the product perpetuates disadvantage or prejudice rising to substantive discrimination: *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, 2011 SCC 12 at paras. 30-31.

E. *The corporate plaintiffs*

25 The judge correctly struck the claims of Charter violations advanced by the corporate plaintiffs. A corporation cannot maintain a section 7 Charter challenge for either a subsection 24(1) or a section 52 remedy unless it is the defendant in a criminal or regulatory prosecution or is subject to compulsory measures, such as injunctive relief, at the behest of the state in a regulatory proceeding: *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157. The pleadings on behalf of the corporate defendants also suffer from the same deficiency found by the judge in respect of the individual plaintiffs. The claims by the corporate plaintiffs for breaches of the "right to equality as a structural imperative of the underlying principle of the *Constitution Act 1867*", and for violations of the corporations' subsection 2(b) rights, lacked a factual foundation in the pleadings. In any event, a corporation cannot assert section 15 rights.

F. *The tort claims*

26 A properly pleaded tort claim identifies the particular nominate tort alleged and sets out the material facts needed to satisfy the elements of that tort. As the judge pointed out, while the appellants assert various torts including misfeasance in public office, they do not link particular conduct to the elements of the tort. For example, the tort of misfeasance in public office requires a pleading of a particular state of mind by a public official -- deliberate, specific conduct which the official knows to be inconsistent with their legal obligations: *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184. The statement of claim in this case does not meet that standard.

27 The bald assertion of a conclusion is not a pleading of material fact. The judge properly struck many of the paragraphs underlying the tort claims on the basis that without more, these were conclusory statements. He also found that the allegations of bad faith and abuse of power comprised a set of statements or conclusions and did not meet the standard of pleading described in *Merchant Law* at paras. 34-35.

28 The judge assessed the allegations of tortious conduct in the implementation and enforcement of the *Regulations* against these principles and concluded that the appropriateness of the enforcement measures could only be assessed in the light of the facts and context of a particular action or series of actions. What was pleaded, however, was a general practice, with no specific instances, leaving it unclear as to whether the conduct was "something mandated by the Act or the Regulations, or conduct set out in some administrative policy of directive, or whether they are referring to what individual officials have chosen to do" (Reasons for Decision at para. 106).

G. *Damages*

29 Relying on *Mackin* and *Ward*, the judge correctly dismissed the claim for relief under sections 24(1) of the *Constitution Act, 1982*: *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, 2010 SCC 27; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24. As a general rule, damages are not available from harm arising from the application of a law which is subsequently found to be unconstitutional, without more. The plaintiffs pleaded that the respondents' conduct was "clearly wrong, in bad faith or an abuse of power" -- one of the elements typically required in order to found a damages claim under section 24(1) of the Charter -- but failed to supply material facts on the question of how the *Regulations* and their enforcement constitute serious error, bad faith or abuse so as to trigger an entitlement to Charter damages. They also fail to give any particulars of any conduct that would support a damages claim.

H. *Declaratory relief*

30 As noted, the judge did not explicitly strike the paragraphs of the claim which sought declarations as to the constitutionality of the scheme, either under the *Constitution Act, 1867* or the Charter. Nor did he explicitly strike the declaratory relief in respect of administrative law challenges to the scope of the definition of "drug" in section 2 of the *FDA* and the *Regulations*.

31 The appellants allege that their action can nonetheless proceed to trial on the basis of the surviving paragraphs. It is not problematic, in their view, that there are no material facts in the statement of claim, including none that link the impugned scheme to an effect on themselves as plaintiffs. They base this argument on the proposition that freestanding declarations on the constitutionality of laws and legal authority are always available.

32 On this latter point, there is no doubt. Free-standing declarations of constitutionality can be granted: *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88. But the right to the remedy does not translate into licence to circumvent the rules of pleading. Even pure declarations of constitutional validity require sufficient material facts to be pleaded in support of the claim. Charter questions cannot be decided in a factual vacuum: *Mackay v. Manitoba*, above, nor can questions as to legislative competence under the *Constitution Act, 1867* be decided without an adequate factual grounding, which must be set out in the statement of claim. This is particularly so when the effects of the impugned legislation are the subject of the attack: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099.

33 The Supreme Court of Canada in *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 46 articulated the pre-conditions to the grant of a declaratory remedy: jurisdiction over the claim and a real as opposed to a theoretical question in respect of which the person raising it has an interest.

34 Following *Khadr*, this Court in *Canada (Indian Affairs) v. Daniels*, 2014 FCA 101 (leave to appeal granted) at paras. 77-79 highlighted the danger posed by a generic, fact-free challenge to legislation -- in other words, a failure to meet the second *Khadr* requirement. Dawson JA noted that legislation may be valid in some instances, and unconstitutional when applied to other situations. A court must have a sense of a law's reach in order to assess whether and by how much that reach exceeds the legislature's *vires*. It cannot evaluate whether Parliament has exceeded the ambit of its legislative competence and had more than an incidental effect on matters reserved to the provinces without examining what its legislation actually does. Facts are necessary to define the contours of legislative and constitutional competence. In the present case, this danger is particularly acute; as the judge noted, the legislation at issue pertains to literally thousands of natural health supplements.

35 This is not new law. While the plaintiffs point to *Solosky v. The Queen*, [1980] 1 S.C.R. 821 for the proposition that there is a broad right to seek declaratory relief, *Solosky* also notes that there must be "a 'real issue' concerning the relative interests of each [party]." The Court cannot be satisfied that this requirement is met absent facts being pleaded which indicate what that real issue is and its nexus to the plaintiffs and their claim for relief.

36 To conclude, while the Federal Court correctly found that there was nothing inherently faulty with claims in respect of declaratory relief (subparagraphs 1(a)(ix) through 1(b)(v)), the action could not move forward on the constitutional issues on the basis of the claims for relief alone. The paragraphs said to underlie the claims of constitutional breaches were struck, and with them disappeared the basis on which these claims could be adjudicated.

I. ***The section 8 violations***

37 A final issue concerns the claim that searches conducted by officers of the defendant against some of the appellants violated section 8 the Charter. The judge struck these allegations on the basis that they had previously been raised and disposed of in the criminal and regulatory prosecutions: *R v. Dahl*, 120998, March 26th 2004 (BC Prov Ct); *R v. Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, 100237221Q3 (AltaB)) [2013] A.J. No. 89. Given that, he found that the section 8 Charter claim constituted a collateral attack on the Provincial Court and Queen's Bench decisions and also an abuse of process.

38 The appellants raise three arguments. Their first and second arguments are that these doctrines do not apply because the judicial forum and the relief sought are different. They also contend that the judge erred in striking the claim on the basis of abuse of process and collateral attack on preliminary motion. On this last point, they say that they will adduce evidence at trial which is different from or expands on the facts which underlie the decision of the BC and Alberta courts, and explain why this claim is not impermissible relitigation. As this requires the judge to weigh evidence, the issue of collateral attack and abuse of process cannot be determined on a motion to strike and must await trial.

39 Collateral attack and abuse of process are related, but distinct, doctrines: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63. A collateral attack is an impermissible attempt to nullify the result of another proceeding outside of the proper channels for the review of that decision. The purpose of the doctrine is to prevent attempts to overturn decisions made in other courts. Its ambit is narrow.

40 Abuse of process, in contrast, is a residual and discretionary doctrine of broad application and scope, which bars the relitigation of issues. It is directed to preventing relitigation of the same issues and the attendant mischief of inconsistent decisions by different courts which, in turn, would undermine the doctrines of finality and respect for the administration of justice. It is thus a more flexible doctrine than collateral attack. It permits a judge to bar relitigation of a criminal conviction in a different forum, as was the case in *CUPE*.

41 The relief sought by the appellants is different in this action from that in the BC and Alberta proceedings. Here, damages are sought for an alleged unconstitutional search and for torts claimed to have been committed in the execution of the search. In the provincial courts, what was sought was the exclusion of the evidence obtained in the search at a criminal trial. These differences preclude the application of the doctrine of collateral attack. Abuse of process, however, remains available; indeed, contrary to the appellants' first and second arguments, abuse of process explicitly contemplates a different judicial forum and relief sought.

42 The remaining question is whether it is appropriate to strike a claim on the basis that it is an abuse of process on a motion to strike. It should be noted at the outset that the rules of practice of the Federal Courts expressly contemplate this (Rule 221(f)). Further, this Court has endorsed the propriety of striking a claim as being an abuse of process at the pleadings stage where the claimant sought to relitigate a criminal conviction from another jurisdiction in a civil action before the Federal Court: *Sauvé v. Canada* 2011 FCA 141 (commenting favourably on the lower court's striking of paragraphs not under appeal).

43 Whether a particular issue has previously been judicially determined is a fact of which a judge is entitled to take notice at the early stage of a motion to strike. The fact of the other decision can form the foundation for the exercise of the judge's discretion. Allowing the abuse of process doctrine to be raised at the pleadings stage is consistent with the objective of maintaining respect for the administration of justice and the court's desire for comity and mutual respect between jurisdictions. More practically, a defendant has the right to have an abusive claim struck before being subjected to an intrusive and costly discovery process. While plaintiffs are not required to build into their pleadings a response to every conceivable defence, it is not unduly burdensome to expect plaintiffs who know they are relitigating a previously-determined issue to include in their pleadings the material facts they will rely upon to explain why the discretion to find the claim abusive should not be exercised.

44 Here, there are no such facts that could be pleaded because granting the Charter or tort claims related to the impugned search would necessarily require the Federal Court to make different factual findings from those reached in the final decisions of the BC Provincial Court and Alberta Court of Queen's Bench in the criminal proceedings, which found the impugned search to be lawful.

45 Accordingly, while the judge erred in characterising the claim as a collateral attack, he correctly identified it as an abuse of process. The difference of forum and relief do not preclude the claim from being abusive; it was appropriate for the judge to decide this issue on a motion to strike, and there is no reviewable error in his application of the principle of abuse of process to the claim before him.

III. Conclusion

46 I would dismiss the appeal and the cross-appeal, with costs. I would grant the appellants sixty days from the date of this Court's judgment to serve and file their fresh as amended statement of claim.

RENNIE J.A.
STRATAS J.A.:— I agree.
GLEASON J.A.:— I agree.

End of Document

Mancuso v. Canada (National Health and Welfare), [2016] S.C.C.A. No. 92

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: March 10, 2016.

Record updated: June 23, 2016.

File No.: 36889

[2016] S.C.C.A. No. 92 | [2016] C.S.C.R. no 92

Nick Mancuso, The Results Company Inc., David Rowland, Life Choice Ltd. (amalgamated from, rolled into, and continuing on business for, and from, E.D. Modern Design Ltd. and E.G.D. Modern Design Ltd.) and Dr. Eldon Dahl, and Agnesa Dahl v. Minister of National Health and Welfare, Attorney General of Canada, Minister of Public Safety and Emergency Preparedness, Royal Canadian Mounted Police, and Her Majesty the Queen in Right of Canada

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Status:

The motion for an extension of time to serve and file the application for leave to appeal is dismissed with costs June 23, 2016. In any event, had such motion been granted, the application for leave to appeal would have been dismissed with costs.

Catchwords:

Charter of Rights — Alleged violations of ss. 2(a), 2(b), 7, 9 and 15 of the Charter — Civil Procedure — Pleadings — Motion to strike — Constitutional law — Division of powers — Does a Judge, sitting on a motion to strike, have the jurisdiction to make findings of fact — Does a Judge sitting on a motion to strike have jurisdiction to "strike the entirety of the claim", with leave to amend, and not allow to proceed the factual assertions and legal remedy not struck — Can an action for Declaratory relief proceed without a "cause of action" for damages — Does a guilty plea in Provincial Court, under a statute where its constitutionality has not been determined, bar a subsequent Superior Court action attacking the constitutionality of the legislation, based on a "collateral attack/abuse of process" pursuant to Toronto (City) v. C.U.P.E., Local 79, [2003] 3 S.C.R. 77, 2003 SCC 63.

Case Summary:

The applicants are individual and corporate consumers, distributors and producers of certain health products (the "Products") in Canada. The Products are regulated as "drugs" as defined by s. 2 under the Food and Drugs Act, R.S.C., 1985, c. F-27 (the "Act") and the Natural Health Products Regulations, SOR 2003-196 (the "Regulations"). The applicants brought an action challenging Parliament's constitutional authority to regulate the production and sale of natural health products, including vitamins and dietary and nutritional food supplements. Alternatively, they challenged the statutory authority for the Regulations, pleading Charter breaches and tortious conduct by government officials in administering and enforcing the regulatory scheme. Their statement of claim sought, inter alia, damages, declarations of invalidity and a stay of enforcement of provisions of the Act and Regulations.

The respondents brought a motion to strike the statement of claim in its entirety or paragraphs amounting to the bulk of the claim, and brought a motion to remove all defendants but Her Majesty the Queen in Right of Canada.

The Federal Court struck the Claim "in accordance with these reasons", granted leave to amend the Claim within 30 days, and struck the other defendants. The applicants appealed the decision, arguing that the Judge had erred in striking parts of the Claim and that those parts which had not been struck should be allowed to proceed. The respondents cross-appealed on the issue of whether the whole Claim had been struck. The Federal Court of Appeal interpreted the lower court decision as striking the entire statement of claim and dismissed the appeal.

Counsel

Rocco Galati (Rocco Galati Law Firm Professional Corporation), for the motion.

Sean Gaudet (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:
   FILED: March 10, 2016.

   SUBMITTED TO THE COURT: May 30, 2016.

   DISMISSED WITH COSTS: June 23, 2016 (without reasons).

   Before: Cromwell, Wagner and Côté JJ.

   The motion for an extension of time to serve and file the application for leave to appeal is dismissed with costs. In any event, had such motion been granted, the application for leave to appeal would have been dismissed with costs.

Procedural History:

Judgment at first instance: Applicants' Claim struck in

accordance with reasons with leave to amend; All

defendants struck except Her Majesty the Queen in Right

of Canada; Motion for stay dismissed.

Federal Court, Russell J., July 16, 2014.

2014 FC 708.

Judgment on appeal: Appeal and cross-appeal dismissed. Federal Court of Appeal, Stratas, Rennie and Gleason JJ.A, October 27, 2015.

A-365-14; 2015 FCA 227; [2015] F.C.J. No. 1245.

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Sivak v. Canada, [2012] F.C.J. No. 291

Federal Court Judgments

Federal Court

Toronto, Ontario

Russell J.

Heard: January 16, 2012.

Judgment: February 28, 2012.

Docket T-1700-11

[2012] F.C.J. No. 291 | 2012 FC 272 | 406 F.T.R. 115 | 7 Imm. L.R. (4th) 247 | 2012 CarswellNat 658 | 213 A.C.W.S. (3d) 30

Between David Sivak, Luci Bajzova, Monika Sivak, Lucie Bajzova, Miroslav Sarkozi, Andrej Balog, Zaneta Balogova, Galina Balogova, Viktor Sarkozi, Andrej Balog, Andrej Balog, Marie Balogova, Lukas Balog, Milan Lasab, Milada Lasaboya, and Elvis Kulasic, Plaintiffs, and Her Majesty the Queen and the Minister of Citizenship and Immigration, Defendants

(95 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Motion by Crown defendants to strike portions of statement of claim allowed — Plaintiffs accused Canadian government of conspiring to deprive them and other Czech Roma of rights under Canadian immigration system — Pleadings were bald accusations supported by rhetoric rather than facts — Portions of pleadings alleging Charter breaches, negligence, conspiracy, abuse of process and misfeasance of public officer were struck as pleadings failed to state or factually substantiate essential elements of claims — Minister of Foreign Affairs struck, as he was not a necessary party to action — Impugned portions struck without leave to amend.

Government law — Crown — Actions by and against Crown — Practice and procedure — Pleadings — Motion by Crown defendants to strike portions of statement of claim allowed — Plaintiffs accused Canadian government of conspiring to deprive them and other Czech Roma of rights under Canadian immigration system — Pleadings were bald accusations supported by rhetoric rather than facts — Portions of pleadings alleging Charter breaches, negligence, conspiracy, abuse of process and misfeasance of public officer were struck as pleadings failed to state or factually substantiate essential elements of claims — Minister of Foreign Affairs struck, as he was not a necessary party to action — Impugned portions struck without leave to amend.

Motion by the defendants, the Crown and the Minister of Citizenship and Immigration, to strike portions of the statement of claim of the plaintiffs, Sivak and 16 others. The motion arose in the context of a motion by the plaintiffs seeking certification of a class action. The plaintiffs accused the Canadian government of conspiring to deprive them and other Czech Roma of rights under the Canadian immigration system. The action arose in the context of a 2009 Fact-Finding Mission Report on State Protection in the Czech Republic and the extent to which it related to the decision-making process of the Refugee Protection Division. The matter was converted to an action, as it raised important issues of institutional bias that could not be assessed on judicial review. The defendants brought a motion to strike portions of the pleadings. The defendants submitted that the Minister of Foreign Affairs was not a proper or

necessary party and that the claim did not support a cause of action against him. The defendants also sought to strike the claims alleging negligence, conspiracy, misfeasance in public office, and breaches of ss. 7 and 15 of the Charter. The plaintiffs submitted that the motion to strike was premature and heavy-handed.
HELD: Motion allowed.

The impugned portions of the pleadings were little more than bald accusations bolstered with rhetoric and irrelevant asides that did not provide a basis of fact. The allegations against the Minister of Foreign Affairs were nothing more than speculative and were conclusions unsupported by material facts. The claim did not disclose any wrongdoing by the Minister, any basis for vicarious liability, or any cause of action against him. The plaintiffs did not plead or factually substantiate the essential elements of the tort of negligence, as no details were provided to support the duties allegedly breached. Similarly, the essential elements of the torts of conspiracy, abuse of process, and misfeasance in public office and supporting material facts were not sufficiently pled. The Charter claims failed to indicate how the plaintiffs' protected interests were infringed. They also failed to identify the circumstances or context in which the breaches allegedly occurred. Further portions were struck as immaterial or redundant. The impugned portions were struck without leave to amend.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 15

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.4(2)

Federal Courts Rules, Rule 104(1)(a), Rule 174, Rule 181, Rule 221, Rule 221(1), Rule 222(1)

Counsel

Rocco Galati, for the Plaintiffs.

Marie-Louise Wcislo, Prathima Prasad and Susan Gans, for the Defendants.

REASONS FOR ORDER AND ORDER

RUSSELL J.

THE MOTION

1 I have before me a motion by the Defendants to strike portions of the Plaintiffs' Amended Statement of Claim. I heard this motion in conjunction with a motion by the Plaintiffs seeking certification as a class action and, to some extent, both motions need to be considered together.

2 By way of judgment, dated March 31, 2011, I converted the Plaintiffs' previous judicial review application into an action pursuant to subsection 18.4(2) of the *Federal Courts Act*, directing that henceforth the judicial review would be treated and proceeded with as an action.

3 Since actions are commenced by way of Statement of Claim, the Plaintiffs filed their most recent Amended Statement of Claim (Claim) on October 19, 2011, and it is this document against which the Defendants' strike motion is directed.

4 The Defendants do not seek to strike the Claim in its entirety. They acknowledge the importance of resolving as quickly as possible the dispute between the parties concerning procedural fairness, natural justice, and the validity of the Fact-Finding Mission Report on State Protection Czech Republic, dated June 2009 (2009 Report) in so far as the 2009 Report relates to the Refugee Protection Division's (RPD) decision-making process. What the Defendants object to are those portions of the Claim that deal with tort allegations, as well as a few more peripheral matters which they say do not comply with the rules and jurisprudence that govern pleadings in this Court.

OVERVIEW

5 After reviewing the Claim, my general conclusion is that the impugned portions are, as the Defendants allege, often little more than bald accusations which the Plaintiffs have attempted to bolster with colourful rhetoric and irrelevant asides instead of providing a real basis of fact. For example, a passage such as

> there is no doubt, in the minds of anyone involved with refugees, particularly the members of the immigration bar, as well as notable NGOs, that this "June, 2009 Report" was manufactured by the IRB, as a means of appeasing the Minister, in order to base negative findings and refugee determinations, which would reduce the acceptance rates of Czech Roma

is a statement of what the Plaintiffs hope to prove, but it also reveals that the Plaintiffs are short of facts to support their case, and so have to fall back upon the alleged omniscience of the "immigration bar" and "anyone involved with refugees." I do not see anywhere in the rules that govern pleadings that facts can be dispensed with provided plaintiff or defendant invokes the oracular powers of their own counsel and his or her cohorts at the bar.

6 This matter was converted to an action because it raised important matters of possible institutional bias that I felt could not be assessed on judicial review given the limited record available to the Court. Since conversion, the Plaintiffs have broadened the scope of their objectives and now wish to accuse the Canadian government of conspiring to deprive them, and other Czech Roma, of their rights under our immigration system. If the Plaintiffs wish to launch such an attack they must proceed efficiently and effectively.

7 To proceed efficiently and effectively both sides must abide by and follow the *Federal Courts Rules* (Rules) which were promulgated precisely for this purpose. At this stage in the proceedings the Plaintiffs must comply with the rules that govern the form and content of pleadings. In my view, the Plaintiffs have not done this with their Claim, and the result is that this action has already taken much longer than it should have taken to reach this stage. The issues raised by the Plaintiffs have a significance for many other extant and future refugee claims, and the system could easily become trammelled as other claims are held in abeyance to await the outcome of this action. This situation gives rise to an even greater need for efficiency and effectiveness than might otherwise be the case. Hence, from this point on, the Court will look to counsel on both sides to do everything in their power to ensure the just, most expeditious and least expensive determination of this dispute on its merits.

8 Deficient pleadings do not promote the just, most expeditious and least expensive determination on the merits. In fact, they promote the opposite, which is why it is important that the objections to the Claim be dealt with quickly and that timelines be set to achieve the remaining steps needed to carry this dispute to a resolution.

THE MOTION TO STRIKE

9 Rather than request particulars, the Defendants have brought a motion to strike some portions of the Claim. After hearing the differences between counsel on these matters, I do not think the Defendants are being premature or heavy-handed. The wide disparity of views between the parties over what is required of pleadings means that the Court's early involvement is to be preferred.

The Applicable Rules

10 I see no dispute between the parties concerning the applicable rules and principles that govern pleadings. The Plaintiffs simply allege that they have complied with the law and that their Claim as presently drafted is sufficient.

11 The two principal functions of pleadings are to clearly define the issues between litigants and to give fair notice of the case which has to be met by the other side. See *Cerqueira v Ontario*, 2010 ONSC 3954.

12 Rule 174 requires that every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proven.

13 Rule 181 requires that a pleading "shall contain particulars of every allegation contained therein."

14 Pursuant to subsection 221(1) of the Rules, a defendant may bring a motion to strike out all or some of a statement of claim on the following grounds:

a. It discloses no reasonable cause of action;
b. It is immaterial, or redundant; or
c. It is scandalous, frivolous or vexatious.

15 The test in Canada to strike out a pleading under Rule 221 of the Rules is whether it is plain and obvious on the facts pleaded that the action cannot succeed. In this regard, the Supreme Court of Canada has noted that the power to strike out a statement of claim is a "valuable housekeeping measure essential to effective and a fair litigation." See *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 and *R v Imperial Tobacco Canada Ltd.* 2011 SCC 42, at paragraphs 17 and 19.

16 In determining whether a cause of action exists, the following principles are to be considered:

a. The material facts pled are to be taken as proven, unless the alleged facts are based on assumptive or speculative conclusions which are incapable of proof;
b. If the facts, taken as proven, disclose a reasonable cause of action, that is, one with some chance of success, then the action may proceed; and
c. The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

See *Operation Dismantle Inc. v Canada*, [1985] 1 SCR 441.

17 These basic principles have acquired a fairly heavy gloss of case law over the years as the Court has applied them to particular sets of pleadings. I think it might be helpful at this stage to set out some of the more basic guidelines that have emerged from the cases that I believe have relevance for this motion.

Rule 174

18 In *Baird v Canada* 2006 FC 205; affirmed 2007 FCA 48, a statement of claim was held to be fatally flawed where it did not specify a time when the offending activities giving rise to the causes of action took place. Nor did it specify which Crown servant did something wrong. The pleadings were allegations and conclusions, and did not provide the essential facts grounding the cause of action.

19 In *Sunsolar Energy Technologies (S.E.T.) Inc. v Flexible Solutions International Inc.* 2004 FC 1205, this Court concluded that in order to implead corporate officers and directors, actual actions of personal conduct must be pleaded. A bare assertion of conclusion is not an allegation of material fact, nor can it support a cause of action against an individual defendant. Nor can it be pled that it is a "reasonable conclusion" that an individual was implicated to a sufficient extent to support a finding of deliberate acts. To hold otherwise is to turn an action into a fishing expedition.

20 *Conohan v The Cooperators*, [2002] 3 FC 421, 2002 FCA 60 makes the often repeated point that it is sufficient for a party to plead the material facts. Counsel is then at liberty to present in argument any legal consequences which the facts support.

21 The importance of pleading facts is asserted again in *Johnson v Canada (Royal Canadian Mounted Police)*

2002 FCT 917, where the Court reiterated that it is not sufficient for a claim to contain assertions without facts upon which to base those assertions. In *Johnson*, this meant that a plea of breach of agreement must allege the relevant terms that have been breached, and a plea of breach of fiduciary duty must identify the material facts alleged to give rise to the existence of the duty and the breach.

22 *Kastner v Painblanc* (1994), 58 CPR (3d) 502, 176 NR 68 (Fed. CA) emphasizes the important general point that an action is not a fishing expedition and that a plaintiff who starts proceedings in the hope that something will turn up abuses the Court's process.

Rule 181

23 *Chen v Canada (Minister of Citizenship and Immigration)* 2006 FC 389, makes it clear that the purpose of pleadings is to define the matters at issue between the parties, but the purpose of particulars is different. Particulars are meant to provide the opposing party with sufficient information of the allegations being advanced so that it might know the case to be met at trial and to prepare a full and meaningful response. If a pleading is not good as a matter of law, particulars cannot save it. If it is not good as a matter of pleading, particulars will not improve it. These distinctions are of significance in the present case because Plaintiffs' counsel often took the position before me that this motion to strike is not appropriate because the Defendants have not asked for particulars and, if the Claim as pled is in any way defective, such defects can be remedied by the Court simply ordering particulars.

24 *Paul v Kingsclear Indian Band* (1997), 137 FTR 275 (TD), however, establishes clearly that there is no obligation on a defendant to demand particulars and a plaintiff cannot cure an otherwise deficient statement of claim by arguing that defendant has not sought particulars.

Rule 221

25 *Edell v Canada (Revenue Agency)*, [2010] GSTC 9, 2010 FCA 26, reaffirms the fundamental rule that in a motion to strike the Court is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved. The defendant who seeks summary dismissal bears the evidentiary burden of showing the lack of a genuine issue.

26 The fundamental rule, however, must take into account that no cause of action can exist where no material facts are alleged against the defendant. See *Chavali v Canada* 2002 FCA 209.

27 *Apotex Inc. v Glaxo Group Ltd*, 2001 FCT 1351 teaches that the Court should generally refuse to strike out "surplus statements" that are not prejudicial. Doubt is to be resolved in favour of permitting the pleading so that relevant evidence in support of the pleading may be brought before the trial judge.

28 Also, while the Court is not required to re-draft pleadings, it must examine defective pleadings to determine if they could be saved through proper amendments. See *Sweet v Canada* (1999), 249 NR 17 (Fed. CA).

29 Even though, if there is any doubt, paragraphs in the pleadings should be left in so that evidence may be brought before the trial judge, this does not mean that redundant or immaterial paragraphs outlining the evidence should remain in the pleadings. See *Mathias v The Queen*, [1980] 2 FC 813 (TD).

30 *Kisikawpimootewin v Canada*, 2004 FC 1426 reiterates the well-recognized premise that a scandalous, vexatious or frivolous action includes an action where the pleadings are so deficient in factual material that the defendant cannot know how to answer. This is echoed again in *Murray v Canada* (1978), 21 NR 230 (Fed. CA). A claim that does not sufficiently reveal the facts upon which a cause of action is based, such that it is not possible for the defendant to answer or the Court to regulate the action, is a vexatious action.

31 There are many cases that hold that an action cannot be brought on speculation in the hope that sufficient facts may be gleaned on discovery to support the allegations made in the pleadings. See, for example, *AstraZeneca Canada Inc. v Novopharm Ltd.* 2009 FC 1209; appeal dismissed 2010 FCA 112.

32 In fact, it is an abuse of process for a plaintiff to start proceedings in the hope that something will turn up. A plaintiff should not be permitted to discover the defendant to pursue such an action. See *Kastner*, above.

33 I think it is also well-established that the rule that material facts in a statement of claim must be taken as true in determining whether a reasonable cause of action is disclosed does not require that allegations based upon assumptions and speculation be taken as true. See *Operation Dismantle*, above.

GROUNDS

The Minister of Foreign Affairs

34 The Defendants say that the Minister of Foreign Affairs should be struck from the Claim as he is not a proper or necessary party; nor is he vicariously liable for acts or omissions of employees at visa posts abroad.

35 Paragraph 104(1)(*a*) of the Rules authorizes the Court to order that a person who is not a proper or necessary party shall cease to be a party to an action. A person is only considered a necessary party where he or she would be bound by the results of the action, and where there is a question in the action "which cannot be effectually and completely settled unless he is a party." The Defendants say that the Minister of Foreign Affairs does not fall into either category. Furthermore, where the Plaintiffs' Claim does not seek relief against a defendant, and makes no allegations against him, that defendant is not a necessary party.

36 The Defendants say that, in the present case, the Claim does not disclose any material facts that establish wrongdoing on the part of the Minister of Foreign Affairs or that support a cause of action against him. The Claim contains only bald allegations respecting this defendant which are asserted in the form of conclusions. In fact, the Minister of Foreign Affairs is referred to only twice in the Claim: once in paragraph 7(b)(ii), which describes the Minister as a party while making allegations against his staff, and again in paragraph 23 in which the Plaintiffs conclude, without any supporting facts, that the Minister of Foreign Affairs "conspired with and facilitated in the manufacturing of the June 2009 Report." It is possible that the Plaintiffs are also referring to the Minister of Foreign Affairs in paragraphs 26 and 27 of the Claim, which allege a "Ministerial and IRB effort to attempt to be rid of the Roma problem" and a "Ministerial and RPD conspiracy." However, the term "Ministerial" is not defined in the Claim and no facts are pled to support the conclusions in those paragraphs. Therefore, it is entirely unclear how the Minister of Foreign Affairs is implicated in any alleged wrongdoing.

37 Furthermore, the Defendants say that the Minister of Foreign Affairs is not vicariously liable for the acts or omissions of the staff members at the embassies and visa posts abroad. While unclear from the vague language in the Claim, the Plaintiffs appear to make this allegation at paragraph 7(b)(ii). The Minister of Foreign Affairs, however, is himself a Crown servant when acting in his official capacity. An individual Crown servant is not vicariously liable for the torts of subordinate Crown servants. This also applies to the statement at paragraph 7(b)(iii) in which the Plaintiffs claim that the Minister of Citizenship and Immigration is liable for the actions of his employees and staff.

38 Based on the foregoing, the Defendants say that the Claim does not comply with Rules 174 and 181 respecting the allegations against the Minister of Foreign Affairs. He should be removed as a party to the within action and the Claim should be amended accordingly. In addition, the portions of paragraph 7(b) alleging vicarious liability on the part of the Minister of Foreign Affairs and the Minister of Citizenship and Immigration should be struck.

39 In response, the Plaintiffs argue that, with respect to paragraphs 9 to 23 of the Defendants' submissions:

a. The Minister of Foreign Affairs in statutorily charged with overseeing, *inter alia*, the operations of Canada's embassies and the foreign missions, including the issuance of visas when visa requirements are imposed;

b. Questions with respect to the contact of the two researchers who drafted the "June, 2009 Issue Paper", and the Canadian Embassy were refused answered;

c. The Plaintiffs plead, as a fact, that both the Minister of Citizenship and Foreign Affairs, conspired to:

   (i) Engage in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiffs, and all other Canadians (*sic*); and/or

   (ii) To engage in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, and all other Czech Roma, is to cause injury to the Plaintiffs and all other Czech Roma, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiffs, and all other Czech Roma, is likely to, and does result;

d. The Plaintiffs have pleaded that the actions of the Minister, and his officials, breached their Charter and constitutional rights;

e. While Ministers are generally not named as Defendants, there are exceptions to this, particularly with respect to constitutional and Charter issues and the Plaintiffs state that this is such an exception and that, at this juncture, it is premature to strike any parties from the pleadings. See *Liebmann v Canada (Minister of National Defence)*, [1994] 2 FC 3 and *Cairns v Farm Credit Corp.*, [1992] 2 FC 115.

40 I do not think that the Plaintiffs adequately answer the complaints raised by the Defendants. My reading of the Claim leads me to the conclusion that the Plaintiffs' accusations against the Minister of Foreign Affairs are, as pled, nothing more than speculative allegations and conclusions unsupported by material facts.

41 I agree with the Defendants that, as presently drafted, the Claim does not disclose sufficient material facts to establish and support:

a. Any wrongdoing on the part of the Minister of Foreign Affairs;

b. Any cause of action against him;

c. How the Minister of Foreign Affairs could be vicariously or otherwise liable for the acts and omissions of other people such as staff members at the embassies and visa posts abroad and/or the imposition of visa requirements.

42 As it stands, the allegations against the Minister of Foreign Affairs are bald accusations. If the Plaintiffs wish to establish that the Minister of Foreign Affairs has conspired to cause them injury, then they must set out the facts upon which they rely. As presently drafted, the Claim merely states what the Plaintiffs hope to prove at trial. At this stage, this amounts to a fishing expedition. As the Federal Court of Appeal made clear in *Simon v Canada*, 2011 DTC 5016; 2011 FCA 6, the requirement that a pleading contain a concise statement of the material facts relied upon is a technical requirement with a precise meaning in law. Each constituent element of a cause of action must be pleaded with sufficient particularity. Making allegations without a factual foundation is an abuse of process. In my view, there is nothing clear and/or inferable in the way the Minister of Foreign Affairs is simply accused of wrongdoing on the basis that he has some vague responsibility for overseeing embassies and foreign missions, or that embassy officials are somehow conducting a broad "Ministerial" conspiracy.

43 The Federal Court of Appeal in *Baird v Canada* 2007 FCA 48 affirmed that a statement of claim was fatally flawed where it did not specify a time when the offending activities giving rise to the causes of action took place, and did not specify which Crown servant did something wrong. It is not enough to plead allegations and conclusions. The essential facts grounding a cause of action must be pled.

44 The applicable rules and jurisprudence interpreting those rules, are readily available to the Plaintiffs and their counsel. The failure to plead sufficient material facts to support a claim against the Minister of Foreign Affairs, or particular Crown servants, leads me to conclude that the Plaintiffs have no such facts and are seeking to use these proceedings as a fishing expedition.

Negligence

45 I also agree with the Defendants that the Plaintiffs have not pled, or factually substantiated, the essential elements of the tort of negligence.

46 As the Defendants point out, to support a cause of action in negligence, a statement of claim must include sufficient facts to support the essential elements of the tort. These include establishing a duty of care, providing details of the breach of that duty, explaining the causal connection between the breach of duty and the injury, and setting out the actual loss. Such a claim requires a factual basis that identifies each wrongful act as well as negligence, such as the "when, what, by whom and to whom of the relevant circumstances." See *Benaissa v Canada (Attorney General)* 2005 FC 1220, at paragraph 24.

47 The Plaintiffs make a bald allegation at paragraph 28(b) of the Claim that the "Defendants' officials have been negligent in the exercise of their common-law, statutory, and constitutional duties owed to the Plaintiffs" and that these duties arose in the context of the processing of their refugee claims pursuant to the *Immigration and Refugee Protection Act*. This is followed by unsubstantiated statements that the "Defendants' officials breached this duty of care" and that this caused the Plaintiffs' losses.

48 I agree with the Defendants that such allegations are nothing more than conclusions and are not sufficient to support a cause of action in negligence. No details have been provided to identify the "Defendants' officials," to explain their roles and responsibilities in relation to the Plaintiffs, or to establish their connection to any of the parties. Similarly, the Claim is silent as to the "Defendants' officials" particular acts or omissions that the Plaintiffs' claim were negligent and no facts are included to support the specific "common-law, statutory and constitutional duties" that were allegedly breached. It seems to me that the general requirements for establishing liability in tort have not been met and it would be impossible to conduct the necessary analysis to determine whether liability could be established. As the Defendants point out, this is particularly difficult where the defendant is a government actor. Issues arise as to whether public law discretionary powers establish private law duties owed to particular individuals or whether the decisions in question were policy decisions or operational decisions. These questions are very complex and detailed factual pleadings are required in order to properly determine whether a cause of action exists.

49 As I read the Claim as presently drafted, the majority of the limited factual allegations upon which the claim in negligence is based relate mainly to members of the Board and/or of the Board's Research Directorate. The Defendants are correct to point out that these individuals are not linked to the named Defendants in the Statement of Claim and factual allegations respecting their conduct are insufficient and fail to ground liability in negligence by the named Defendants.

50 All that the Plaintiffs say in general reply is that "the proper and complete context and reading [of all their tort claims] illustrate that the various causes of action are properly pleaded."

51 Once again, if the Claim is read in the light of the relevant rules and governing jurisprudence, I think the Plaintiffs fall a long way short of providing what is required.

Conspiracy

52 The Defendants point out that the Plaintiffs have not pled the essential elements of the tort of conspiracy and that paragraphs 23, 27 and 28(a)(iv) should therefore be struck from the Claim.

53 The Defendants direct the Court to the Supreme Court of Canada decision in *Canada Cement LaFarge Ltd. v British Columbia Lightweight Aggregate Ltd.*, [1983] 1 SCR 452 (SCC) at paragraph 33 for the constituents of the tort of conspiracy:

> ... whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy, if:

1. whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants'conduct is to cause injury to the plaintiff; or,
2. where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff... and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

54 In *Normart Management Ltd. v West Hill Redevelopment Co.*, (1998), 37 OR (3d) 97 (OCA) the Ontario Court of Appeal provided guidance with respect to pleading the tort of conspiracy at paragraphs 21 and 22. Applied to the present context, I think this means that, as the Defendants point out,

a. All the parties to the conspiracy must be identified and their relationship to each other must be described;

b. Agreements between the various defendants must be pled with all facts material to such agreements including the parties to each agreement, the date of the agreement, and the object and purpose of each agreement;

c. Overt acts of each of the alleged conspirators in pursuance or furtherance of the conspiracy must be pled with clarity and precision, including the times and dates of such overt acts; and

d. The pleadings must allege the injury and the damage occasioned to the plaintiffs and special damages in the sense of the monetary loss the plaintiffs have sustained must be pled and particularized.

55 Once again, I have to agree with the Defendants that the Claim is entirely deficient with respect to pleading the elements of the tort of conspiracy. Bald allegations of a conspiracy involving undefined Ministers, the Board, and unidentified "Defendants' officials" are made at paragraphs 23, 27 and 28(a)(iv) without any reference to the above requirements. The Plaintiffs also accuse the "Defendants' officials" of engaging in unlawful conduct at paragraph 28(b)(iii)(A), but provide no details to describe this conduct or establish its unlawfulness. This is scandalous and vexatious.

56 Once again, the Plaintiffs provide no detailed response and say little more than that, in their opinion, they have complied with the rules and the governing jurisprudence.

57 I have to conclude that, once again, when the Claim is read against the rules and governing jurisprudence, the paragraphs alleging conspiracy should be struck.

Misfeasance in Public Office/Abuse of Authority

58 The Defendants make similar complaints in relation to this aspect of the Claim. They say that the Plaintiffs have not pled the essential elements of the tort of misfeasance in public office/abuse of authority, so that, paragraphs 24 and 28(a)(i) and (iii) of the Claim should be struck.

59 In *Freeman-Maloy v Marsden*, (2006) 79 OR (3d) 401, the Ontario Court of Appeal provided the following guidance regarding the constituents of the tort of misfeasance in a public office:

> [10] The tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen. As Lord Steyn put it in *Three Rivers District Council v. Bank of England* (No. 3), [2000] 2 W.L.R. 1220, at p. 1230 W.L.R.: "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes." The "underlying purpose" of the tort of misfeasance in a public office "is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions": *Odhavji*, *supra*, at para. 30.
>
> [11] In *Three Rivers*, *supra*, the House Lords identified the ingredients of the tort as being: (1) the defendant must be a public officer; (2) the claim must arise from the exercise of power as a public officer; and (3) the

> mental element, namely, the defendant must have acted with malice or bad faith. In *Odhavji*, at para. 23, [page407] Iacobucci J. described the elements of the tort in similar terms: "First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff."

60 The Supreme Court of Canada has also provided extensive guidance with regard to this tort. In *Odhavji Estate v Woodhouse* 2003 SCC 69 (SCC), the Supreme Court of Canada emphasized the following:

> 22 What then are the essential ingredients of the tort, at least insofar as it is necessary to determine the issues that arise on the pleadings in this case? In *Three Rivers*, the House of Lords held that the tort of misfeasance in a public office can arise in one of two ways, what I shall call Category A and Category B. Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff. This understanding of the tort has been endorsed by a number of Canadian courts: see for example *Powder Mountain Resorts, supra*, [2001] B.C.J. No. 2172; *Alberta (Minister of Public Works, Supply and Services)* (C.A.), *supra*, [2002] A.J. No. 1474; and *Granite Power Corp. v. Ontario*, [2002] O.J. No. 2188 (QL) (S.C.J.). It is important, however, to recall that the two categories merely represent two different ways in which a public officer can commit the tort; in each instance, the plaintiff must prove each of the tort's constituent elements. It is thus necessary to consider the elements that are common to each form of the tort.
>
> 23 In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such [page282] as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.
>
> 24 Insofar as the nature of the misconduct is concerned, the essential question to be determined is not whether the officer has unlawfully exercised a power actually possessed, but whether the alleged misconduct is deliberate and unlawful. As Lord Hobhouse wrote in *Three Rivers, supra*, at p. 1269:
>
> > The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose.
>
> Lord Millett reached a similar conclusion, namely, that a failure to act can amount to misfeasance in a public office, but only in those circumstances in which the public officer is under a legal obligation to act. Lord Hobhouse stated the principle in the following terms, at p. 1269: "If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance [in a public office]." See also *R. v. Dytham*, [1979] Q.B. 722 (C.A.). So, in the United Kingdom, a failure to act can constitute misfeasance in a public office, but only if the failure to act constitutes a deliberate breach of official duty.
>
> 25 Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999). 70 Alta. L.R. (3d) 267, 1999 ABQB 440, at para. 108, the Court of Queen's Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of: (i) an intentional illegal act; and (ii) an intent to harm an individual or class [page283] of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)* (2001), 156 Man. R. (2d) 14, 2001 MBCA 40, in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts, supra*, Newbury J.A. described the tort in similar terms, at para. 7:

> ... it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in "bad faith in the sense of the exercise of public power for an improper or ulterior motive") or to have acted "unlawfully with a mind of reckless indifference to the illegality of his act" and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231].) Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power -- i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff. [Emphasis in original.]
>
> Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

61 It seems to me, then, that in order to establish a cause of action based on the tort of public misfeasance/abuse of authority, the Claim must meet the following requirements:

a. It must be established that the Defendant(s) is a public officer;

b. The Claim must arise from the exercise of power as a public officer; and

c. The mental element, namely that the Defendant(s) must have acted in bad faith or with malice, must be present.

62 As the Defendants point out, while the Plaintiffs have listed the generic elements of the tort of misfeasance in public office/abuse of authority at paragraph 28(a)(iii) of their Claim, they have failed to provide material facts to substantiate the allegations. Again, the "Defendants' officials" are not identified, there are no particulars respecting the nature of the public offices that particular individuals are alleged to have held, the unidentified "Defendants' officials" are not connected to the named Defendants, and the bald allegation of "unlawful conduct" is not substantiated by material facts. Also, the majority of the factual allegations in the Claim refer to members of the Board and/or of the Board's Research Directorate and their relationship to the named Defendants, or to the "Defendants' officials" is not established in the Claim.

63 With respect to the allegations in this regard against the Minister of Citizenship and Immigration at paragraph 24 of the Claim I agree with the Defendants that insufficient material facts are pled and details of the public comments that were allegedly made are not provided. Paragraph 24 of the Claim is not sufficient to ground a cause of action against the Minister of Citizenship and Immigration based on public misfeasance/abuse of authority.

64 Once again, the Plaintiffs provide no substantial response to these deficiencies in their Claim. They simply say that they disagree and that their Claim complies with the relevant rules and jurisprudence. I cannot accept this position.

65 Based on the foregoing, paragraphs 24 and 28(a)(i) and (iii) of the Claim should be struck, as well as any other reference to the tort of public misfeasance/abuse of authority.

Abuse of Process

66 The Defendants have similar complaints with regard to the abuse of process claims. They say the Plaintiffs have not pled the essential elements of the tort of abuse process and it is not relevant to the within proceedings.

67 An allegation of "abuse of process" is made at paragraph 28(a)(ii) of the Claim. The Plaintiffs assert that unidentified Defendants' officials "engaged in an abuse of process at common law." This allegation is not factually substantiated.

68 The tort of abuse of process usually involves the misuse of the process of the Court to coerce someone in a way that is outside the ambit of the legal claim upon which the Court is asked to adjudicate. The Federal Court of Appeal in *Levi Strauss & Co. v Roadrunner Apparel Inc.* (1997), 76 CPR (3d) 129 (FCA) held that:

> A review of the authorities shows that the essential element of the tort of abuse of process is that the abuser must have used the legal process for a purpose other than that which it was designed to serve, in other words for a collateral, extraneous, ulterior, improper or illicit purpose. The gist of the tort is the misuse of or perversion of the Court's process and there is no abuse when a litigant employs regular legal process to its proper conclusion, even with bad intentions.

69 The Defendants say that it is entirely unclear from the Claim how the tort of abuse of process could be applied to the actions of any of the named Defendants and that, in any case, the elements of the tort have not been pled. For these reasons they say that paragraph 28(a)(ii) should therefore be struck, as well as any other reference to the tort of abuse of process.

70 Once again, the Plaintiffs assert that they have pled this matter appropriately. However, they also say that abuse of process is not restricted to Court proceedings and that it can attach to Ministerial abuse. They say that the essential point is that the Ministers have interfered with the IRB which is supposed to be as independent as the judiciary. The Plaintiffs say that the Ministers and their staffs have interfered with the IRB both by their comments and their actions.

71 Quite apart from whether abuse of process can be applied in this context (basically a legal point that can be left for future determination) it is my view that the Plaintiffs still need to provide the factual underpinnings for the tort. Before the Defendants can properly respond, they still need to know the who, where, when, what and how of these allegations. Factual substantiation is missing from the Claim. For this reason, I think I have to strike paragraph 28(a)(ii) and other reference to the tort of abuse of process.

Conclusions on the Named Torts

72 Generally speaking, then, with regard to the named private law causes of action, I feel that the Defendants' objections to the pleadings are substantially justified, and that the Claim fails to comply with Rule 174 and the "plain and obvious" test posited in *Hunt*, above.

Sections 7 and 15 of the Charter

73 The Defendants allege that the Plaintiffs' allegations at paragraphs 24, 28(a)(v) and 28(b)(iii)(A), (B) and (D) of the Claim respecting alleged breaches of sections 7 and 15 of the Charter are speculative and hypothetical and are not supported by adequate facts. In both respects, the Plaintiffs assert that the actions of unidentified officials of the Defendants breached the Plaintiffs' sections 7 and 15 Charter rights, resulting in damages. They have failed to indicate how one or more of their protected interests have been infringed, and they have also failed to identify the circumstances or context in which the breaches allegedly occurred. I have to agree with the Defendants that the allegations in this regard are stated in the form of conclusions without any factual basis. This does not meet the requirements set out by the Supreme Court of Canada in *MacKay v Manitoba*, [1989] 2 SCR 357.

74 Charter allegations in the Claim that are made in a "factual vacuum" should be struck. In *MacKay*, above, the Supreme Court of Canada provided the following guidance:

> 9 *Charter decisions should not and must not be made in a factual vacuum.* To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter [page362] decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel. [emphasis added]

75 Once again, the Plaintiffs say that their Claim sufficiently pleads the facts and grounds upon which the Defendants can respond to the allegations of Charter breaches, but they have also indicated that they are not adverse to providing particulars if the Defendants require them.

76 Once again, I have to agree that, with regard to sections 7 and 15 and the Charter, the Claim is deficient in the ways alleged by the Defendants.

Redundant and Immaterial Material

77 The Defendants say that, pursuant to subsection 222(1) of the Rules, the Court can strike out a pleading on the ground that it is "immaterial or redundant." Immaterial or redundant allegations in a claim result in useless expense and prejudice the trial by involving the parties in a dispute that is wholly apart from the issues. Similarly, portions of a pleading that are irrelevant or inserted for colour should also be struck as they are scandalous.

78 On this basis, the Defendants seek to strike the following paragraphs from the Claim for the following reasons:

a. Paragraphs 12(c) and 14 - in these paragraphs, the Plaintiffs purport to have knowledge of the opinions of "members of the refugee bar, and others" respecting the June 2009 Report and assert that this ill-defined group predicted that the situation was a repeat of the "Hungarian (Roma) Lead Case." Such opinions cannot be proven, the scope of the group is not clearly identifiable, the allegations are unsubstantiated and they are irrelevant and redundant to the Claim. Such allegations are inserted for colour only and should be struck as they are scandalous and violate the Rules;

b. Paragraph 12(f) and 17 - these paragraphs also refer to the "Hungarian Lead Case" and are argumentative, inserted for colour only, and are irrelevant and redundant to the within Claim;

c. Paragraph 20 - this paragraph refers to the cross-examination of Gordon Ritchie and the Defendants' alleged refusal to answer undertakings. These factual details are irrelevant to the Claim;

d. Paragraph 25 - this paragraph should be struck because it is repetitive of paragraph 28 which is in fact pled with more specificity (although factually insufficient in any event). Paragraph 25 does not refer to a specific cause of action upon which the Plaintiffs base their entitlement to the damages claimed and is redundant;

e. Paragraph 27 - this paragraph is immaterial to the Claim. It refers to the treatment of the Roma during the Holocaust and is inserted for colour only and is redundant.

79 In response, the Plaintiffs simply say that "these 'facts' with respect to the Hungarian Roma Lead Case, in *Geza v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 477, (FCA) were not only pleaded, and advanced, but also further *accepted* by the Court of Appeal in that case."

80 It is difficult to know what the Plaintiffs mean by this allegation, and which "facts" they are referring. *Geza* was not an action and we are in the present case dealing with particular rules of pleadings. The Rules are clear that the pleadings are to contain facts, not evidence. I just do not see, for instance, what the unsubstantiated collective opinion of the immigration bar has to do with the factual underpinnings of this case. The same goes for most of the other points. In my view, the redundant material simply has no place in this Claim and impedes progress towards a clear statement of facts and issues to which the Defendants can respond, and the Court can adjudicate. The Plaintiffs may well feel a sense of historical grievance, and they may have good reason for it, but I think it better to wait until the facts are provided before the government of Canada and the RPD are connected with Hitler's Holocaust and a historical "continuum of persecution." I am well aware of the cases referred to earlier where the Court has refused to strike "surplus" statements that do not give rise to prejudice. However, accusations of this kind are not self-evident facts. All they do is raise the emotional and rhetorical temperature of the action and impede the just, most expeditious and least determination of the action on its merits.

81 I disagree with the Defendants regarding paragraph 12(f) which, although it refers to the "Hungarian Lead Case" and unspecified public comments by Minister Kenney, does allege facts which may be relevant and may help to ground the principal claim of institutional bias.

82 As regards paragraph 25, because paragraph 24 is not substantiated by relevant facts, there is nothing to ground the Minister's alleged public references and the balance of the paragraph is really pleading evidence.

Improperly Pleading Evidence

83 As the Defendants point out, Rule 174 of the Rules directs that a statement of claim shall not include evidence by which the facts of the case are to be proven.

84 On this basis, the Defendants say that the following paragraphs of the Claim should be struck:

a. Paragraph 12(c) - not only should this paragraph be struck on the basis that it is irrelevant and/or immaterial, it also constitutes evidence.;

b. Paragraph 12(g) - this paragraph lists the credentials of Paul St. Clair. This is evidence that has no place in the Claim;

c. Paragraph 14 - as noted above, this paragraph purports to confirm the opinion in the minds of "anyone involved with refugees, particularly the members of the immigration bar" which could constitute evidence.

85 The Plaintiffs provide little by way of response on this issue other than disagreement. There is significant overlap here with other grounds of complaint and I think I have said enough already to explain why I agree with the Defendants on these points.

Miscellaneous Deficiencies

86 The Defendants also complain of the following deficiencies:

a. The term "Minister" is used throughout the Claim without proper specificity given that two Ministers are named as Defendants. In this regard, it is unclear which Minister the Plaintiffs are referring to in certain sections of the Claim. Further, the Plaintiffs appear to use the Minister of Immigration, Minister Kenney, Minister, Immigration Minister and the Minister of Citizenship and Immigration interchangeably (see, for example, paragraph 12(b), 12(c), 22 and 24.) Such terminology must be clarified so that the Defendants can properly respond to the Claim;

b. The Plaintiffs have not defined or listed the statutory provisions or legislation upon which they rely despite making numerous, vague references to statutory breaches through the Claim;

c. The relief outlined in paragraph 6 of the Claim is duplicative of the relief outlined in paragraph 1(a) to (d). As well, the Plaintiffs have only particularized their damages with respect to their negligence claim.

87 Given that I have already accepted the Defendants arguments as outlined above, I think that these difficulties disappear and/or do not sufficiently offend the Rules to warrant striking.

Conclusions

88 It seems to me that the Defendants have provided ample authority and justification for striking certain portions of the Claim as outlined above.

89 In *George v Harris*, [2000] OJ No 1762, at paragraph 20, Justice Epstein, then of the Ontario Superior Court of Justice, provided examples of what constitutes a "scandalous," "frivolous" or "vexatious" document:

i. A document that demonstrates a complete absence of material facts;

ii. Portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations;

iii. A document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative, unsupported allegations of defamation;

iv. Documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters.

90 A statement of claim containing bare assertions but no facts on which to base those assertions discloses no reasonable cause of action and may also be struck as an abuse of process. Furthermore, as indicated above, a claimant is not entitled to rely on the possibility that new facts may arise as the case progresses. On the contrary, the facts must be pled in the initial claim. The question of whether those facts can be proven is a separate issue, but they must be pled nonetheless.

91 The authorities cited above also show that when a particular cause of action is pled, the claim must contain pleadings of fact that satisfy all of the necessary elements of that cause of action. Otherwise, it will be plain and obvious that the claim discloses no reasonable cause of action.

92 A statement of claim will also be struck on the grounds that it is so unruly that the scope of the proceedings is unclear. As stated by this Court in *Ceminchuk v Canada*, [1995] FCJ No 914, at paragraph 10

> A scandalous, vexatious or frivolous action may not only be one in which the claimant can present no rational argument, based upon the evidence or law, in support of the claim, but also may be an action in which the pleadings are so deficient in factual material that the defendant cannot know how to answer, and a court will be unable to regulate the proceedings. It is an action without reasonable cause, which will not lead to a practical result.

93 The Plaintiffs claim that this motion to strike is premature and the Defendants were obliged to request particulars first. However, as pointed out above, I think the jurisprudence of the Court is clear that there is no obligation on defendants to demand particulars and a plaintiff cannot cure an otherwise deficient statement of claim by arguing that the defendants have not sought particulars. See *Paul v Kingsclear Indian Band*, (1997), 132 FTR 145 (TD).

Amendments

94 I have no motion or request before me from the Plaintiffs that they be allowed to amend their Claim to correct the deficiencies outlined above. By and large, they have simply alleged that they have already pled in accordance with the relevant rules and governing jurisprudence. For the most part, and for reasons given, I cannot accept this position. I am well aware that an amendment should be allowed where a claim might possibly succeed if the pleading is amended and that to deny an amendment there must be no scintilla of a cause of action. See *Larden v Canada* (1998), 145 FTR 140. However, the Plaintiffs have not sought leave to amend and I have nothing before me to suggest that the Plaintiffs can establish the scintilla of a cause of action in relation to those portions of the Claim that have been struck.

95 It will soon be a year since I ordered this matter converted to an action, and yet we are still dealing with the fundamentals of the Claim. The time has come to adopt a more urgent approach to this action and I want counsel on both sides to acknowledge this factor and to proceed and conduct themselves accordingly. I know that Mr. Galati plans to take a break during the rest of January and February, but he has indicated he can be available to deal with this file during March 2012. In any event, the matter cannot be allowed to drag on and both counsel must expect to have to prioritize this action in future. Both sides acknowledge the importance of the issues raised for the immigration system generally and there is already a significant body of applications in this Court awaiting the outcome of these proceedings. That body will grow and will, eventually, begin to cause problems for the administration of justice in this Court, as well as for the handling of cases before the IRB. This uncertainty must be addressed quickly and the Court will be looking for counsel's enhanced assistance in ensuring the just, most expeditious and least expensive determination of the merits.

ORDER

THIS COURT ORDERS that

1. For reasons given, the following are struck from the Amended Statement of Claim pursuant to Rule 221(1) of the *Federal Court Rules* without leave to amend:
   (i) Paragraph 6(b)
   (ii) Paragraph 12(c);
   (iii) Paragraph 14;
   (iv) Paragraph 17;
   (v) Paragraph 20;
   (vi) Paragraph 24;
   (vii) Paragraph 25;
   (viii) Paragraph 27;
   (ix) Paragraph 12(g);
   (x) The Minister of Foreign Affairs as a party;
   (xi) All references to the Minister of Foreign Affairs in the body of the Claim;
   (xii) Paragraph 28(b) and all other references to the tort of negligence;
   (xiii) Paragraphs 23, 27 and 28(a)(iv) and all references to the tort of conspiracy;
   (xiv) Paragraphs 24, 28(a)(i) and (iii) and all references to the tort of public misfeasance/abuse of authority;
   (xv) Paragraphs 28(a)(ii) and all references to the tort of abuse of process;
   (xvi) All allegations of breach of sections 7 and 15 of the Charter contained in paragraphs 24, 28(a)(v), 28(b)(iii)(A), (B) and (D), and elsewhere in the claim.
2. The Defendants shall have the costs of this motion.
3. Counsel will confer and prepare and provide to the Court on or before March 20th, 2012, an itemized list of the further steps to be taken in this action and a preliminary timetable for accomplishing them. If necessary, the Court will then establish the time for a conference meeting to discuss and resolve points of concern.

RUSSELL J.

End of Document

Wang v. Canada, [2016] F.C.J. No. 1502

Federal Court Judgments

Federal Court

Toronto, Ontario

R.L. Barnes J.

Heard: May 16, 2016.

Judgment: September 16, 2016.

Docket: T-1747-15

[2016] F.C.J. No. 1502 | [2016] A.C.F. no 1502 | 2016 FC 1052

Between Zhenhua Wang and Chunxiang Yan, Plaintiffs, and Her Majesty the Queen, Oxana M. Kowalyk (Id Member), Susy Kim (Id Member), Iris Kohler (Id Member), Officer O'hara (CBSA Officer), Hal Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/CIC Officials Unknown to the Plaintiffs, Involved in the Arrest, Detention and Continued Detention of the Plaintiffs, Linda Lizotte-Macpherson, President of the CBSA, Minister of Public Safety and Emergency Preparedness, Minister of Citizenship and Immigration, Attorney General of Canada, Defendants

(32 paras.)

Counsel

Mr. Rocco Galati, for the Plaintiffs.

Mr. Jonathan Dawe, Mr. Michael Dineen, for the Defendants, Oxana M. Kowalyk (Id Member), Susy Kim (Id Member), Iris Kohler (Id Member).

Mr. Jamie Todd, Ms. Ildiko Erdei, for the Defendants, Officer O'hara (CBSA Officer), Hal Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/CIC Officials Unknown to the Plaintiffs, Involved in the Arrest, Detention and Continued Detention of the Plaintiffs, Linda Lizotte-Macpherson, President of the CBSA, Minister of Public Safety and Emergency Preparedness, Minister of Citizenship and Immigration, Attorney General of Canada.

ORDER AND REASONS

R.L. BARNES J.

1 On these motions the Defendants seek relief under Rule 221 of the *Federal Courts Rules*, SOR/98-106, striking out the Statement of Claim filed by the Plaintiffs in this action on the basis that it discloses no viable cause of action, is scandalous, frivolous or vexatious, is an abuse of the process of the Court and is barred by cause of action estoppel.

2 At the outset of argument the Plaintiffs conceded that the claims asserted against the President of the Canada Border Services Agency [CBSA], the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration [CIC] should be struck. In the result the action is dismissed as against those parties.

What remains for determination is whether the claims against the remaining Defendants should be struck and, if so, on what terms.

3 In order to apply the legal principles relied upon by the parties it is necessary to consider the specific allegations in the Plaintiffs' 65 page Statement of Claim.

4 The Plaintiffs' complaint arises out of their arrest and detention at the hands of the CBSA on March 7, 2014. Among other allegations the Plaintiffs say that they were wrongfully arrested and unlawfully detained on the strength of false information that CBSA and CIC officials either knowingly or negligently relied upon in the prosecution of the Plaintiffs' ongoing immigration detentions. Included in the claims against the named and unnamed officials are allegations that they misrepresented evidence, conspired to deprive the Plaintiffs of a fair hearing, and sought to punish the Plaintiffs for bringing refugee claims.

5 Some representative passages concerning the alleged conduct of the CBSA and CIC officers are set out below:

> * The Arrest and Detention of Plaintiffs in Canada
>
> 87. Prior to, and up to being arrested by the CBSA on March 7th, 2014, the Plaintiffs were subject to the following actionable conduct by the CBSA/CIC officials:
>
> (a) negligent investigation in refusing to properly investigate the facts and evidence put forward by the Plaintiffs; and relying solely on the false information provided by those who defrauded the Plaintiffs, as well as officials of the People's Republic of China, and who were defendants in Ontario civil actions for that fraud and other criminal acts, for which negligent investigation the CBSA/CIC officers, and Her Majesty the Queen are liable, in that:
>
> (i) the officers owed a common-law and statutory duty of care to competently investigate prior to arrest and detention;
>
> (ii) the officer(s) breached that duty of care; and
>
> (iii) as a result of that breach they caused the Plaintiffs compensable damages;
>
> (b) that the initial duty to competently investigate is owed to the present day, which has been flagrantly breached and ignored by the named and unnamed CBSA/CIC officers, notwithstanding more comprehensive and updated information and evidence provided by Plaintiffs' counsel;
>
> (c) engaged in abuse and excess of authority, and misfeasance of public office for the facts set out above, by:
>
> (i) refusing disclosure undertaken and resisting disclosure due to the Plaintiffs;
>
> (ii) misrepresenting the nature and quality of the evidence against the Plaintiffs;
>
> (iii) acting in bad faith, and absence of good faith, continued to shift the grounds, for continued detention against the Plaintiffs;
>
> (iv) sought the continued detention of the Plaintiffs, as punishment, because the Plaintiffs made refugee claims, refugee claims necessitated by the actions of the Defendant CBSA/CIC officials who have now, knowingly, exposed the Plaintiffs to torture and/or death if returned to China;
>
> (v) refusing to properly investigate;
>
> (d) conspired to deprive the Plaintiffs of their statutory and constitutional rights, to be free of arbitrary and unlawful arrest and detention as set out below in this statement of claim;
>
> (e) breached the Plaintiffs' constitutional right(s) to counsel; and
>
> (f) otherwise breached their rights under s. 7 of the ***Charter***, to life, liberty, and security of the person, in a matter inconsistent with the tenets of fundamental justice, and contrary to s. 15 of

the ***Charter***, by discriminating against the Plaintiffs based on their status as wealthy Chinese nationals, with respect to their investigation, arrest, detention, and continued detention of the Plaintiffs.

. . .

102. Prior to, and during, the 1st detention review, the Defendant CBSA/CIC officials at the hearing, engaged in the following actionable conduct:

(a) they continued to engage in negligent investigation as set out above;

(b) they engaged in abuse of process, and abuse and excess of authority, and misfeasance of public office by:

(i) refusing disclosure undertaken and owed to the Plaintiffs;

(ii) misrepresenting the nature and quality of the evidence against the Plaintiffs';

(iii) in bad faith, and absence of good faith, shifted the grounds, for continued detention against the Plaintiffs;

(iv) sought the continued detention of the Plaintiffs, as punishment, because the Plaintiffs made refugee claims, refugee claims necessitated by the actions of the Defendant CBSA/CIC officials who have now, knowingly, exposed the Plaintiffs to torture and/or death if returned to China;

(c) conspired to deprive the Plaintiffs of a fair hearing, and further conspired to continue the Plaintiffs' unlawful and arbitrary arrest and detention by:

  (i) engaging in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiffs; and/or

  (ii) engaging, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, is to cause injury to the Plaintiffs, or the Defendants' officials should know, in the circumstances, that injury to the Plaintiffs, is likely to, and does result;

(d) continued to breach the Plaintiffs' right to counsel and effective right to assistance of assistance of counsel;

(e) endangered the lives of the Plaintiffs if ever returned to China; and

(f) otherwise breached their rights under s. 7 of the ***Charter***, to life, liberty, and security of the person, in a matter inconsistent with the tenets of fundamental justice, and contrary to s. 15 of the ***Charter***, by discriminating against the Plaintiffs based on their status as wealthy Chinese nationals, with respect to their investigation, arrest, detention, and continued detention of the Plaintiffs.

6 In this action the Plaintiffs also seek damages from three members of the Immigration Division (collectively the ID Members) for unlawfully maintaining the Plaintiffs' detention in the context of three detention reviews. Each of the impugned decisions was overturned by this Court on judicial review. The Plaintiffs' claims are based, in part, on an assertion that ID Members Kowalyk, Kim and Kohler are liable in damages for failing to follow the Federal Court orders that quashed the earlier detention review decisions and for a variety of other adjudicative errors. Parts of the Statement of Claim assert causes of actions in negligence and others assert fraud and malice.

7 The material allegations made against the ID Members are the following:

MEMBER KOWALYK

106. In making her decision, on December 11th, 2014, ID Member O.M. Kowalyk, which decision was made in bad faith, and absence of good faith, the ID Member, with knowledge and intent

and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs by:

(a) making substantive determinations with respect to the strength and ***bona fides*** of the Plaintiffs' refugee claims which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(b) making rulings diametrically opposed to binding Federal Court orders and judgments;

(c) knowingly misapplying the jurisprudence to the facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(d) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(e) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(f) doing all of the above set out in (a)- (e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding jurisprudence, and the knowledge, experience, and expertise of the Member which spans just over 30 years as an Adjudicator and ID member conducting detention reviews.

...

109. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Kowalyk, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

...

MEMBER KIM

114. In making her decision, on April 2nd, 2015, ID Member Susy Kim, which decision was made in bad faith, and absence of good faith, the ID Member, with knowledge and intent and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs:

(a) making rulings diametrically opposed to binding Federal Court orders and judgment of Justice Phelan and knowingly ignored and contradicted Justice Phelan's judgment on judicial review;

(b) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(c) making rulings diametrically opposed to binding Federal Court orders and judgments;

(d) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(e) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(f) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(g) doing all of the above set out in (a)- (e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding Federal Court jurisprudence, including that of the previous, successful judicial review, by the Federal Court, of the previous detention review of Oxana M. Kowalyk.

...

116. The Member's decision essentially adopted and rehashed the decision of the previous ID Member (Kowalyk). This is referenced in Justice Gagne's decision, at paragraph 48, as quoted in the previous paragraph of this Statement of Claim. The decision further ignores and flies in the face of the judicial review conducted by Justice Phelan of ID Member Kowalski's decision, whereby ID Member Kim knowingly adopts Kowalyk's errors to fly in the face of the Federal Court decision quashing Kowalyk's decision.

117. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Susy Kim, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

...

MEMBER KOHLER

143. In making her decision, which decision was made in bad faith, and absence of good faith, the ID Member, Iris Kohler, with knowledge and intent and sole purpose of the continued detention of the Plaintiffs, contrary to law, engaged in the following conduct, and made the following baseless findings, with intention and knowledge, in bad faith and absence of good faith, for the sole purpose of continuing the unlawful detention of the Plaintiffs:

(a) making rulings diametrically opposed to binding Federal Court orders and judgments;

(b) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;

(c) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;

(d) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;

(e) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and

(f) doing all of the above set out in (a)- (e), with discrimination, contrary to s. 15 of the ***Charter* ,** because the Plaintiffs are wealthy Chinese nationals;

which conduct and findings were contrary to the binding Federal Court jurisprudence, including that of previous, successful judicial reviews, by the Federal Court, of previous detention reviews, by Justice Phelan and Justice Gagné, as set out above.

...

146. Furthermore, ID Member Kolher's decision, rehashes and repeats the reasons of the previous two ID Members' decisions, with a number of paragraphs being extracted and merged from ID Member Kowalyk's, and ID Member Kim's decision, which findings and conclusions knowingly, and with the sole intent to continue the detention of the Plaintiffs, fly in the face of the previous two Federal Court decisions of Justice Phelan and Justice Gagné.

> 147. The Plaintiffs state and the fact is that the errors cited by the Federal Court were not "errors" by Member Iris Kohler, but made knowingly by her, in bad faith, and absence of good faith, intentionally designed for the purpose of continuing the Plaintiffs' unlawful and unconstitutional detention.

8 In addition to the above allegations, the Statement of Claim includes prolix, unfocussed and generalized accusations of a conspiracy to harm the Plaintiffs carried out by the named Defendants and other unnamed government officials. It is not possible to tell whether the ID Members are included in all of the conspiracy allegations but, in a few instances, they are expressly identified. For the most part, these conspiracy allegations simply repeat the earlier pleading of individualized bad faith set out above. Below are the key conspiracy allegations specific to the ID Members:

> (d) that the ID members, Oxana Kowalyk, Susy Kim, Iris Kohler, have also done so in a separate and overlapping conspiracy, by:
>
> (i) making substantive determinations with respect to the Plaintiffs' refugee hearings which are outside the jurisdiction of the ID, and the exclusive jurisdiction of the RPD (Refugee Protection Division) of the IRB;
>
> (ii) making rulings diametrically opposed to binding Federal Court orders and judgments particularly the Federal Court orders and judgment made with respect to the Plaintiffs; on judicial review(s) of their detention;
>
> (iii) knowingly misapplying the jurisprudence to facts of the Plaintiffs' detention with the intention to continue the unlawful and arbitrary detention of the Plaintiffs;
>
> (iv) refusing a release plan, which has been accepted as a release plan, for those accused of (association with) terrorism in Canada;
>
> (v) knowingly making capricious and perverse findings of fact and law, with the knowledge and intention of continuing the detention of the Plaintiffs; and
>
> (vi) doing all of the above set out in (a)-(e), based on discrimination, contrary to s. 15 of the ***Charter***, because the Plaintiffs are wealthy Chinese nationals;
>
> ...
>
> 155. The Plaintiffs further state that actions of the named and unnamed CBSA/CIC officers, in conjunction with the ID Members, at the behest and false information from agents of the People's Republic of China, and the fraudsters Szeto and Chen, with the resulting unlawful and unconstitutional detention, constitute torture and unusual treatment contrary to the ***Convention Against Torture and Other Cruel or Unusual Treatment***, and also constitutes a crime against humanity contrary to, ***inter alia***, s. 6 of the ***Crimes Against Humanity Act***, as well as an offence under the ***Criminal Code of Canada***. The Plaintiffs state, and fact is, that the named and unnamed officials, in furtherance of attempting to remove the Plaintiffs to China, are acting as ***de facto*** agents for the People's Republic of China, and in fact are accessories, co-conspirators with the attempt to deliver the Plaintiffs to torture, and unlawful imprisonment and/ or death. This conspiracy, and over-lapping conspiracies, and unlawful and unconstitutional conduct, through the knowledge and willful conduct of the above-noted officials, in bad faith and the absence of good faith, also grounds the basis for civil and constitutional torts and liability.
>
> ...
>
> 158. The Plaintiffs further state that this entire process, is a statutory and constitutional abuse of process, by way of disguised extradition, on false information obtained from fraudsters and officials of a dictatorial regime, with a refusal by Canadian officials to properly and competently investigate, to remove at the request of a regime that engages in ***inter alia***, torture, without the procedural and substantive safeguards of the ***Extradition Act***, which the named and unnamed officials, and ID

> Members, know run contrary to the Royal Commission Inquiry conducted with respect to Maher Arar, and its report and recommendations, as well as the Ontario Court of Appeal decision (leave to the SCC denied), finding it constitutionally impermissible to extradite based on information obtained by torture, as set out in ***USA v. Kadr***, which decision is a document referred to in the pleadings herein.

9 In one concluding passage, the Statement of Claim asserts that the ID Members, among others, were acting "as ***de facto*** agents of the People's Republic of China, in what amounts to a disguised and baseless extradition" (see para 156 (vi)).

I. Analysis

10 Rule 221 of the *Federal Courts Rules* applies to these motions and provides for relief on the following basis:

> STRIKING OUT PLEADINGS
>
> 221 (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> (a) discloses no reasonable cause of action or defence, as the case may be,
>
> (b) is immaterial or redundant,
>
> (c) is scandalous, frivolous or vexatious,
>
> (d) may prejudice or delay the fair trial of the action,
>
> (e) constitutes a departure from a previous pleading, or
>
> (f) is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.
>
> (2) No evidence shall be heard on a motion for an order under paragraph (1)(a).

* * *

> RADIATION D'ACTES DE PROCÉDURE
>
> 221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
>
> a) qu'il ne révèle aucune cause d'action ou de défense valable;
>
> b) qu'il n'est pas pertinent ou qu'il est redondant;
>
> c) qu'il est scandaleux, frivole ou vexatoire;
>
> d) qu'il risque de nuire à l'instruction équitable de l'action ou de la retarder;
>
> e) qu'il diverge d'un acte de procédure antérieur;
>
> f) qu'il constitue autrement un abus de procédure.
>
> Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.
>
> (2) Aucune preuve n'est admissible dans le cadre d'une requête invoquant le motif visé à l'alinéa (1)a).

11 The Defendants all contend that the Statement of Claim discloses no cause of action known to law and is scandalous, frivolous and vexatious. They also argue that a markedly similar Statement of Claim was struck out by the Ontario Superior Court as disclosing no viable cause of action, thus rendering this proceeding an abuse of process by relitigation or subject to cause of action estoppel. The Immigration Division members also rely on the immunity that is afforded to them by section 156(a) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA].

II. The claims against the ID Members

12 There is no question that the claims advanced against the ID Members in the performance of their adjudicative duties are protected by a strongly worded immunity provision. Section 156 of IRPA states:

> 156. Immunity and no summons -- The following rules apply to the Chairperson and the members in respect of the exercise or purported exercise of their functions under this Act:
>
> (a) no criminal or civil proceedings lie against them for anything done or omitted to be done in good faith; and
>
> (b) they are not competent or compellable to appear as a witness in any civil proceedings.

13 Mr. Galati opposes the motion to strike the claims against the ID Members on the basis that the Court must take the pleaded facts as provable. He asserts that it is only where it is plain and obvious that a pleading is bad that it can be struck: see, for instance, *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at page 980, 74 DLR (4th) 321. Motions to strike under Rule 221 of the *Federal Courts Rules* are, of course, also subject to Rule 174 requiring that every pleading contain "a concise statement of the material facts on which the party relies".

14 While I accept that, on a motion to strike, the Court must take the pleaded facts to be provable and should only strike in the clearest of cases, at the same time not every legal theory that can be imagined by the creative legal mind must be entertained. For instance, I do not agree that this Court must accept, as potentially viable, fanciful interpretations of the scope of immunity afforded to the ID Members by section 156 of IRPA. An example of such an argument is the Plaintiffs' contention that they are entitled to pursue a cause of action for the negligent enforcement of a judicial decree (*i.e.*, the Federal Court judgments). The Plaintiffs advance this claim on the strength of the decision in *Holland v Saskatchewan*, 2008 SCC 42, [2008] 2 SCR 551. That case, of course, involved an allegation of negligent implementation of a judicial decree and not negligent adjudication. In the face of the broad immunity created by section 156, it is plain and obvious that this allegation and any similar allegation could not, in the absence of pleaded material facts bearing on bad faith, possibly succeed.

15 The same can be said of the allegations concerning ostensible errors made by the ID Members. The Statement of Claim does not survive a motion to strike by the pleading of a series of supposed errors followed by a bare assertion of bad faith and conspiracy. Indeed, all of the conspiracy allegations are purely speculative and improper. To assert without any factual foundation that the ID Members were engaged in a conspiracy to harm the Plaintiffs with the CBSA and CIC officials and were acting as de facto agents of the Chinese authorities is particularly scandalous and improper. What the record actually discloses is that the ID Members produced thoughtful and thorough decisions. This Court found some discrete reviewable errors in their decisions but identified nothing blameworthy and returned the cases for redetermination. The remedy for adjudicative error lies in judicial review and not in a collateral action seeking damages.

16 What the Court must still consider is whether some remainder of the Statement of Claim would, if proven, be sufficient to escape the confines of section 156. To determine this, it is necessary to consider the basic principles with respect to pleadings. The fundamental purpose and rule of pleadings were discussed by Justice Eric Bowie in *Zelinski v the Queen*, [2002] 1 CTC 2422, [2002] DTC 1204 (TCC) and recently endorsed by Justice Wyman Webb in *Beima v Canada*, 2016 FCA 205, [2016] F.C.J. No 907 (QL):

> 4 The purpose of pleadings is to define the issues in dispute between the parties for the purposes of production, discovery and trial. What is required of a party pleading is to set forth a concise statement of the material facts upon which she relies. Material facts are those facts which, if established at the trial, will tend to show that the party pleading is entitled to the relief sought ...
>
> 5 The applicable principle is stated in Holmsted and Watson [Ontario Civil Procedure, Vol. 3, pages 25-20 to 25-21]:
>
>> This is the rule of pleading: all of the other pleading rules are essentially corollaries or qualifications to this basic rule that the pleader must state the material facts relied upon for his or her claim or defence. The rule involves four separate elements: (1) every pleading must state facts, not mere conclusions of law; (2) it must state material facts and not include facts which are immaterial; (3) it must state facts

> and not the evidence by which they are to be proved; (4) it must state facts concisely in a summary form.

17 The question is therefore whether the Statement of Claim contains any material factual allegations that could support a finding of bad faith on the part of any of the ID Members in the discharge of their adjudicative functions. In this context, bad faith requires proof of deliberate dishonest conduct by each of the ID Members in carrying out their detention review responsibilities.

18 An assessment of the Statement of Claim must begin with an appreciation of the legal principles that distinguish between speculative or conclusory allegations and those that are sufficiently particularized to be subjected to further judicial scrutiny (*i.e.*, material facts that are capable of supporting a potentially viable cause of action). This distinction is discussed by Justice David Stratas in *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184, 321 DLR (4th) 301 [*Merchant Law*] in the following passage:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; *Vojic v. Canada (M.N.R.)*, [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). "The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
>
> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, *i.e.*, deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

19 More recently, Justice Michael Manson discussed the need for particulars when pleadings allege fraud or malice. His comments in *Tomchin v Canada*, 2015 FC 402, 332 CRR (2d) 64 [*Tomchin*] are particularly apt on this motion:

> [21] In order to strike a pleading on the ground that it does not disclose a reasonable cause of action, those allegations that are properly pleaded as concise material facts and are capable of being proved must be taken as true (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959; *Federal Court Rules*, Rule 174). However, that rule does not apply to allegations based on assumptions and speculation (*Operation Dismantle Inc v Canada*, [1985] 1 SCR 441 at para 27).
>
> [22] As well, any pleading of misrepresentation, fraud, malice or fraudulent intent must provide particulars of each and every allegation; bald allegations of bad faith, ulterior motives or *ultra vires* activities is both "scandalous, frivolous and vexatious", and an abuse of process of this Court (*Federal Court Rules*, Rule 191; *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 at paras 34-35).
>
> ...
>
> [38] Throughout the Statement of Claim, the Plaintiff alleges bad faith and ulterior motives on the part of the Defendants. However, I agree with the Defendants that the allegations are purely speculative and none of

> the statements are supported by the facts as pleaded. What the facts show is nothing other than legitimate, *intra vires* reasons for the Plaintiff's interview, investigation and detention by CBSA.
>
> ...
>
> [47] The pleading as a whole is replete with opinion and conclusory statements, devoid of the concise, material facts needed to support a viable cause of action. I agree with the Defendants that the Statement of Claim appears to have been filed for collateral purposes, in the hopes that a fishing expedition may yield some claim of substance that may somehow support the Plaintiff's desire for a remedy against the Defendants. His position is simply wrong (*Kastner v Painblanc,* [1994] F.C.J. No 1671 at para 4 (FCA)).

20 The allegations made by the Plaintiffs against the ID Members in this proceeding are bad for the same reasons identified in the *Merchant Law* and *Tomchin* decisions noted above. The allegations of bad faith and malice are merely conclusions unsupported by any material facts. The allegation of a conspiracy in concert with the People's Republic of China is particularly troublesome. In the absence of any supporting facts it is a scandalous allegation and, in that form, should never have been pleaded.

21 I can only conclude from the total absence of particulars that the claims made against the ID Members were solely intended to embarrass those Defendants for making detention rulings adverse to the Plaintiffs' interests. In the result, all of the claims against the ID Members are struck out without leave to amend and the action is dismissed as against each of them.

22 The ID Members are entitled to their costs in the action. Having regard to the scandalous nature of the allegations made against them, an increased award of costs is justified. These Defendants are awarded $5,500 payable within 30 days by the Plaintiffs, jointly and severally.

III. The claims against the CBSA and CIC

23 One of the principal arguments advanced on behalf of the CBSA and CIC Defendants is that this action is an abusive relitigation of a very similar cause of action dismissed by the Ontario Superior Court of Justice. To fairly address this argument it is necessary to examine the scope and disposition of that earlier action.

24 The Statement of Claim issued on behalf of the Plaintiffs in the Ontario Superior Court of Justice named, among other parties, CIC and the CBSA as Defendants. That Statement of Claim sets out, almost verbatim, much of the factual history contained in the Federal Court Statement of Claim (see for example paras 16-18 and 76-99).

25 Nevertheless, the specific allegations directed at the conduct of CIC and the CBSA in the Ontario pleading were limited to the following:

> 62. CIC and CBSA knew, or ought to have known, at the time that the application forms were submitted by Chen and Szeto, that Chen and Szeto were not licensed or approved immigration consultants or professionals, and that they were submitting the application documents contrary to the IRPA s. 91(1).
>
> 63. Furthermore, subsequent to Ms. Yan and Mr. Wang's discovery that Chen and Szeto were not licensed to submit immigration applications, and subsequent to their discovery of significant other misrepresentations and frauds perpetuated against them by Chen and Szeto, CIC and CBSA were notified by letters dated, respectively, January 27, 2014 and February 5, 2014 from counsel for Ms. Yan and Mr. Wang, specifically advising CIC and CBSA that:
>
>   (a) Ms. Yan and Mr. Wang had discovered that Chen and Szeto were not licensed or approved immigration consultants and were not licensed or qualified to complete and submit applications to Canada Immigration on their behalf;
>
>   (b) Ms. Yan and Mr. Wang had reason to believe that Chen and Szeto had provided incorrect information on the applications;

(c) Chen and Szeto had threatened repeatedly to make false reports regarding Ms. Yan and Mr. Wang to CBSA and Canada Immigration in the course of continued attempts at extorting funds from Ms. Yan and Mr. Wang. Because of the legal actions and criminal complaints made by Ms. Yan and Mr. Wang against Chen and Szeto, Ms. Yan and Mr. Wang had reason to believe that Chen and Szeto had made and were continuing to make false allegations to CBSA and CIC against Ms. Yan and Mr. Wang; and

(d) Ms. Yan and Mr. Wang were requesting copies of all application documents submitted on their behalf by Chen and Szeto.

64. Ms. Yan and Mr. Wang have to date received no response whatsoever from CBSA or CIC to the January 27th and February 5th letters.

65. Therefore, in addition to the fact that CIC and CBSA should have known that Chen and Szeto were in breach of s. 91(1) of the IRPA at the time of submission of the purported application, CIC and CBSA should certainly have known, and commenced a specific investigation and consulted with Ms. Yan and Mr. Wang's counsel, after receipt of their counsel's February notice letter.

66. Further, having received the latest application in or about 2013, and possibly previous applications from Chen and Szeto prior to that time, and then the February notification from counsel for Yan and Mr. Wang, CBSA should then have known that they were relying upon documents, the preparation of which were a criminal offence by Chen and Szeto contrary to s. 91(1) of the IRPA.

67. Knowing that the preparation of the application documents was a criminal offence by third parties, the CBSA should not have instructed its counsel to rely upon information on those documents to continue the detention and deny the freedom of Ms. Yan and Mr. Wang.

68. Chen and Szeto were not licensed or approved immigration consultants, and they were submitting the application documents contrary to the IRPA s. 91(1).

...

74. The CBSA's arrest disclosure referred to "tips" that they received in respect of Ms. Yan and Mr. Wang.

75. Ms. Yan and Mr. Wang believe that their concerns, set out in their counsel's February 2014 letter to CIC and CBSA, were correct and that Chen and Szeto made false report to the Canadian immigration agencies including CIC and CBSA, as well as false reports to the embassy, national government, and provincial government of China, as well as false reports to the Dominican Republic, all falsely claiming improperly actions and activities by the Plaintiffs.

...

109. The plaintiffs state pleading that they have suffered damages as a result of the Citizenship and Immigration Canada and Canada Border Services Agency failure:

(a) to identify and take preventative steps because, at the time that the application forms were submitted by Chen and Szeto, Chen and Szeto were not licensed or approved immigration consultants or professionals, and that they were submitting the application documents contrary to the IRPA s. 91(1);

(b) to take preventative action, including contacting counsel for the plaintiffs, upon receipt of counsel's letter in February 2014 warning that Chen and Szeto were not licensed and may have file false information regarding the plaintiffs;

(c) to refrain from using documents prepared by Chen and Szeto and relying upon "tips" from Chen and Szeto as a part of the basis for investigation and detention of the plaintiffs; and

(d) to refrain from CBSA instructing its Minister's Counsel to rely on documents prepared by Chen and Szeto in submissions at Detention Hearings to continue the detention of the plaintiffs.

26 Not surprisingly, the Attorney General of Canada moved to strike the Ontario Statement of Claim as it related to CIC and the CBSA on the basis that it disclosed no cause of action and was otherwise frivolous, vexatious and an abuse of the Court process. On the day the motion was to be heard, the Plaintiffs' then counsel (not Mr. Galati) requested and obtained an adjournment based, in part, on an argument that "new facts" had emerged "which inform the Plaintiffs' case against the moving Defendants". Plaintiffs' counsel also advised the Court that he intended to amend the Statement of Claim. Thrown-away costs were awarded to the Attorney General in the amount of $2,500.00, payable within 30 days.

27 The Attorney General brought the motion to strike back before the Court on June 17, 2015. Plaintiffs' counsel failed to file any responding material and seems not to have opposed the motion. Indeed, in an apparent effort to avoid the motion to strike, the Plaintiffs filed a Notice of Discontinuance on June 11, 2015. Justice Edward Belobaba described the filing of the Notice of Discontinuance as "improper" and of no effect. He went on to strike the claims against the Attorney General without leave to amend on the following basis:

> The AG Canada's motion to strike St. of Claim as against AG Canada (CIC & CBSA) w/o leave to amend is granted. Unopposed. No reasonable cause of action is created by not investigating s 91 IRPA breaches. Ps have not alleged insufficient legal basis for detention. I agree with and adopt AG's submissions in paras. 35- 37, 38-40 and 41-43, 45 and 50 of AG's Factum.

28 By reference Justice Belobaba adopted the following points from the Attorney General's written arguments:

> 35. There is nothing in *IRPA* that imposes a duty on CIC or CBSA to investigate or take action against anyone who contravenes s. 91 by giving representation or advice in an immigration proceeding or application for consideration.
>
> 36. Similarly, s. 91(9) of *IRPA*, which provides that "[e]very person who contravenes subsection (1) commits an offence..." does not impose any duty on CIC or CBSA to investigate or penalize every person who breaches s. 91.
>
> 37. The Plaintiffs have cited no authority to show any duty on CIC or CBSA to investigate or penalize all persons who may have breached s. 91 of *IRPA*. They have also not pointed to any rationale for imposing such a duty on CIC or CBSA or indicated how it would be possible or feasible to perform such a duty.
>
> **2) No cause of action created by not investigating Ms. Chen and Mr. Sze to**
>
> 38. The Plaintiffs seem to suggest that CIC or CBSA should have investigated Ms. Chen and Mr. Szeto after the Plaintiffs' counsel wrote letters of January 27, 2014, and February 5, 2014 advising that these persons breached s. 0091. This allegation fails to show any cause of action as the Plaintiffs cannot, by their counsel's letters, create a duty on CIC and CBSA to investigate persons who allegedly breach s. 91(1), where no such duty exists in law.
>
> Claim, paras 63, 65, 68, 109(b), [Motion Record of the AG]
>
> 39. The Plaintiffs have not explained how their counsel's letters could mandate CIC or CBSA to investigate or prosecute Ms. Chen or Mr. Szeto for breaching or allegedly breaching s. 91, absent any legislative duty, court order or other legal requirement to do so.
>
> 40. Further, the Plaintiffs do not allege that their detention by CBSA is unlawful, i.e. that there are insufficient legal bases for the detention. As such, they fail to show any reasonable cause of action regarding their detention.
>
> **3) Plaintiffs have not alleged insufficient legal basis for detention**
>
> ***Plaintiffs' detention currently based on flight risk***

> 41. The Plaintiffs assert a claim for "Special damages in the amount of $10,000.00 of each day of detention of the plaintiffs by the defendant Canada Border Services Agency", but nowhere in the Claim do the Plaintiffs allege that their detention is unlawful.
>
> Claim, para 1 (o), [Motion Record of the AG]
>
> 42. It seems that the Plaintiffs are seeking damages for time spent in lawful detention. However, this does not give rise to any reasonable cause of action.
>
> 43. Further, the Plaintiffs implicitly admit that their detention is lawful, as they assert that "the essence of its [CBSA's] current claims against the Plaintiffs" include "the flight risk and misrepresentation issues". While the Plaintiffs say that these "claims" are "in any event, incorrect", they do not indicate any reason why they are not flight risks. In addition, they do not allege that the flight risk issue was caused by Ms. Chen or Mr. Szeto. In fact, their allegations indicate the contrary.
>
> Claim, para 45, [Motion Record of the AG]
>
> ...
>
> 45. The Plaintiffs' allegations indicate that they are foreign nationals who are detained in Canada as flight risks, i.e., being unlikely to appear for examination, an admissibility hearing or removal from Canada. Since they state that "flight risk" is part of the essence of CBSA's claims against them, and flight risk in these circumstances is sufficient for their lawful detention by the Immigration Division, the mere fact that they are detained or that they disagree with the flight risk finding does not create a reasonable cause of action.
>
> ...
>
> 50. As such, the Plaintiffs fail to show any cause of action against the AG (on behalf of CIC or CBSA) regarding their detention, or regarding the use or reliance of alleged incorrect information submitted by Mr. Chen and Mr. Szeto, as the Plaintiffs' allegations indicate that CIC or CBSA relied on information other than that received from Ms. Chen and Mr. Szeto, to lawfully detain them as flight risks, pursuant to *IRPA*.

29 It is quite clear to me that Justice Belobaba effectively dismissed the Plaintiffs' claims against the CIC and the CBSA alleging a negligent investigation, albeit in relation to specified deficiencies pertaining to the supposed fraudsters, Szeto and Chen. To the extent that the Statement of Claim purported to assert a claim to damages from the Plaintiffs' detention, that, too, was dismissed.

30 I have some reservations about globally applying abuse of process principles to this motion to strike based on the Ontario Superior Court's dismissal endorsement. That proceeding was supported by a few vague allegations of negligent investigation by unnamed officials in the CBSA and CIC, but the Statement of Claim did not include allegations against the ID Members named in this action nor did it assert that government officials acted or conspired to present false evidence to the Immigration Division for the purpose of harming the Plaintiffs. In addition to the absence of a clear overlap of pleaded issues, it is also not entirely clear what the Ontario Superior Court decided beyond the finding that no cause of action based on an alleged negligent investigation could be made out. It is also of some significance that the Ontario action was dismissed on a motion to strike that was unopposed. Finally, some of the allegations in the Federal Court Statement of Claim post-date the dismissal of the Ontario action. Those after-the- fact allegations cannot be struck based on the argument that a party is required to put its best case forward and cannot selectively plead or split its case. Alleged events that have not yet occurred cannot be reasonably anticipated and pleaded. Given these issues I am not prepared to strike the entire Statement of Claim based on abuse of process by relitigation principles. That is not to say, however, that all of what has been pleaded in this action is permissible in the face of the dismissal of the Ontario action. In my view, the Plaintiffs are not entitled to replead their allegations concerning supposedly negligent investigations by the CBSA, CIC or any of their officials. The Ontario Superior Court found those allegations could not support a viable cause of action and the

Plaintiffs are not legally entitled to relitigate that issue in this Court. To do so is an abuse of process: see *Toronto (City) v CUPE*, *Local 79*, 2003 SCC 63 at para 37, [2003] 3 SCR 77. Those allegations are accordingly struck from the Statement of Claim without leave to amend.

31 There is not much of any substance that remains in the Statement of Claim, and what does remain is devoid of material facts. Prolixity, repetition and the bare pleading of a series of events are not substitutes for the requirement that a defendant know what is being factually and legally alleged so that a proper answer and defence can be stated. What is always required is a recitation of material facts that can support an arguable cause of action. Nevertheless, there are some generalized allegations that CBSA and CIC officials knowingly fabricated a case against the Plaintiffs in order to keep them in custody. In theory, a viable cause of action for misfeasance in public office could arise, provided that there are sufficient material facts pleaded to support it. Here there are none and the remaining portions of the Statement of Claim are struck out for that reason and because what little remains is unintelligible. The Plaintiffs will, however, have leave to file a fresh Statement of Claim provided that it contains sufficient material particulars to support a cause of action for misfeasance in the prosecution of a case for the detention of the Plaintiffs.

32 These Defendants have been successful on their separate motions and are entitled to their costs which I fix at $3,500.00. These costs are similarly payable jointly and severally by the Plaintiffs within 30 days.

ORDER

THIS COURT ORDERS that these motions are allowed and the Statement of Claim is struck out in its entirety. The action against the Defendants, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member), Linda Lizotte-Macpherson, President of the CBSA, the Minister of Public Safety and Emergency Preparedness, the Minister of Citizenship and Immigration is dismissed without leave to amend or refile. The Plaintiffs will have leave to refile only in respect of a cause of action framed in accordance with these reasons.

THIS COURT FURTHER ORDERS that the Defendants Oxama M. Kowalyk, Susy Kim and Iris Kohler, shall have their costs in the amount of $5,500.00 payable by the Plaintiffs jointly and severally within thirty (30) days.

THE COURT FURTHER ORDERS that the remaining Defendants shall have their costs in the amount of $3,500.00 payable by the Plaintiffs jointly and severally within thirty (30) days.

R.L. BARNES J.

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Wang v. Canada, [2018] F.C.J. No. 268

Federal Court Judgments

Federal Court of Appeal

Toronto, Ontario

W.W. Webb, D.J. Rennie and M.J.L. Gleason JJ.A.

Heard: February 28, 2018.

Oral judgment: February 28, 2018.

Docket: A-339-16

[2018] F.C.J. No. 268 | [2018] A.C.F. no 268 | 2018 FCA 46

Between Zhenhua Wang And Chunxiang Yan, Appellants (Plaintiffs), and Her Majesty the Queen, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member), Officer O'hara (CBSA Officer), Hal Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/CIC Officials Unknown to the Plaintiffs, Involved in the Arrest, Detention and Continued Detention of the Plaintiffs, Minister of Citizenship and Immigration, Attorney General of Canada, Respondents (Defendants)

(3 paras.)

Case Summary

Civil litigation — Civil procedure — Pleadings — Striking out pleadings or allegations — Grounds — Failure to disclose a cause of action or defence — False, frivolous, vexatious or abuse of process — Appeal by plaintiffs from order striking out the statement of claim without leave to amend dismissed — Open to Federal Court to conclude that the claims against the individual members of the Refugee Board should be struck in the absence of any material facts that could conceivably ever support a claim against them — Portions of the claim that sought to re-litigate issues that had previously been finally decided were properly struck as abusive.

Counsel

Rocco Galati, for the Appellants.

James Todd, B. Asha Gafar, for the Respondents.

Jonathan Dawe, Michael Dineen, for the Respondents, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member).

REASONS FOR JUDGMENT OF THE COURT

The judgment of the Court was delivered by

M.J.L. GLEASON J.A. (orally)

1 The appellants appeal from the judgment of the Federal Court in *Wang and Yan v. The Queen et al*, 2016 FC

1052 (per Barnes, J.) in which the Federal Court struck the appellants' Statement of Claim, with leave to amend it in part. We see no basis for interfering with the Federal Court's judgment as the Federal Court correctly set out the law applicable on a motion to strike and made no palpable and overriding error in applying that law to the appellants' Statement of Claim.

2 More specifically, it was open to the Federal Court to conclude that the claims against the individual members of the Immigration Division of the Immigration and Refugee Board (the ID) should be struck in the absence of any material facts that could conceivably ever support a claim against them. Likewise, it was open to the Federal Court to dismiss as abusive those portions of the claim that sought to re-litigate issues that had previously been finally decided by the Ontario Superior Court of Justice and to conclude that what remained of the pleading was so devoid of material fact that it ought to be struck, with leave to amend. Although the Federal Court did not deal with the appellants' claim for *habeus corpus*, the appellants have been released from custody and the circumstances have therefore changed from those that existed at the time of the pleading. It is unnecessary for us to address in this appeal the extent, if any, of the Federal Court's jurisdiction to hear a new application for *habeas corpus* based on these changed facts, which application has not yet been made.

3 We would accordingly dismiss this appeal with costs, fixed in the all-inclusive amount of $2000.00, payable to the respondent members of the ID and in the all-inclusive amount of $2000.00, payable to the remaining respondents. We would grant the appellants the requested 60 days within which to amend their Statement of Claim, if they wish.

M.J.L. GLEASON J.A.

End of Document

Wang v. Canada, [2018] S.C.C.A. No. 368

Supreme Court of Canada Rulings on Applications for Leave to Appeal and Other Motions

Supreme Court of Canada

Record created: September 18, 2018.

Record updated: February 21, 2019.

File No.: 38301

[2018] S.C.C.A. No. 368 | [2018] C.S.C.R. no 368

Zhenhua Wang, Chunxiang Yan v. Her Majesty the Queen, Oxana M. Kowalyk (ID Member), Susy Kim (ID Member), Iris Kohler (ID Member), Officer O'Hara (CBSA Officer), Hall Sippel, Eric Blenkarn, Andrej Rustja, CBSA Officers, All John and Jane Doe CBSA/ CIC officials unknown to the Plaintiffs, involved in the arrest, detention and continued detention of the Plaintiffs, Minister of Citizenship and Immigration, Attorney General of Canada

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Case Summary

Status:

Application for leave to appeal dismissed with costs (without reasons) February 21, 2019.

Catchwords:

Civil procedure — Pleadings — Statement of claim — Motion to strike — Whether Federal Court of Appeal applied wrong test on motion to strike — Whether Federal Court of Appeal drew a non-existing distinction between negligent "implementation" and "adjudication" by an administrative tribunal pursuant to Holland v. Saskatchewan, 2008 SCC 42, [2008] 2 S.C.R. 551 — Whether "material proof" in pleadings is required to meet bad faith exception to immunity from civil action, pursuant to s. 156(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 — Whether Federal Court has concurrent jurisdiction, in habeas corpus, in context of a Federal scheme, in this case, immigration, in accordance with Idziak v. Canada (Minister of Justice), [1992] 3 S.C.R. 631.

Case Summary:

The applicants, Zhenhua Wang and Chunxiang Yan, alleged they were wrongfully arrested and unlawfully detained because of false information that the Canada Border Services Agency ("CBSA") and the Minister of Citizenship and Immigration ("CIC") officials knowingly or negligently relied upon in the prosecution of their immigration detentions. In their statement of claim, the applicants alleged that named and unnamed officials misrepresented evidence, conspired to deprive the applicants of a fair hearing and sought to punish the applicants for bringing refugee claims. The applicants sought damages against the numerous named and unnamed respondents.

The respondents sought to strike out the statement of claim filed by the applicants pursuant to r. 221 of the *Federal Courts Rules*, SOR/98-106, on the basis that it disclosed no viable cause of action. At the Federal Court, the motions judge allowed the motion to strike the statement of claim. Leave to amend or re-file the action was granted in part. The Federal Court of Appeal dismissed the appeal.

Counsel

Rocco Galati (Rocco Galati Law Firm Professional Corporation), for the motion.

James Todd (A.G. of Canada), contra.

Chronology:

1. Application for leave to appeal:
   FILED: September 18, 2018.

   SUBMITTED TO THE COURT: January 21, 2019.

   DISMISSED WITH COSTS: February 21, 2019 (without reasons)

   Before: R.S. Abella, C. Gascon and R. Brown JJ.

   The motion for an extension of time to serve and file the application for leave to appeal is granted. The application for leave to appeal from the judgment of the Federal Court of Appeal, Number A-339-16, 2018 FCA 46, dated February 28, 2018, is dismissed with costs in accordance with the tariff of fees and disbursements set out in Schedule B of the Rules of the Supreme Court of Canada.

Procedural History:

Motion to strike allowed and statement of claim struck. Leave to
amend or re-file action granted in part.
September 16, 2016
Federal Court
Barnes J.
2016 FC 1052

Appeal dismissed.
February 28, 2018
Federal Court of Appeal
Webb, Rennie and Gleason JJ.A.
2018 FCA 46; [2018] F.C.J. No. 268

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Vancouver
25-May-22
REGISTRY

FORM 36
(RULE 9-8 (1))

No. VLC-S-S217586
Vancouver Registry

In the Supreme Court of British Columbia

Between

Action4Canada, **Kimberly Woolman, The Estate of Jaqueline Woolman**, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3 — Plaintiff(s)

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General
British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia) — Defendant(s)

NOTICE OF DISCONTINUANCE

Filed by: Rocco Galati Law Firm PC

TAKE NOTICE that Kimberly Woolman, The Estate of Jaqueline Woolman

[*Check whichever one of the following boxes is correct and complete the required information.*]

☒ discontinue(s) this proceeding against

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, D

☐ discontinue(s) the following claim(s) in this proceeding against

[Check the correct box(es).]

☒ Notice of trial has not been filed

☐ Notice of trial has been filed and this discontinuance is

  ☐ with the consent of all parties of record

  ☐ by leave of the court

Date: 25 May 2022

Signature of

☐ filing party ☒ lawyer for filing party(ies)

Rocco Galati. B.A., LL.B., LL.M.

TAB 2

VANCOUVER
MAY 24 2022
REGISTRY

This is the 2nd affidavit of
Rebecca Hill
in this case and was made on
24/MAY/2022

No. 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

AFFIDAVIT

I, Rebecca Hill, of 1301-865 Hornby Street, in the City of Vancouver, in the Province of British Columbia, AFFIRM THAT:

1. I am a paralegal with the Ministry of Attorney General, Legal Services Branch, and am assisting Mark Witten, counsel for the Defendants, Her Majesty the Queen in

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From: [redacted]
Sent: Friday, August 27, 2021 4:33 PM
To: Minister, HLTH HLTH:EX; Henry, Bonnie HLTH:EX
Subject: notice of Liability
Attachments: Vaccine-Notice-of-Liability BJM 23 AUG 21.pdf

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Please read this entire document and send me a receipt of delivery along with an acknowledgement that the entire document has been read and fully understood.

[redacted]

***RECEPTION IS IN TO ANSWER CALLS ON MONDAYS AND THURSDAYS ONLY FROM 9:30AM - 2:00PM*. EMAILS WILL BE CHECKED REGULARLY THROUGHOUT THE WEEK.**

If I haven't answered your email in your expected timeframe, please know that I have read it and am formulating a thoughtful response for you :)

[redacted]

This is Exhibit "I" referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

....
A Commissioner for taking Affidavits
Within the Province of British Columbia

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: Premier John Horgan

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 “vaccines”, are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell’s Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the “vaccine” gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they “have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation.” The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines.”

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease).” In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, “The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]”

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

   On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old’s more than tripled in one week.[28]

   Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths.” He further added, “...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it’s pulled off the market.[29]”

10. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use**.[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights[38] (2005)**
- **Nuremberg Code[39] (1947)**
- **Helsinki Declaration[40] (1964, Revised 2013) Article 25, 26**

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for “implied consent.” The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a “medical procedure”. The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print)

Signature

August 23, 2021

Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: Premier John Horgan

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 “vaccines”, are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell’s Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the “vaccine” gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they “have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation.” The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf
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[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html
[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine
[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/
[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/
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8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines.”

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11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use**.[30] [31]

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[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

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[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights[38] (2005)**
- **Nuremberg Code[39] (1947)**
- **Helsinki Declaration[40] (1964, Revised 2013) Article 25, 26**

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for “implied consent.” The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a “medical procedure”. The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]________________

August 23, 2021
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Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

MINISTER'S OFFICE
HEALTH

#
☐ DRAFT REPLY
☐ FYI
SEP 07 2021
☐ REPLY DIRECT
☐ FILE
REMARKS
☐ PHONE CALL
☒ BATCH
☐ MTG REQ/EVENT
☐ BRIEFING NOTE

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: MLA: Hon. Adrian Dix

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter.[9]" On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nOgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

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[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

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Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
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Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that; even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a "medical procedure". The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]
Name (print)

[redacted]
Signature

Aug 24/21
Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: Adrian Dix

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter.[9]" On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

   On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[28]

   Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market.[29]"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s_08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

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[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

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[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

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[redacted]
Name (print)

[redacted]
Signature

Sept 11, 2021
Date

Source: Action Canada.com

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[41] https://www.bitchute.com/video/W5qSPiy1onXt/

RECEIVED
SEP 14 2021
DEPUTY MINISTER
MINISTRY OF HEALTH

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: Stephen Brown Deputy of health.

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter.[9]" On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/uQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

RECEIVED

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

   A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

   On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[28]

   Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market.[29]"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a "medical procedure". The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print)

[redacted]

Signature

Aug 30, 2021

Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

From: [redacted]
Sent: October 21, 2021 7:38 PM
To: Dix.MLA, Adrian LASS:EX <Adrian.Dix.MLA@leg.bc.ca>; Henry, Bonnie HLTH:EX <Bonnie.Henry@gov.bc.ca>; OfficeofthePremier, Office PREM:EX <Premier@gov.bc.ca>; Minister, HLTH HLTH:EX <HLTH.Minister@gov.bc.ca>; Horgan.MLA, John LASS:EX <John.Horgan.MLA@leg.bc.ca>
Subject: Official Notice of Liability
Importance: High

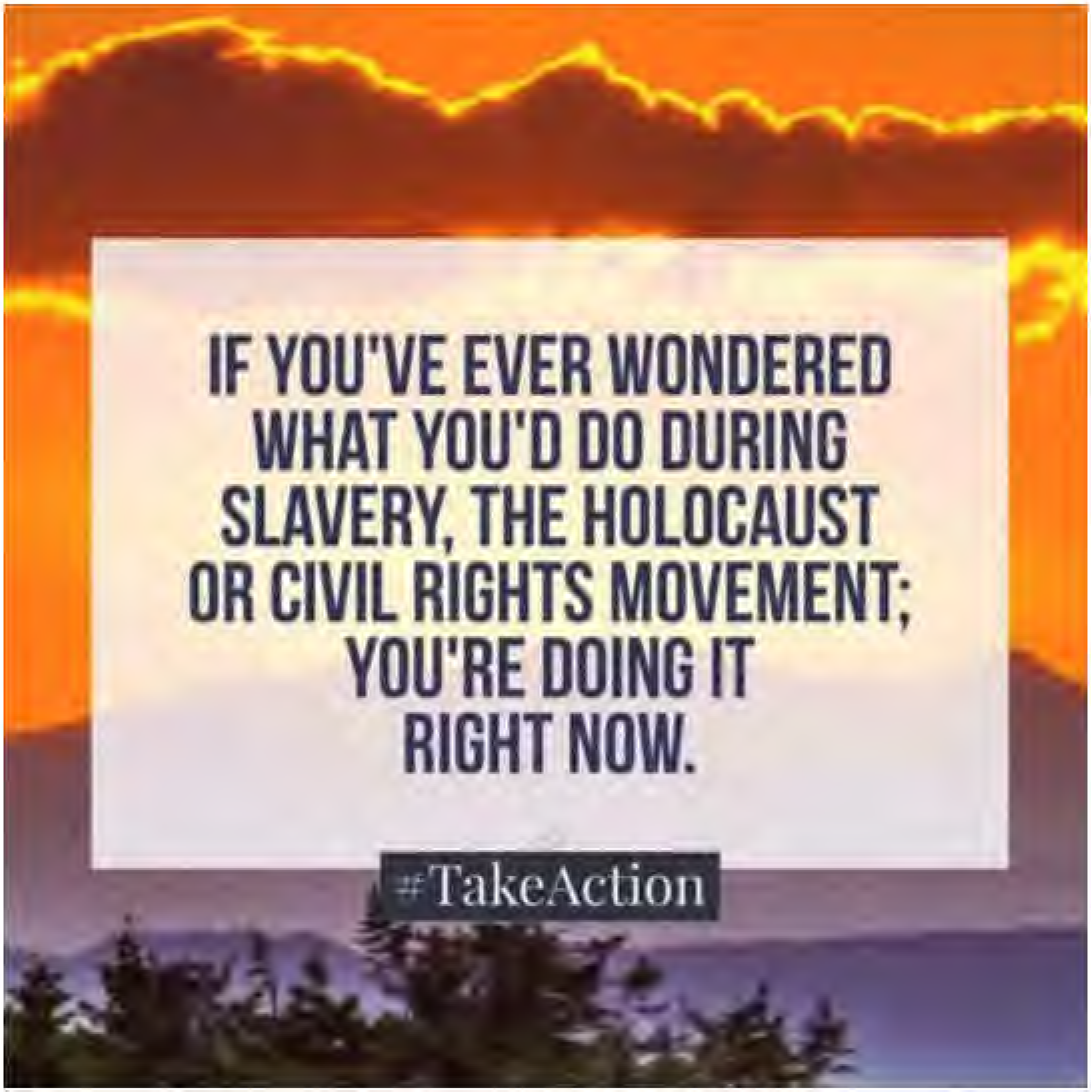
[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Hi,

Please see the attached notice of liability for the unlawful mandating of experimental covid 19 gene therapy.

It is disgraceful that you would even try to implement such tyrannical measures especially on an already suffering healthcare system. You clearly DO NOT CARE about the people of this province or you would not be doing such things. If you cared you would not be putting our system into a tailspin where people will get poor care or die. My husband's appointment he has been waiting over a year for was cancelled today because of your policies which have created major staffing shortages. You are terrible people who should not be allowed to be leaders.

You should all be ashamed of yourselves for what you are doing at this moment in time. None of you will be remembered for the good things you did (if any), only for the lives that were lost because of the unlawful policies YOU implemented. You are not following science, you only care about lining your own pockets with money. You're as bad as the Nazi's how can you not see that what you are doing is wrong and is history repeating itself. I hope you are all tried for your crimes and spend the rest of your life in prison. I look forward to being able to testify at each of your trials. You are on the wrong side of history.


IF YOU'VE EVER WONDERED
WHAT YOU'D DO DURING
SLAVERY, THE HOLOCAUST
OR CIVIL RIGHTS MOVEMENT;
YOU'RE DOING IT
RIGHT NOW.
#TakeAction

ANY GOVERNMENT WITH ENOUGH
POWER TO DEMAND THAT YOU CARRY
PAPERS IN ORDER TO MOVE AROUND FREELY
IS FAR MORE
DANGEROUS THAN COVID19

Regards,

[redacted]
Registered Nurse

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: John Horgan + Bonnie Henry + Adrian Dix.

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist citizens, including minors, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

Experimental vaccines are only authorized to be used under an official State of Emergency and only if there are no other adequate, approved or available alternatives. The Federal Government did not enact a State of Emergency for COVID-19 and effective alternatives including Vitamin D, Ivermectin and Hydroxychloroquine have been available from the onset but their use was prohibited.

The emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

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[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[19] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death;

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08%20 (pg. 9)

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[20], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[21].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[22]. It is further reported that only one percent of vaccine injuries are reported to VAERS[23], compounded by several month's delay in uploading the adverse events to the VAERS database[24].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[25].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[26]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[27] [28].**

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families.

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[20] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[21] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[22] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years- of-recorded-vaccine-deaths-according-to-avers/

[23] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[24] http://vaxoutcomes.com/thelatestreport/

[25] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[26] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[27] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[28] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental injection, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[29], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada[30], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[31], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

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[29] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[30] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[31] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

It is a further violation of the Canadian Criminal Code,[32] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[33] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[34]

Vaccination is voluntary in Canada[35]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, but they are also putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose these experimental injections on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[33] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[34] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

[35] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[36] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[37] **(2005)**
- **Nuremberg Code**[38] **(1947)**
- **Helsinki Declaration**[39] **(1964, Revised 2013) Article 25, 26**

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[40].

In conclusion, administration of vaccinations is defined as a "medical procedure". Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or beheld personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering ANY vaccine including the experimental COVID-19 injections to members of the public, including myself, and/or including minors.

Name (print): [redacted]

Signature: [redacted] RN

Date: OCt. 21/21

Source: **action4canada.com**

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[36] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[37] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[38] http://www.cirp.org/library/ethics/nuremberg/

[39] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[40] https://www.bitchute.com/video/W5qSPiv1onXt/

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: Premier John Horgan

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter.[9]" On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] [illegible]

[2] [illegible] kary-mullis-inventor-of-the-pcr-test.html

[3] [illegible]

[4] [illegible]

[5] [illegible]

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] [illegible]

[10] [illegible]

[11] [illegible]

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

   A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] [illegible]

[13] [illegible]

[14] [illegible]

[15] [illegible]

[16] [illegible]

[17] [illegible]

[18] [illegible]

[19] [illegible]

[20] [illegible]

[21] [illegible]

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

   On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[28]

   Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market.[29]

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] [illegible]online.anyflip.com/[illegible]/mobile/index.html[illegible]

[23] https://[illegible]canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

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[26] https://[illegible]rockwell.com/2019/10/no-author-harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] [illegible].com/thelatestreport/

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[29] [illegible]/2021/04/29/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] [illegible]news-study-finds-[illegible]-fewer-hospitalizations-for-patients-treated-with-[illegible]

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It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

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Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
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[35] [illegible]
[36] [illegible]
[37] [illegible]
[38] [illegible]
[39] [illegible]
[40] [illegible]

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine".

In conclusion, administration of vaccinations is defined as a "medical procedure". The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print)

August 23, 2021

Date

Source: Action Canada.com

- [illegible]
- [illegible]

From: [redacted]
Sent: Tuesday, August 24, 2021 10:51 AM
To: Horgan.MLA, John LASS:EX; OfficeofthePremier, Office PREM:EX
Cc: Minister, HLTH HLTH:EX; Henry, Bonnie HLTH:EX
Subject: Attn: John Horgan - Notice of Liability re: vaccine passports
Attachments: Signed-Vaccine-Notice-of-Liability-John-Horgan.pdf

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

John Horgan,

Find attached my signed Notice of Liability regarding my objection with your policies and coercion of the general public to be vaccinated against covid-19.

In addition, you should reconsider your recent decision to require a vaccine passport for all BC residents to participate in certain activities (i.e. attend sporting events, eat at a restaurant). I see this as discriminatory against unvaccinated, medically unable to be vaccinated and previously infected persons. Your own science shows that vaccinated people are contracting and transmitting covid-19 in the general public (see Israel case data too). Their transmission rate may be less than that of unvaccinated persons but it is still not zero %. You will be creating a false sense of security for the vaccinated while continuing the fear and divisiveness within or communities that does no one any good. Again, review this policy thru the discriminatory lens and retract it.

Sincerely,

[redacted]

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: Premier John Horgan

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 “vaccines”, are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell’s Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

   A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the “vaccine” gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they “have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation.” The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf
[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html
[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine
[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/
[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/
[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines.”

    Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease).” In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

    The report specifically states, “The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]”

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

    It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

    On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old’s more than tripled in one week.[28]

    Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths.” He further added, “...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it’s pulled off the market.[29]”

10. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use**.[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

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Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

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The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

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Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name

Signature

August 23, 2021

Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: Bonnie Henry and Adrian Dix

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This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine
[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/
[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/
[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

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[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/
[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/
[27] http://vaxoutcomes.com/thelatestreport/
[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/
[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?
[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for “implied consent.” The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a “medical procedure”. The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

_____[redacted]_______________________

Name (print)

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Signature

August 25, 2021

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Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: Premier John Horgan,
Dr. Bonnie Henry
Adrian Dix

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine
[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/
[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/
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[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

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The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

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R.S., c. C-34, s. 198

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Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

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Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
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Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for “implied consent.” The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a “medical procedure”. The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print)

August 25, 2021

Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: Premier John Horgan

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines.”

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease).” In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, “The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]”

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

   On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old’s more than tripled in one week.[28]

   Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths.” He further added, “...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it’s pulled off the market.[29]”

10. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use**.[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08
[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463
[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/
[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/
[27] http://vaxoutcomes.com/thelatestreport/
[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/
[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?
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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

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[redacted]

Name (print)

August 24, 2021

Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

"Vaccine" Notice of Liability
Elected/Appointed Officials

MINISTER'S OFFICE
HEALTH
#
DRAFT REPLY ☐ FYI ☐
NOV - 3 2021
☐ REPLY DIRECT ☐ FILE
REMARKS
☐ PHONE CALL ☒ BATCH
☐ MTG REQ/EVENT ☐ BRIEFING NOTE

On Notice To: Adrian Dix

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist citizens, including minors, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

Experimental vaccines are only authorized to be used under an official State of Emergency and only if there are no other adequate, approved or available alternatives. The Federal Government did not enact a State of Emergency for COVID-19 and effective alternatives including Vitamin D, Ivermectin and Hydroxychloroquine have been available from the onset but their use was prohibited.

The emergency measures are based on the claim that we are experiencing a "public health emergency".There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[19] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death;

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08%20 (pg. 9)

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[20], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[21].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[22]. It is further reported that only one percent of vaccine injuries are reported to VAERS[23], compounded by several month's delay in uploading the adverse events to the VAERS database[24].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[25].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[26]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[27] [28].**

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families.

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[20] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[21] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[22] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years- of-recorded-vaccine-deaths-according-to-avers/

[23] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[24] http://vaxoutcomes.com/thelatestreport/

[25] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[26] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[27] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[28] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental injection, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[29], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada[30], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[31], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

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[29] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[30] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[31] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

It is a further violation of the Canadian Criminal Code,[32] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[33] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[34]

Vaccination is voluntary in Canada[35]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, but they are also putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose these experimental injections on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[33] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[34] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

[35] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[36] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[37] **(2005)**
- **Nuremberg Code**[38] **(1947)**
- **Helsinki Declaration**[39] **(1964, Revised 2013) Article 25, 26**

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[40].

In conclusion, administration of vaccinations is defined as a "medical procedure". Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or beheld personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering ANY vaccine including the experimental COVID-19 injections to members of the public, including myself, and/or including minors.

Name (print): [redacted]

Signature: [redacted]

Date: October 29, 2021

Source: **action4canada.com**

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[36] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[37] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[38] http://www.cirp.org/library/ethics/nuremberg/

[39] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[40] https://www.bitchute.com/video/W5qSPiy1onXt/

MINISTER'S OFFICE
HEALTH
#
DRAFT REPLY ☐
FYI ☐
AUG 09 2021
☐ REPLY DIRECT
☐ FILE
REMARKS
☐ PHONE CALL
☒ BATCH
☐ MTG REQ/EVENT
☐ BRIEFING NOTE

"Vaccine" Notice of Liability Elected/Appointed Officials

On Notice To: ADRIAN DIX

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

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[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

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   Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market.[29]"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

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Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a "medical procedure". The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print)

[redacted]

Signature

aug 4, 2021

Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

From: [redacted]
Sent: Wednesday, August 25, 2021 2:15 PM
To: Horgan.MLA, John LASS:EX; OfficeofthePremier, Office PREM:EX; Minister, HLTH HLTH:EX; Henry, Bonnie HLTH:EX
Subject: ATTN: John Horgan - notice of liability re: vaccine passports
Attachments: Send!!!.pdf

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

YOU CAN NOT DO THIS. I have been a guinea pig in this health system my ENTIRE LIFE!!! My body my choice!!! OUR HEALTH SYSTEM HAS COMPLETELY RUINED ME!!!! My body can NOT physically handle this 'vaccine'
I have a half paralyzed nervous system already from an EXPERIMENTAL brain surgery THAT I WAS COERCED INTO GETTING FOR MY OWN HEALTH!!!!! THEY PARALYZED MY VAGUS NERVE, MY THROAT, MY VOCAL CORD AND HAVE RUINED MY LIFE! I HAVE HEALED MY BIDY THE LAST 5 years WITH EXTENSIVE NATURAL TREATMENTS.
MY. BODY. MY CHOICE.
HOW DARE YOU LIE THIS ENTIRE TIME. HOW DARE YOU.

Sent from my iPhone

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: Premier John Horgan

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter.[9]" On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] [illegible]

[2] [illegible]

[3] [illegible]

[4] [illegible]

[5] [illegible]

[6] [illegible]

[7] [illegible]

[8] [illegible]

[9] [illegible]

[10] [illegible]

[11] [illegible]

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

   A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] [illegible]

[13] [illegible]

[14] [illegible]

[15] [illegible]

[16] [illegible]

[17] [illegible]

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[19] [illegible]

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The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
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- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

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[35] [illegible]

[36] [illegible]

[37] [illegible]

[38] [illegible]

[39] [illegible]

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[44].

In conclusion, administration of vaccinations is defined as a "medical procedure". The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print)

August 23, 2021

Date

Source: Action Canada.com

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[44] [illegible]

[44] [illegible]

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: adrian Dix

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021. Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. *Most vaccines are trialed for at least 5-10 years,*[17] *and* COVID-19 *treatments have been in trials for less than a* year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

   A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

    Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

    The report specifically states, "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

    It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

    On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[28]

    Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market.[29]"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ulbs/mobile/index.html?s -08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a *further violation of the Canadian Criminal* Code,[34] *to endanger the life of another* person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg

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[redacted]
Name (print)

[redacted]
Signature

Sept 11 /21
Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: Mike Farnworth

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

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[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

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8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

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11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

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[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a "medical procedure". The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

Name (print)

[redacted]

Sept 30/2021
Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

From: [redacted]
Sent: Wednesday, August 25, 2021 12:49 PM
To: OfficeofthePremier, Office PREM:EX
Cc: Minister, HLTH HLTH:EX; Henry, Bonnie HLTH:EX
Subject: Attn: John Horgan - Notice of Liability re: vaccine passports
Attachments: Vaccine-Notice-of-Liability-Elected-Officials.pdf

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Dear John Horgan,

In light of the announcement made in BC on the 23rd August 2021 regarding vax passports, please find attached a Notice of Liability to you, Premier John Horgan.

Your actions in light of this 'mandate' constitute breach of trust and massive deception to us, the population that you promised to serve. Your actions will one day be tried under the Crimes Against Humanity and War Crimes Act of Canada.

We understand that you and your families may be personally threatened and we will continue to work hard to save, not only ourselves, but you and your families. The alternative is to walk with our arms open wide into a monstrous system of oppression and centralized control that WILL enslave us and our children (and that's not the worst of it).

All tyrannical regimes were set up using the following: (1) Mass Fear, (2) Emergency Government Measures, (3) Divide and Conquer Tactics, and (4) Moral Indignation/Moral Justification Sentiments. Prove to us how humans in positions of power today are now fundamentally different from ALL rulers in the past. I have Volumes of evidence that prove that this is Not true.

I pray for your salvation.

Regards, [redacted]

"To see in front of one's own nose is a constant struggle" -- George Orwell
"The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing" - Albert Einstein
"Go with the crowd and lose your soul. Go with your soul and lose the crowd" -- anonymous

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: John Horgan

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 “vaccines”, are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell’s Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

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[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine
[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/
[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/
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[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

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[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

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(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
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Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

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Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for “implied consent.” The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a “medical procedure”. The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print)

[redacted]

Signature

25 August 2021

Date

Source: Action4Canada.com

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[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

“Vaccine” Notice of Liability
Elected/Appointed Officials

RECEIVED
SEP 1 4 2021
DEPUTY MINISTER
MINISTRY OF HEALTH

On Notice To: Stephen Brown

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivising, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

    A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

   On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[28]

   Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market.[29]"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

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[25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

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[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg

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[redacted]
Name (print)

[redacted]

[redacted]
Signature

Aug 30/2021
Date

Source: Action4Canada.com

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MINISTER'S OFFICE
HEALTH
#
DRAFT REPLY ☐ NOV 18 2021 ☐ REPLY DIRECT
FYI ☐ ☐ FILE
REMARKS
☐ PHONE CALL ☒ BATCH
☐ MTG REQ/EVENT ☐ BRIEFING NOTE

"Vaccine" Notice of Liability
Elected/Appointed Officials

On Notice To: Adrian Dix.

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public

This is your official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist citizens, including minors, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

Experimental vaccines are only authorized to be used under an official State of Emergency and only if there are no other adequate, approved or available alternatives. The Federal Government did not enact a State of Emergency for COVID-19 and effective alternatives including Vitamin D, Ivermectin and Hydroxychloroquine have been available from the onset but their use was prohibited.

The emergency measures are based on the claim that we are experiencing a "public health emergency".There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[19] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death;

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08%20 (pg. 9)

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[20], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[21].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[22]. It is further reported that only one percent of vaccine injuries are reported to VAERS[23], compounded by several month's delay in uploading the adverse events to the VAERS database[24].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[25].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[26]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[27] [28].**

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families.

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[20] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[21] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[22] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years- of-recorded-vaccine-deaths-according-to-avers/

[23] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[24] http://vaxoutcomes.com/thelatestreport/

[25] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[26] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[27] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[28] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental injection, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[29], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada[30], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[31], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

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[29] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[30] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[31] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

It is a further violation of the Canadian Criminal Code,[32] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[33] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[34]

Vaccination is voluntary in Canada[35]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, but they are also putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose these experimental injections on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont
[33] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[34] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[35] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[36] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[37] **(2005)**
- **Nuremberg Code**[38] **(1947)**
- **Helsinki Declaration**[39] **(1964, Revised 2013) Article 25, 26**

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[40].

In conclusion, administration of vaccinations is defined as a "medical procedure". Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or beheld personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering ANY vaccine including the experimental COVID-19 injections to members of the public, including myself, and/or including minors.

[redacted]

Name (print): ______________________ Signature: ______________________

[redacted]

Oct 22/21

Oct 22/21

Oct 24/21

[redacted]

Date: ______________________

[redacted]

Oct 22/21

Oct 22/21

Oct 22, 2021

Oct 22, 2021

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Oct. 24th 2021

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Source: **action4canada.com**

[redacted]

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Oct 27/21

[redacted]

Oct 24/21

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[36] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[37] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[38] http://www.cirp.org/library/ethics/nuremberg/

[39] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[40] https://www.bitchute.com/video/W5qSPiy1onXU/

[redacted]

[redacted]

Oct 22/21

Oct 29/2021

Oct 22/21

Oct. 26/21

[redacted]

Dix

Room 337 Parliment Building.
Victoria BC
V8V 1X4.

From: [redacted]
Sent: Saturday, September 4, 2021 2:11 PM
To: Kennedy.Stewart@vancouver.ca; Henry, Bonnie HLTH:EX; pcqo@vch.ca; OfficeofthePremier, Office PREM:EX; cbcnewsvancouver@cbc.ca
Cc: christinesorensen@bcnu.org; CFLN@protonmail.com; Horgan.MLA, John LASS:EX; pcqoffice@fraserhealth.ca; hcinfo.infosc@canada.ca; Health, HLTH HLTH:EX; Farnworth.MLA, Mike LASS:EX; Singh.MLA, Rachna LASS:EX; admininfo@bccdc.ca
Subject: NOTICE of Liability You are not listening
Attachments: VGH-BC Health authority.pdf; Vaccine-Notice-of-Liability-Elected-Officials VGH.pdf

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

"Vancouver mayor tells demonstrators to 'stay the hell home'; premier slams 'harassment' of health-care workers?"
https://www.cbc.ca/news/canada/british-columbia/vaccine-passport-protest-1.6161817

TO:
Mayor Kennedy Stewart and council of Vancouver, Executive Team of VGH Vancouver General Hospital, Bonnie Henry Health Authority of BC, Vivian Eliopoulis Vancouver Coastal Health Authority Leadership Executive, Fraser Health Authority, Rachna Singh Surrey-Green Timbers/Surrey Community College/Surrey Memorial Hospital, BC Ministry of Health, Provincial Health Services Authority, Minister of Public Safety and Solicitor General, Health Canada Patty Hajdu, CBC Fake News

NOTE:
Nurses are caregivers. They are telling you there is "no care left in the fake pharma system".

They are telling you that the experimental so-called "vaccine" is causing adverse side effects to healthy people.

These are 5,000 concerned citizens trying to convey the truth about what they are witnessing to the risk to the blind followers of poison experimental so-called vaccines peddling hope porn and death.

Masks do not stop viruses. The false positive PCR test does not detect Covid, it detects dead cells and records DNA.
Healthy people have 95% natural immunity. Double vaccinated people have 40% reduced immunity, which diminishes with each booster, which in this case is not a vaccine. It is a weaponized chemical agent pushed by drug companies. Natural cures and treatments are being blocked from use in Canada suddenly by the Health Canada big pharma globalist agenda.

Here is the typical response from the media brainwashed CBC follower : The eyes cannot see what the heart cannot feel.

"Nancy van der Meulen
2 days ago
This wasn't a peaceful protest.
This was an angry mob attacking health care workers.
What is wrong with these people?"

CONCLUSION:
mRNA spike protein, luciferase, graphene oxide, propylene glycol is not a vaccine, these are poison chemicals.

People Are not Sick of Covid, We Are Sick of Lies:

Why are you administering poison to humans?

Why are you not listening?

Please see the attached documents

This is to be forwarded to all Members, Agents, Affiliates and Associates, Employees of Provincial Service Bodies, Vancouver General Hospital, BC Nurses Union, All Associates in British Columbia and Their Employees, Bonnie Henry, Fraser Health, All Provincial and Regional Health Authorities Administering said Procedures
Provincial and Federal Governments and their allegiances, Health Canada,
(As listed in Appendix below)

YOU ARE BEING PUT ON NOTICE!
September 01, 2021

LEGAL PREMISE:

Before You Attempt to Implement Any Restrictions Regarding the so called Covid Virus or Fake Vaccine, You Should Understand The Crime in which You Are Participating.

Take Time to Explore These LINKS Below: There is Hope For You Yet

“Vaccine” and/or Vaccine Passport Notice of Liability To BC Health Authorities

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivized in any way by you to the public. Restriction of Individual

Human Rights.

On Notice To: ____**Bonnie Henry**________
And All Parties Named Herein As Per Appendix Below
This is your official and personal Notice of Liability.

As a person involved in public oversight for your organization and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by recommending, advertising, incentivizing, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to any restrictions under the experimental medical treatment for COVID-19, namely requiring the wearing of masks to enter a place of business, being injected with one of the experimental gene therapies commonly referred to as a "vaccine", or the requirement of so called freedom of movement passports to do business.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.1 In fact these manufactured claims have been egregiously inflated by uninformed individuals acting in positions of public spectre and private stewardship.

The False Positive PCR DNA Test

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus2. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives3. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-24.

In November 2020, a Portuguese court ruled that PCR tests are unreliable.5

On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive6.

February 16, 2021, Health Officer, Bonnie Henry, admitted PCR tests are unreliable7.

On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.9”

On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing8.

On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason.10

On May 10th, 2021,Manitoba’s Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.11

VAERS Ignoring the Evidence of Adverse Effects Reporting System, Suffered from the Experimental Vaccine

The risks far outweigh the benefits and prove to exacerbate and infect further

As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.25

No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.

On Mar 16, 2021 It was reported that more than a dozen countries mostly European, including Poland and Germany, Italy, France, Spain, Sweden, Latvia, Luxembourg, Cyprus, Portugal, Slovenia, Indonesia, Ireland, Bulgaria, Congo, Thailand, Romania, Iceland, Denmark, Austria, Norway, and the Netherlands have suspended AstraZeneca’s COVID-19 experimental vaccine due to adverse reactions, developing “mystery” blood clots in recipients. 12
On August 26, 2021 Japan Suspends 1.63 Million Doses Of Moderna's COVID-19 Vaccine Over Contamination 13
On July 13, 2021 Seattle Times published an article titled “**What to know about blood clots, anaphylaxis and other COVID-19 vaccine fears”** 14
On August 26, Using lies and deception, the American FDA criminal drug organization in coercion with the NIH, CDC, Pfizer-BioNTech, Moderna, AstraZeneca and other Pharmaceutical Manufacturers, gave unlawful permission to use experimental chemical agents as weapons onto an unconsenting public under fake emergency measures. Health Canada takes its model from this same group of criminal pharmaceutical drug organizations. (For those who cannot think or investigate for themselves, this is not a good thing, but the opposite of truth) 15

U.K. and U.S. have advised people who have allergies to any component of a COVID vaccine not to receive experimental mRNA so called “Covid Vaccine”, containing undisclosed ingredients, therefore NOT MEETING CRITERIA for open transparent or INFORMED CONSENT. 25 (section Whereas:)

On April 5, 2021 a long practising physician in Lytton BC, bringing adverse reactions in his patients to AstraZeneca so called vaccine, had his license revoked for asking how to deal with this unprecedented anomaly after contacting BC Chief Health Officer Bonnie Henry with concerns as to patient safety after so called vaccine. Dr. Hoffe had his hospital visitation privileges removed, so that he was not able to follow his practice and care for his patients. His practice and the whole town of Lytton has since been (conveniently) devastated by wildfires. See Letter of Concern to Bonnie Henry 16

As of June 23rd, 2021 it has come to light that a Portugal court ruling revealed that only 0.9% of ‘verified cases’ died of COVID, numbering 152, not the 17,000 deaths that have been claimed 17

On August 16, 2021 Action4Canada and the Constitutional Rights Centre have filed a statement of Claim for the BC/ Federal legal action in evidence against unwarranted Covid measures. *Please note what a legal civil action against you will look like. 18

1 https://www.bitchute.com/video/nQgq0BxXfZ4f
2 https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
3 https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
4 https://cormandrostenreview.com/report/
5 https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
6 https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
7 https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
8 https://greatgameindia.com/austria-court-pcr-test/
9 https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
10 https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
11 https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/
12 https://www.aljazeera.com/news/2021/3/15/which-countries-have-halted-use-of-astrazenecas-covid-vaccine
13 https://www.npr.org/2021/08/26/1031208526/japan-suspends-1-63-million-doses-of-moderna-covid-19-vaccine-over-contamination
14 https://www.seattletimes.com/nation-world/what-to-know-about-blood-clots-anaphylaxis-and-other-covid-19-vaccine-fears/
15 https://www.fda.gov/emergency-preparedness-and-

response/coronavirus-disease-2019-covid-19/covid-19-vaccines

16 https://assets-global.website-files.com/606d3dece4ec3c3866cc798a/60a601ccd6eac8d0fc8a311e_53%20Health%20Impact%20News%202021%20Canadian%20Doctor%20Defies%20Gag%20Order%20and%20Tells%20the%20Public.pdf

17 https://americasfrontlinedoctors.org/frontlinenews/lisbon-court-rules-only-0-9-of-verified-cases-died-of-covid-numbering-152-not-17000-claimed/

18 https://action4canada.com/wp-content/uploads/21.08.17-FILED-Notice-of-Civil-Claim-Action4Canada.pdf

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection and/or vaccine passports is not required or recommended.

Suppression of Common Effective Therapeutics

HCQ plants being destroyed by mysterious events.
Restriction by Health Authorities under Big Pharma to allow distribution of Ivermectin or Hydroxychloroquine in Canada and the US.
Ivermectin shows instant results in improvement of symptoms from conditions said to be Covid. Doctors have safely and successfully administered such cures, whereas those not given this option have died due to untreated complications.

Ventilators kill people with respiratory conditions that are being claimed to be “Covid caused or Covid related”. To the point of those dying from unrelated circumstances are being assigned on false death certificates to have “died of Covid”.
Refusal to take into account comorbidities from Covid reactions exacerbates oxytosis, “cell death” and related to the so called vaccine, in patient being mistreated with ventilators.
Oxytosis, “cell death” and blood clots related to spike protein in the so called vaccine, which is in fact an mRNA bio-weapon, laced with questionable “secret” ingredients such as graphene oxide poison, luciferase DNA disruptor, hijacks our auto immune system in to overreaction and therefore attacking and compromising our own biome.

Whereas:
1. The Nuremberg Code,12 to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the

nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 “vaccines”, are still in Phase III clinical trials until 2023,13 and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada 14 15 16 is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,17 and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.18

6. Numerous doctors, scientists, and medical experts are

issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell’s Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart19, and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.20

A. *Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study21 on COVID-19 shots. The added Spike Protein to the “vaccine” gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they “have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation.” The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.*

12 https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf
13 https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
14 https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
15 https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html
16 https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine
17 https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/
18 https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
19 https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/
20 https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
21 https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with

the SARS-CoV-2 virus is 99.997%. 22 In spite of these facts, the government and well-meaning businesses are pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real- world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines.”

– *Under the Risk Management plan section of the Summary Basis of Decision,23 it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease).” In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.*

– *The report specifically states, “The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety* *concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)*.24”

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.25

– It is further reported that only one percent of vaccine injuries are reported to VAERS,26 compounded by several months delay in uploading the adverse events to the VAERS database.27

– On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old’s more than tripled in one week.28

– Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths.” He further added, “...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths

it’s pulled off the market.29”

10. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.30 31

22 https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08
23 https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
24 https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463against-covid-19/
25 https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/
26 https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/
27 http://vaxoutcomes.com/thelatestreport/
28 https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
29 https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-

unprecedented-numbers-of-injection-related-deaths/
30 https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?
31 https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people’s ability to meet basic needs and care for themselves and their families. You have incentivized the receiving of injections, measuring the public’s compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 “vaccine” curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, “full” disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make ‘medical’ decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these ‘qualified’ individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from ‘medically unqualified’ people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the **Crimes Against Humanity and War Crimes Act of Canada**32, a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The Act also confirms that every person who conspires or attempts to commit, is an accessory after the fact, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,33 a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,34 to endanger the life of another person. Sections 216, 217, 217.1 and 221.

32 https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html
33 https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
34 https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life
Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.
R.S., c. C-34, s. 198
Duty of persons undertaking acts
Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work
Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or

performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence
Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than10 years; or,
(b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,35 the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual’s right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, “A Reasonable Person Would Want to Know the Serious Risks, Even if Remote.”

Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.36

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivized the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** 37 (1982) Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights** 38 (2005)
- **Nuremberg Code** 39 (1947)
- **Helsinki Declaration** 40 (1964, Revised 2013) Article 25, 26

35 https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
36 https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
37 https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
38 https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
39 http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO and Health Canada and its affiliates, does not allow for “implied consent.” The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine41.

In conclusion, administration of vaccinations is defined as a “medical procedure”. The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivizing, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]____________ Name (print)
_______________[redacted]________ Signature
_________September 04, 2021___ Date

Citizen of Canada

[redacted]
https://vaccinechoicecanada.com
Member of Action4Canada
https://action4canada.com
Supporter Canadian Frontline Nurses

APPENDIX: Forward NOTICE
CC: Many
BCC: Health Canada, Public Health Authorities, Boards of Trade, Regional Chambers of Commerce, Local Businesses, MLAs and MPS, BC Government, Government of Canada

See Email Directed To The Following Parties:
Kennedy.Stewart@vancouver.ca,
bonnie.henry@gov.bc.ca, pcqo@vch.ca, premier
<premier@gov.bc.ca>, cbcnewsvancouver@cbc.ca,
christinesorensen@bcnu.org,
CFLN@PROTONMAIL.COM, john.horgan.mla@leg.bc.ca,

pcqoffice@fraserhealth.ca, hcinfo.infosc@canada.ca, hlth.health@gov.bc.ca, mike.farnworth.mla@leg.bc.ca, rachna.singh.MLA@leg.bc.ca, admininfo@bccdc.ca

NOTICE OF LIABILITY

“Vaccine” Notice of Liability Elected/Appointed Officials

On Notice To: ___All Government Leaders Workers, Health Officials and Agencies______

This is your official and personal Notice of Liability.

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency.” There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person.”

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the World Health Organization (WHO) admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. February 16, 2021, BC

On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter.[9]” On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in any way by you to the public.

As a person involved in public oversight and/or decision making, you are NOT a qualified medical professional and, therefore, you are unlawfully practising medicine by

recommending, advertising, incentivizing, mandating, facilitating and/or using coercion or undue influence, to insist the public submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8].

Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7].

Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a

[10]. On May 10th, 2021, trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

Whereas:

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected;

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. All the treatments being marketed as COVID-19 “vaccines”, are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada [14] [15] [16] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for less than a year.

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models.[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell’s Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[20]

A. Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the “vaccine” gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they “have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation.” The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf
[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html
[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine
[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/
[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/
[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/ [21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

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7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%. [22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real- world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines.”

Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease).” In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

The report specifically states, “The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA).[24]”

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[25]

It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database.[27]

On May 21, 2021, VAERS data release showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[28]

Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market.[29]"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported.

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use**.[30] [31]

- [22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08
- [22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08
- [23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf [24]
- [24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463 against-covid-19/
- [25] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded- vaccine-deaths-according-to-avers/
- [26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/
- [27] http://vaxoutcomes.com/thelatestreport/
- [28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
- [29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/
- [30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?
- [31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families. You have incentivized the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make 'medical' decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these 'qualified' individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Duty of persons undertaking acts dangerous to life

Sec. 216: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill, and care in so doing.

R.S., c. C-34, s. 198

Duty of persons undertaking acts

Sec. 217: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.

Duty of persons directing work

Sec. 217.1: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or, (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada, yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivized the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts' lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, they are putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose this experimental medical treatment on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms** [37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights[38] (2005)**
- **Nuremberg Code[39] (1947)**
- **Helsinki Declaration[40] (1964, Revised 2013) Article 25, 26**

- [35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
  [36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
  [37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
  [38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
  [39] http://www.cirp.org/library/ethics/nuremberg

All Canadian law, contrary to misinformation spread by the WHO, does not allow for “implied consent.” The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[41].

In conclusion, administration of vaccinations is defined as a “medical procedure”. The courts have established jurisprudence on Informed Consent requirements.

Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending,

encouraging, advertising, mandating, facilitating, incentivizing, coercing, or administering these experimental injections to members of the public, including myself, and/or including minors.

[redacted]___________ Name (print)
[redacted]_____________ Signature
_________September 04, 2021___ Date

Source: Action4Canada.com

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.bitchute.com/video/W5qSPiy1onXt/

This is Exhibit "J" referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

A Commissioner for taking Affidavits
Within the Province of British Columbia

Attn: Evan McAskile

RE: Threat to use an experimental COVID-19 injection, mask or testing as a condition of employment

There are no provisions in any orders of any health minister, doctor, or provincial legislation, that can, nor pretend that any measures can, override Charter or other pre-Charter constitutional rights.

All Statutes, Orders, By-laws, and Acts must be consistent with the Constitution...or they are of no force or effect.

> Section 52(1) of the **Constitution Act**, 1982: The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

According to the Public Health Agency of Canada, Canadian National Report on Immunization, 1996:

> **"Vaccines are not mandatory in Canada and they cannot be made mandatory because of the Canadian Constitution."**

If the Federal Government had invoked the **Federal Emergencies Act**, which it has not, even that Emergencies Act states:

> AND WHEREAS the Governor in Council, in taking such special temporary measures, would be subject to the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights and must have regard to the International Covenant on Civil and Political Rights, particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency.

Employment is 100% guaranteed and protected under Section 7 of The Canadian Charter of Rights and Freedoms:

> "Everyone has the right to **life, liberty,** and **security** of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Consent to Medical Treatment and Testing

In Canada, a doctrine of informed consent regarding any medical treatment has become part of Canadian Federal law. According to Supreme Court rulings, no Canadian citizen is required to take any medical treatment without informed consent, which includes the right to refuse such treatment[1].

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[1] https://bottomlineresearch.ca/pdf/informed_consent.pdf

The Genetic Non-Discrimination Act, Bill S- 201, states that it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both[2].

Extortion; committing tort; privacy violations; willful misconduct; assault and battery; and acting in bad faith are serious indictable criminal code offences. Interfering with someone's right to gainful employment, or essential and non-essential services, is a further violation of the Constitution and Charter of Rights and Freedoms.

I am writing to advise you that if you persist in interfering with my guaranteed rights by supporting or enforcing the COVID-19 injection, testing, mask or any other medical treatment, under threat of losing my employment or being suspended without pay, I will hold you personally liable for any loss of income, damages and/or any injury I suffer as a result of your actions. You are personally not protected under any Act, Order or Statute that is in violation of the Canadian Rule of Law, Constitution and Charter of Rights and Freedoms.

It is the duty of every Canadian citizen to uphold the law and respect the Constitution and Charter Rights. You have been duly warned.

Name: [redacted]

Signed: [redacted]

Date: 12 / 10 / 2021

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[2] https://laws-lois.justice.gc.ca/eng/acts/G-2.5/index.html

Source: Action4Canada.com **© 2021 All Rights Reserved** Revised November 23rd, 2021

Attn: ADAM MCKINNON

RE: Threat to use an experimental injection as a term of employment

There are no provisions in any orders of any health minister, doctor, or provincial legislation, that can, nor pretend that any measures can, override Charter or other pre-Charter constitutional rights.

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Name: [redacted]

Signed: [redacted]

Date: 9 / 11 / 2021

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Attn: DAVID GALBRAITH

RE: Threat to use an experimental injection as a term of employment

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Name: [redacted]

Signed:

Date: 9 / 11 / 2021

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Attn: HEATHER HOUSE

RE: Threat to use an experimental injection as a term of employment

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Name: [redacted]

Signed:

Date: 9 / 11 / 2021

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Attn: TONJA JOYCE

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Name: [redacted]

Signed:

Date: 9 / 11 / 2021

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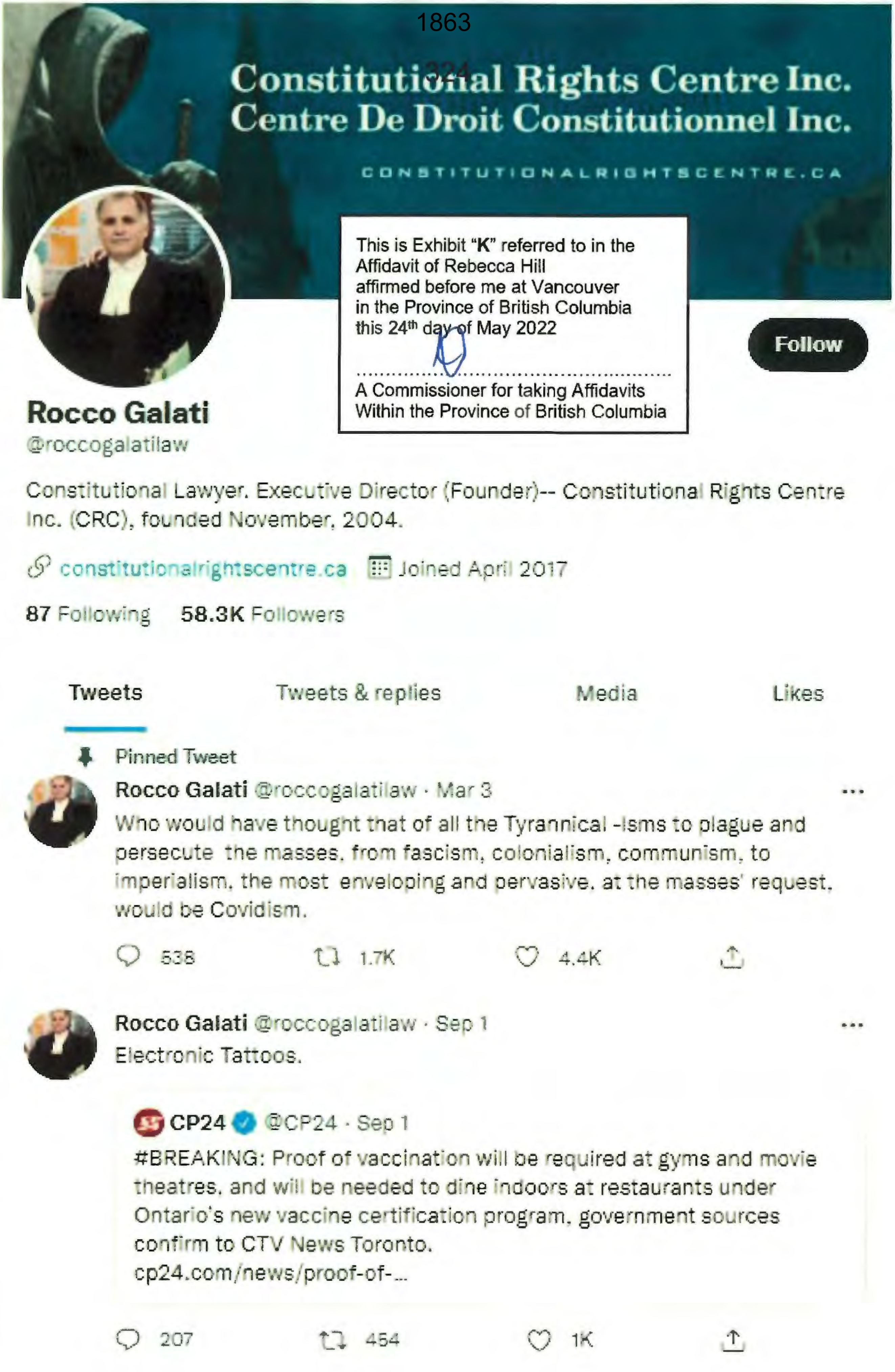
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Centre De Droit Constitutionnel Inc.
CONSTITUTIONALRIGHTSCENTRE.CA
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This is Exhibit “**K**” referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

....
A Commissioner for taking Affidavits
Within the Province of British Columbia

Rocco Galati
@roccogalatilaw

Constitutional Lawyer. Executive Director (Founder)-- Constitutional Rights Centre Inc. (CRC), founded November, 2004.

constitutionalrightscentre.ca Joined April 2017

87 Following **58.3K** Followers

Tweets
Tweets & replies
Media
Likes

Pinned Tweet

Rocco Galati @roccogalatilaw · Mar 3

Who would have thought that of all the Tyrannical -Isms to plague and persecute the masses, from fascism, colonialism, communism, to imperialism, the most enveloping and pervasive, at the masses' request, would be Covidism.

538 1.7K 4.4K

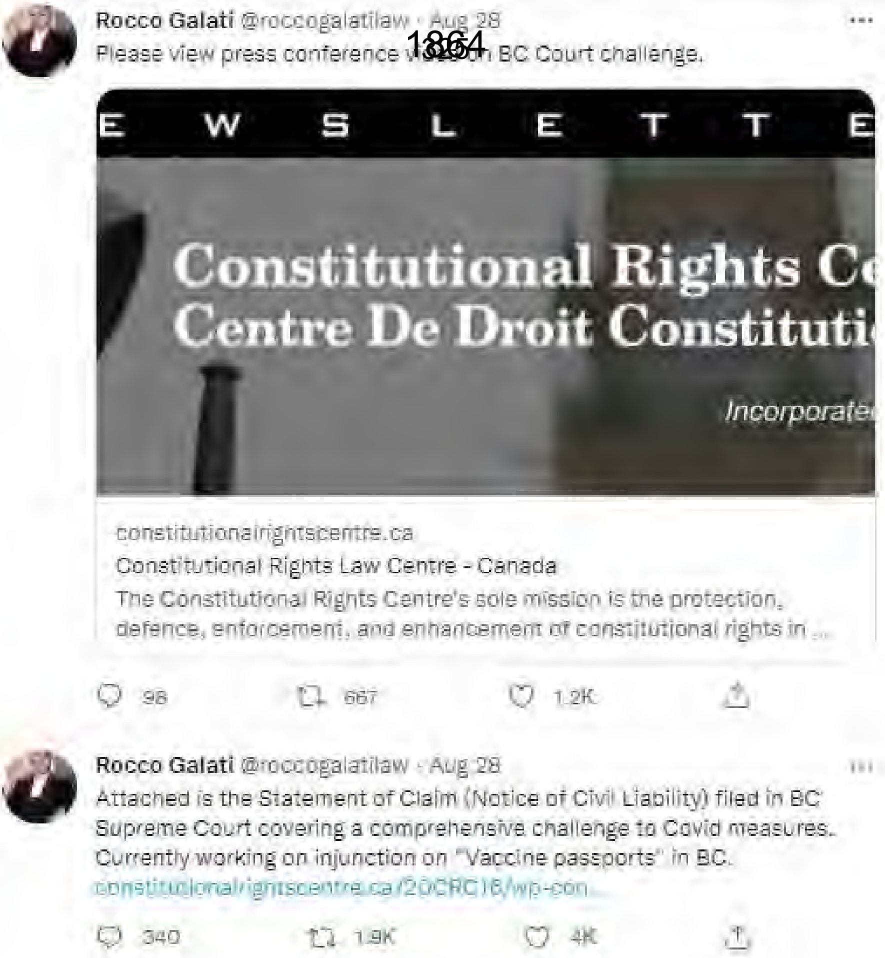
Rocco Galati @roccogalatilaw · Sep 1

Electronic Tattoos.

CP24 @CP24 · Sep 1

#BREAKING: Proof of vaccination will be required at gyms and movie theatres, and will be needed to dine indoors at restaurants under Ontario's new vaccine certification program, government sources confirm to CTV News Toronto.
cp24.com/news/proof-of-...

207 454 1K



Rocco Galati @roccogalatilaw · Aug 28

Please view press conference video on BC Court challenge.

constitutionalrightscentre.ca

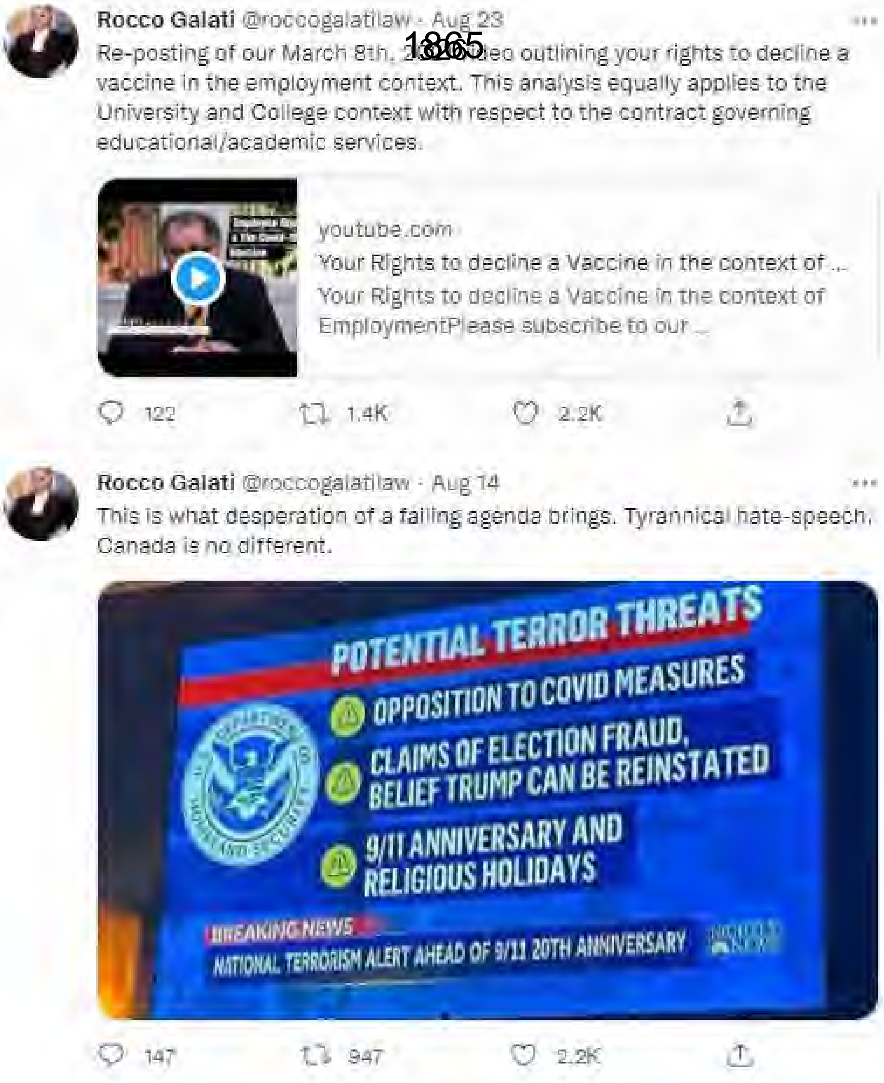
Constitutional Rights Law Centre - Canada

The Constitutional Rights Centre's sole mission is the protection, defence, enforcement, and enhancement of constitutional rights in ...

E W S L E T T E
Constitutional Rights Ce
Centre De Droit Constituti
Incorporate
98
667
1.2K

Rocco Galati @roccogalatilaw · Aug 28

Attached is the Statement of Claim (Notice of Civil Liability) filed in BC Supreme Court covering a comprehensive challenge to Covid measures. Currently working on injunction on "Vaccine passports" in BC.
constitutionalrightscentre.ca/20CRC16/wp-con...



Rocco Galati @roccogalatilaw · Aug 23

Re-posting of our March 8th, 2[illegible] video outlining your rights to decline a vaccine in the employment context. This analysis equally applies to the University and College context with respect to the contract governing educational/academic services.

youtube.com

Your Rights to decline a Vaccine in the context of ...

Your Rights to decline a Vaccine in the context of EmploymentPlease subscribe to our ...

Rocco Galati @roccogalatilaw · Aug 14

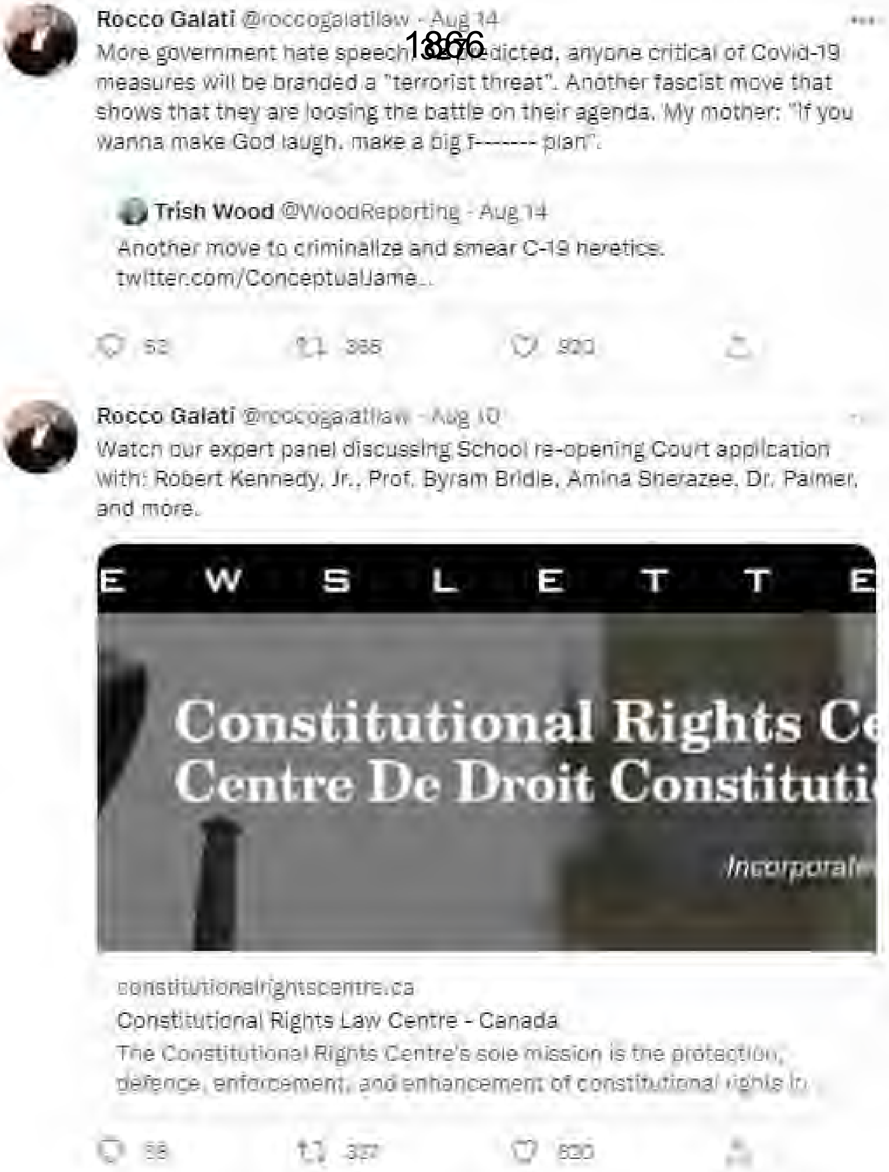
This is what desperation of a failing agenda brings. Tyrannical hate-speech. Canada is no different.

POTENTIAL TERROR THREATS

- OPPOSITION TO COVID MEASURES
- CLAIMS OF ELECTION FRAUD, BELIEF TRUMP CAN BE REINSTATED
- 9/11 ANNIVERSARY AND RELIGIOUS HOLIDAYS

BREAKING NEWS

NATIONAL TERRORISM ALERT AHEAD OF 9/11 20TH ANNIVERSARY



Rocco Galati @roccogalatilaw · Aug 14

More government hate speech, as predicted, anyone critical of Covid-19 measures will be branded a "terrorist threat". Another fascist move that shows that they are loosing the battle on their agenda. My mother: "If you wanna make God laugh, make a big f------- plan".

> **Trish Wood** @WoodReporting · Aug 14
>
> Another move to criminalize and smear C-19 heretics.
> twitter.com/ConceptualJame...

52 386 920

Rocco Galati @roccogalatilaw · Aug 10

Watch our expert panel discussing School re-opening Court application with: Robert Kennedy, Jr., Prof. Byram Bridle, Amina Sherazee, Dr. Palmer, and more.

constitutionalrightscentre.ca

Constitutional Rights Law Centre - Canada

The Constitutional Rights Centre's sole mission is the protection, defence, enforcement, and enhancement of constitutional rights in

38 327 630

Right of the Province of British Columbia, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix (Minister of Health), Jennifer Whiteside (Minister of Education), Mable Elmore (Parliamentary Secretary For Seniors Services) and Mike Farnworth (Minister of Public Safety and Solicitor General, (collectively, the "Province"), in the above captioned proceedings. As such, I have personal knowledge of the matters deposed to except where such are stated to be based on information and belief, in which case, I verily believe them to be true.

Action4Canada Website Information

2. On November 30, 2021, I visited the website www.Action4Canada.com which I understand to be a website created and maintained by the Action4Canada, a Plaintiff in the above referenced proceeding (the "Action4Canada Site").

3. Attached and marked as **Exhibit "A"** is a true copy of a printout of the main page of the Action4Canada Site, obtained by me on November 30, 2021.

4. Attached and marked as **Exhibit "B"** is a true copy of a printout of the "Donate" page from the Action4Canada Site, obtained by me on November 30, 2021.

5. Attached and marked as **Exhibit "C"** is a true copy of a printout of the "The House of COVID keeps on Falling" page from the Action4Canada Site, obtained by me on November 30, 2021.

6. Attached and marked as **Exhibit "D"** is a true copy of a printout of the "Action4Canada: Statement of Claim FILED" page from the Action4Canada Site on November 30, 2021.

Notices of Liability

7. Attached and marked as **Exhibit "E"** is a true copy of a printout of the "Notices of Liability" page from the Action4Canada Site, obtained by me on November 30, 2021.

8. Attached and marked as **Exhibit "F"** is a true copy of the "Employer Vaccine Notice of Liability" page from the Action4Canda Site along with a copy of the blank

form and an instruction page for completion and service, obtained by me on November 30, 2021.

9. Attached and marked as **Exhibit "G"** is a true copy of the "Elected Officials Vaccine Notice of Liability" page from the Action4Canada Site along with a copy of the blank form and an instruction page for completion and service, obtained by me on November 30, 2021.

10. Between August and December 2021, our office was provided with copies of approximately seventy (70) Vaccine Notices of Liability to Employers in the template provided on the Action4Canada Site, which had been sent by employees to representatives of various BC government agencies and ministries. Attached and collectively marked as **Exhibit "H"** is a sample of twenty (20) completed Vaccine Notices of Liability to Employers and, where provided, accompanying emails.

11. Between August and December 2021, our office was provided with copies of approximately one hundred ten (110) Vaccine Notices of Liability to Elected/Appointed Officials in the template provided on the Action4Canada Site, which had been sent to representatives of various BC government agencies and ministries. Attached and collectively marked as **Exhibit "I"** is a sample of twenty (20) completed Vaccine Notices of Liability to Elected/Appointed Officials, and, where provided, accompanying emails.

12. Between August and December 2021, our office was provided with copies of approximately five (5) letters in a template provided on the Action4Canada Site, with the subject line "Threat to use an experimental injection as a term of employment." Attached and collectively marked as **Exhibit "J"** is a copy of those letters, and, where provided, accompanying emails.

Other Material

13. On November 30, 2021, I conducted an internet search using www.Google.com for a Twitter account related to the name "Rocco Galati". As a result of that search, I was able to access a Twitter account under the name @roccogalatilaw. Attached and marked as **Exhibit "K"** are true copies of screenshots taken by me of postings from the Twitter

account @roccogalatilaw on November 30, 2021 for the period August 10 – September 1, 2021.

14. **Exhibits "H", "I"** and **"J"** have been redacted to remove the personal information of the senders.

AFFIRMED BEFORE ME)
at Vancouver, British Columbia)
on May 24, 2022.)
)
)
A commissioner for taking) Rebecca Hill
affidavits for British Columbia)

Mark Witten
Barrister and Solicitor, Legal Services Branch
Ministry of Attorney General
1301 - 865 Hornby Street
Vancouver BC V6Z 2G3 (604) 660-3093
COMMISSIONER FOR TAKING
AFFIDAVITS FOR BRITISH COLUMBIA

This is Exhibit "**A**" referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

....
A Commissioner for taking Affidavits
Within the Province of British Columbia

Action4Canada is a grassroots movement reaching out to millions of Canadians and UNITING our voices in opposition to the destructive policies tearing at the fabric of this Nation.

action4canada.com/

ACTION4CANADA

Protecting Faith, Family and Freedom

God Keep Our Land Glorious and Free

**Action*4*Canada is a grassroots movement reaching out to millions of Canadians and UNITING our voices in opposition to the destructive policies tearing at the fabric of this nation. Through Call To ACTION campaigns, we equip citizens to take action.
We are committed to protecting… FAITH, FAMILY and FREEDOM**

Remembrance Day Message

A Message from Tanya Gaw, Founder of Action4Canada

Statement of Claim Filed! Legal action against the Government officially commenced!
Action*4*Canada has commenced legal action against the BC and federal government. We have retained Rocco Galati, a top constitutional lawyer, who is willing to take on the defence of our Charter Rights and Freedoms in response to the extreme and destructive emergency measures and Bill 19.

Please support Action*4*Canada as we continue our work in defending Canadians.

DONATE NOW

ACTION 4 CANADA

Protecting Faith, Family and Freedom

Vax Victims

Vax Victims Canada

If you, or someone you know, has been injured or died due to the COVID experimental injection, then Canadians need to hear your story.

ACTION 4 CANADA

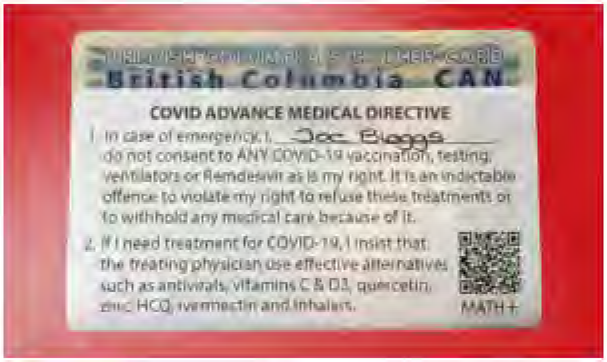
Notices of Liability

COVID-19
VACCINE
Notice of Liability

Mask Notice of Liability

Action4Canada.com

Advance Medical Directive



British Columbia CAN

COVID ADVANCE MEDICAL DIRECTIVE

1. In case of emergency I, Joe Bloggs do not consent to ANY COVID-19 vaccination, testing, ventilators or Remdesivir as is my right. It is an indictable offence to violate my right to refuse these treatments or to withhold any medical care because of it.
2. If I need treatment for COVID-19, I insist that the treating physician use effective alternatives such as antivirals, vitamins C & D3, quercetin, zinc, HCQ, ivermectin and inhalers.

MATH+

Charter Rights

CANADIAN
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AND FREEDOMS
CANADIAN CITIZENS
FOR CHARTER
RIGHTS & FREEDOMS

Calls to Action

CALL TO
ACTION

Join Action4Canada

BLOGROLL

ACT! For Canada

Laura-Lynn Tyler Thompson

Life Site News

Rebel News

True North

Odessa

Dan Dicks

Epoch Times

C3RF

Our mission is to protect Canada's rich heritage which is founded on Judeo-Christian principles.
Inherited through our British Commonwealth and embedded in the Magna Carta, it forms our laws and values and is a system of governance which sets us apart from totalitarian, communist and socialist regimes. Giving Canadians the freedom to believe, or not to believe, without fear of persecution.

WE ARE UNITED, ON THE MOVE AND DEVOTED TO MAKING CANADA GREAT AGAIN!

DONATE NOW

ALL RIGHTS RESERVED ACTION4CANADA INC.

ACTION4CANADA

Select Page

Donate to Action4Canada

Action4Canada Inc is volunteer run and 100% supported by the generous donations of members who share our concerns and value our work. We are committed to educating, equipping and encouraging Canadians to take action and give the silent majority a much needed voice.

Special Notice –Action4Canada Inc has filed legal action against the Federal and BC governments in response to their extreme emergency measures. For updates Click Here. **We have reached 100% of our current fundraising goal for the Constitutional legal action.** Thank you so much to all the donors who helped make this happen. We are going into court fully armed and ready to win!

Please continue to support the work of **Action4Canada** as we work to protect Canadians rights and freedoms through providing effective resources, legal actions, training and more.

Payment Methods

Interac e-Transfer

This is Exhibit "**B**" referred to in the Affidavit of Rebecca Hill affirmed before me at Vancouver in the Province of British Columbia this 24th day of May 2022

A Commissioner for taking Affidavits Within the Province of British Columbia

Action4Canada General Fund

callto@action4canada.com

Legal Action Fund

legalaction@action4canada.com

Thank you!

We have reached 100% of our original fundraising goal for the Constitutional legal action.

However, this is only one part of our strategy.

Please continue to support A4C by donating to the General Fund and consider becoming a monthly donor.

Action4Canada is working hard to equip Canadians to defend their guaranteed rights!

Secure Payments

Powered by stripe

Safe and Secure SSL Encrypted

VISA DISCOVER AMERICAN EXPRESS

Donate – A4C General Fund

Donate to Action4Canada

Donate Monthly to Action4Canada

Donate – Legal Fund

Donate - Legal Fund

By cheque

Action4Canada Inc.
102 – 15910 Fraser Hwy, Suite #453
Surrey, BC V4N 0X9

E-mail us @ callto@action4canada.com

Action4Canada is a registered non-profit organization. We do not have charitable status.

Non-Profit Certificate of Incorporation

ALL RIGHTS RESERVED ACTION4CANADA INC.

SIGNUP 4
EMAIL
UPDATES
SIGN ME UP!

Partner with Us…

Partnering with Action4Canada allows concerned Canadians to have the tools to address issues crucial to Canada’s Sovereignty, Democracy, and our Freedom.

DONATE

Privacy Policy Disclaimer

ACTION4CANADA

This is Exhibit "**C**" referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

A Commissioner for taking Affidavits
Within the Province of British Columbia

Select Page

Join Tanya Gaw & Rocco Galati On Wednesday September 1st Via Two Zoom Presentations

Meeting #1 – Action4Canada @ 5:45pm PST/8:45pm EST
Register below

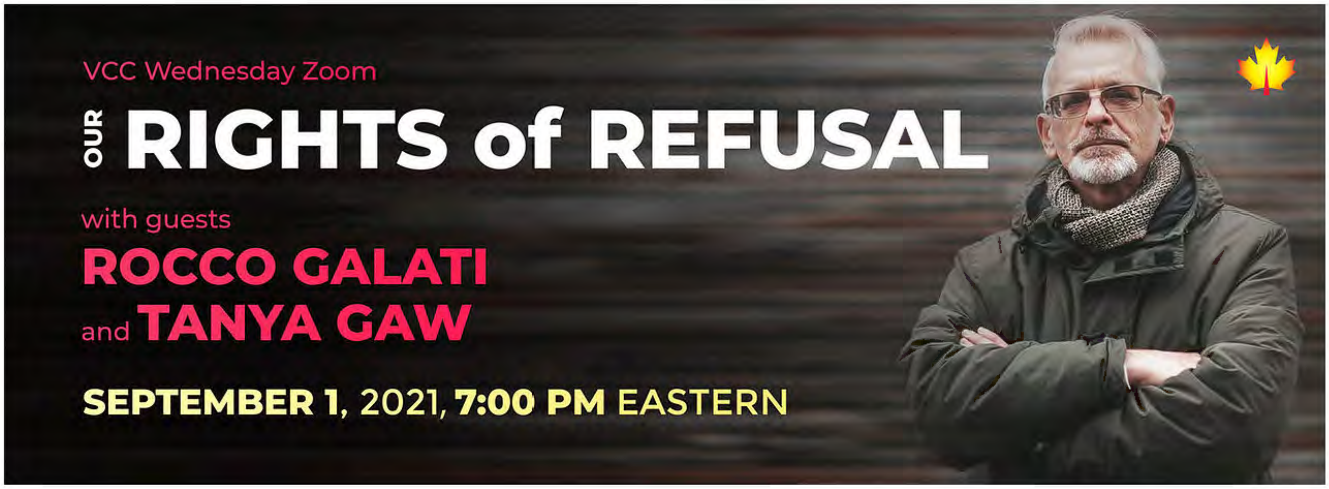
ACTION4CANADA
Wednesday Weekly Meetings
5.30 pm PST / 8.30 pm EST
Special Guest:
Rocco Galati

When: September 1st, 2021. Sign on starts at 05:30pm PST/8:30pm EST

The meeting begins at 5:45pm PST/8.45pm EST with an Intro Presentation to Action4Canada and Rocco begins at 6pm PST/9pm EST. Rocco and Tanya will discuss the filing of the Statement of Claim.

Register in advancefor this meeting. After registering, you will receive a confirmation email.

Meeting #2 – Rocco and Tanya with Vaccine Choice Canada


VCC Wednesday Zoom
OUR RIGHTS of REFUSAL
with guests
ROCCO GALATI
and TANYA GAW
SEPTEMBER 1, 2021, 7:00 PM EASTERN

When: September 1st, 2021 4pm PST/7pm EST

Register in advance for this meeting. After registering, you will receive a confirmation email.

The Word is Getting Out

LOCKDOWN
COVID-19
RESTRICTIONS

Grassroots group sues Canadian gov't over "dictatorial and unlawful" COVID measures.

The Canadian government's "actions appear to constitute criminal negligence, breach of trust, incitement of hatred, crimes against humanity committed against our elderly, our children and society at large," **Action4Canada** said. **Read More.**

Trudeau's Waning Fan Club

Opposition Rising! Angry crowd in White Rock, British Columbia force Trudeau out of the neighbourhood, whilst in Milton Ontario he was too afraid to get out of his bus (video below).

Please support Action4Canada via a **donation** as we continue our work in defending Canadians. We are a not-for-profit and rely solely on the contributions of our donors to support the work we are doing.

Thank you and God bless Canada.

The Team @
Action4Canada

Vax Victims

Vax Victims Canada
If you, or someone you know, has been injured or died due to the COVID experimental injection, then Canadians need to hear your story.
ACTION 4 CANADA

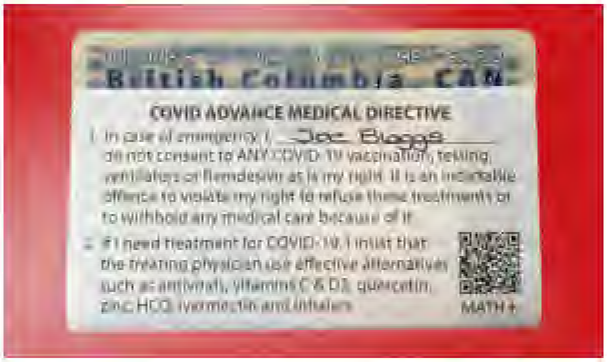
Notices of Liability

VID-
COVID-1
VACCINE
Notice of Liability

Mask Notice of Liability

Action4Canada.com

Advance Medical Directive



British Columbia CAN

COVID ADVANCE MEDICAL DIRECTIVE

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2. If I need treatment for COVID-19, I insist that the treating physician use effective alternatives such as antivirals, vitamins C & D3, quercetin, zinc, HCQ, ivermectin and inhalers.

MATH+

Charter Rights

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AND FREEDOMS
CANADIAN CITIZENS
FOR CHARTER
RIGHTS & FREEDOMS

Calls to Action

CALL TO
ACTION

Join Action4Canada

[ACT! For Canada]

[Laura-Lynn Tyler Thompson]

[Life Site News]

[Rebel News]

[True North]

Odessa

Dan Dicks

Epoch Times

C3RF

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in the Province of British Columbia
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....
A Commissioner for taking Affidavits
Within the Province of British Columbia

Thank you! We have reached 100% of our current Legal Fund financial goal!

action4canada.com/action4canada-statement-of-claim-filed/

August 26, 2021

ALRIGHTSCENT
39:49 / 51:17
rumble

Action4Canada Statement of Claim FILED!

Action4Canada and the Constitutional Rights Centre are very pleased to announce that the Statement of Claim for the BC/Federal legal action has been filed.

On August 16th, 2021, **Action4Canada** formally filed legal action in the BC Supreme Court, to hold multiple parties accountable for their actions with respect to COVID-19 measures. The defendants include: the Government of Canada, the Government of British Columbia, various public health officers, the Canadian Broadcasting Corporation, and others. **Action4Canada** is committed to defending faith, family and freedom.

Video from the Press Conference

Statement of Claim

Select here for the full Statement of Claim (PDF)

Action4Canada and the Constitutional Rights Centre believe the government is infringing on human rights and have exceeded their authority causing irreparable harm. Their actions appear to constitute criminal negligence, breach of trust, incitement of hatred, crimes against humanity committed against our elderly, our children and society at large, by withholding life-saving treatments, causing extreme psychological trauma due to the ordering of isolation, lockdowns, masking, social distancing and, without making full, true and plain disclosure of the known risks thereof, mandating and promoting dangerous experimental medical injections which they know, or ought to know, cause adverse reactions and death.

The government's dictatorial and unlawful measures and their out-of-control spending, in response to COVID-19 are further destroying our businesses, our communities, and our economy. Many small businesses have been forced to close. Furthermore, the escalating national debt is putting the future of our children and grandchildren at risk.

The measures are in violation of the Constitution and nearly every section of the Charter of Rights and Freedoms. Canadians have "guaranteed" rights. Such as Section 7 of the Charter and 1(a) of the Bill of Rights; "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

The government's actions are putting our sovereignty, national security, and our democracy at risk.

Financial Goal 100% 100%

Please **consider a donation** as we are a not-for-profit and rely solely on the contributions of our donors to support the ongoing work we are doing.

Vax Victims

Vax Victims Canada
If you, or someone you know, has been injured or died due to the COVID experimental injection, then Canadians need to hear your story.
ACTION4CANADA

Notices of Liability

Notice of Liability
COVID-1
VACCINE

Mask Notice of Liability

Action4Canada.com

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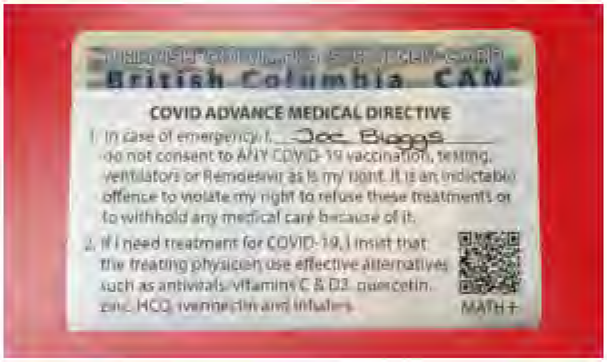

British Columbia CAN

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A Commissioner for taking Affidavits
Within the Province of British Columbia

COVID-19 Liability Notices | Action4Canada

action4canada.com/covid-liability-notices/

August 4, 2021

Notices of Liability

Business, Mask, Jab, Testing etc

Action4Can
COVID-1
VACCINE
njection
MASK...
OR NOT TO MASK?
That is the question.
RESPECT YOUR RIGHT TO CHO
nder the Charter of Rights and Freedom

All things COVID Related: Protect yourself, your job and your children

Personal liability is a critical weapon in this war against individual rights and freedoms. Canadians have inalienable rights. We have a Constitution and a Charter of Rights and Freedoms, plus the Rule of Law. If you do not want to lose your rights then you need to take action to protect them by holding those who are violating your rights, personally liable.

No Order or government mandates supersede YOUR guaranteed right to work; assemble; worship; or see your family or loved ones; nor to force you to have anything stuck into any part of your body without your 100% consent. If you do not want to lose your rights then you must not concede, comply or give in to this tyranny.

To assist you, **Action4Canada** has created the following Notices of Liability and non-consent form to protect you and your family from a government that is out of control.

Click on these links to jump directly to each Notice of Liability section:

NOTE: You do not need a lawyer to serve a Notice of Liability.
Fill in the top of the NOL with the name of the person you are serving, sign and date the bottom, keep a copy, and either deliver personally or send by registered mail.

COVID Advance Medical Directive

COVID Advance Medical Directive

Print off and attach to your medical card to advise medical professionals of your wishes should you need hospital care.

COVID Testing

Notice of Liability Against Forced Covid Testing

Right to REFUSE Covid Testing. The Genetic Non-Discrimination Act, Bill S201, It is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity. The PCR test measures the “genetic” material in a sample.

Warning Letter: PDF

Vaccine NOLs

PROTECT MINORS – **Do not give the NOL to your child to serve. Follow the instructions provided.

Student Mask/Covid Notice Non-Consent NOL to Educators

- **Student Mask/Covid Notice to Educators**
- **British Columbia Mask Exemption**

If anyone is disregarding the Notice of Liability and interfering with education, extra-curricular activities or essential or non-essential services then use the following letter to inform them they will be held ‘personally’ liable for any loss of income, damages and/or injury you suffer as a result of their actions. You are not addressing them in their capacity as an educator, business owner or coach but as a citizen who is committing indictable offenses. Any post-secondary student being prohibited from attending school is missing out on future income and should be included in your claim.

NEW: Additional Vax Mandate Letter of Response

PROTECT EMPLOYEES

- **Employer Notice of Liability**
- **Union Notice of Liability**
- **Join the Workers Unite group**

If your employer or union is disregarding the NOL then use the following letter to inform the ‘individual’ that they will be held ‘personally’ liable for any loss of income or damages you suffer as a result of their actions. You are not addressing them in their capacity as employer or union rep but as a citizen who is committing indictable offenses.

NEW: **Employee Further Letter of Response**

If all else fails…it is time to file criminal charges. Remember, you are not going after anyone in their capacity as an employer or union rep but as a citizen who is in violation of the criminal code and your guaranteed protected Constitutional rights.

David Lindsay's E-book on how to file criminal charges against other citizens, "The Annotated Criminal Code Procedure in Canada," is available by emailing David at [email protected]

Go to the **Empower Hour page** and listen to Oct. 13 and Oct. 27, 2021 for further instructions.

AGAINST ELECTED OFFICIALS

Elected Officials Notice of Liability

AGAINST 'ANYONE' ADMINISTERING THE EXPERIMENTAL INJECTION

We have a duty to protect the public and minors from this harmful, deadly, injection.

Public Health Nurses/Physicians/Pharmacist/Firefighters/etc. Notice of Liability

Businesses

Premiers & Health Officials

If you are a church leader, business owner, educator, medical professional, law enforcement or firefighter…. Sign and send one of the following notices to your Premier and Provincial Health Officer advising them that **you will no longer comply with Orders that are unlawful, irrational, causing harm, and in violation of the Constitution and Charter of Rights and Freedoms.**

Notices to Premiers and Health Officials

Mobility Rights

Every citizen has the Guaranteed right to travel in Canada. The right to enter, remain and leave Canada.

Printable PDF

Notice of Liability Flyers

Notice of Liability Flyer

NOLs in Action

Notice of Liability (Elected/Appointed Official) Served to Mayor and Council (Kamloops, BC)

Watch Video At: https://youtu.be/gNRi31VZyIs

***Action4Canada** accepts no responsibility or liability for any harms or losses that occur as result of delivering this notice. If you do not agree to these terms then please do not use this notice. We do not make any representations or warranties about the potential consequences of delivering this Notice of Exemption/Non-Consent (eg. removal of child from a private school). A parent/legal guardian must decide what is in the best interest of their child.*

Vax Victims

Vax Victims Canada
If you, or someone you know, has been injured or died due to the COVID experimental injection, then Canadians need to hear your story.
ACTION4CANADA

Notices of Liability

COVID-19
VACCINE
Notice of Liability

Mask Notice of Liability

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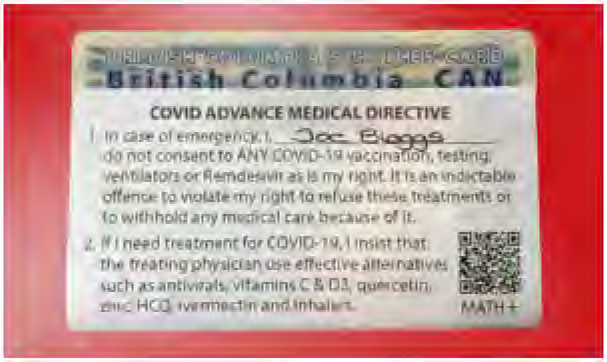
Advance Medical Directive



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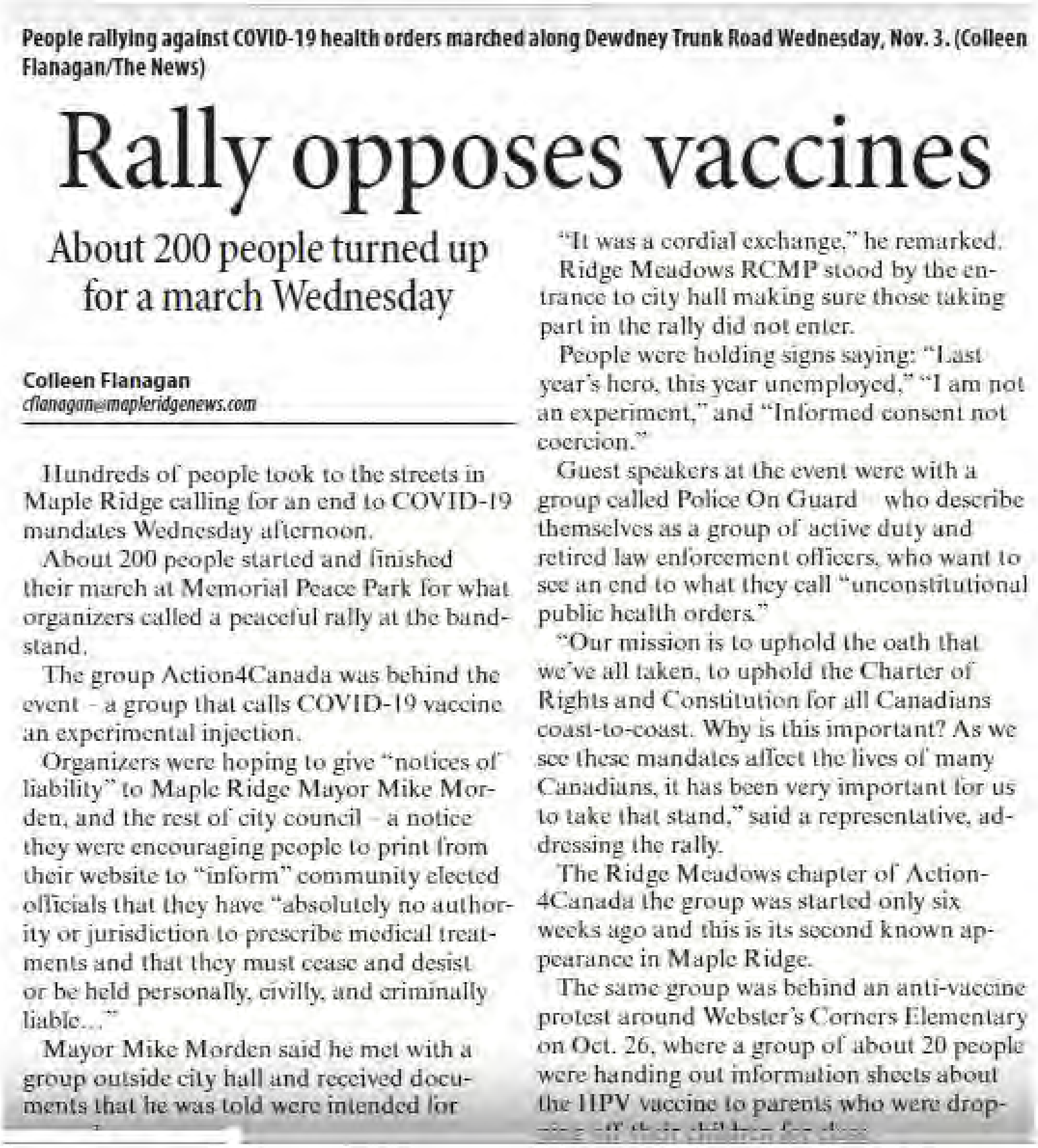
Epoch Times

C3RF



People rallying against COVID-19 health orders marched along Dewdney Trunk Road Wednesday, Nov. 3. (Colleen Flanagan/The News)

Rally opposes vaccines

About 200 people turned up for a march Wednesday

Colleen Flanagan
cflanagan@mapleridgenews.com

Hundreds of people took to the streets in Maple Ridge calling for an end to COVID-19 mandates Wednesday afternoon.

About 200 people started and finished their march at Memorial Peace Park for what organizers called a peaceful rally at the bandstand.

The group Action4Canada was behind the event – a group that calls COVID-19 vaccine an experimental injection.

Organizers were hoping to give "notices of liability" to Maple Ridge Mayor Mike Morden, and the rest of city council – a notice they were encouraging people to print from their website to "inform" community elected officials that they have "absolutely no authority or jurisdiction to prescribe medical treatments and that they must cease and desist or be held personally, civilly, and criminally liable…"

Mayor Mike Morden said he met with a group outside city hall and received documents that he was told were intended for

"It was a cordial exchange," he remarked.

Ridge Meadows RCMP stood by the entrance to city hall making sure those taking part in the rally did not enter.

People were holding signs saying: "Last year's hero, this year unemployed," "I am not an experiment," and "Informed consent not coercion."

Guest speakers at the event were with a group called Police On Guard who describe themselves as a group of active duty and retired law enforcement officers, who want to see an end to what they call "unconstitutional public health orders."

"Our mission is to uphold the oath that we've all taken, to uphold the Charter of Rights and Constitution for all Canadians coast-to-coast. Why is this important? As we see these mandates affect the lives of many Canadians, it has been very important for us to take that stand," said a representative, addressing the rally.

The Ridge Meadows chapter of Action-4Canada the group was started only six weeks ago and this is its second known appearance in Maple Ridge.

The same group was behind an anti-vaccine protest around Webster's Corners Elementary on Oct. 26, where a group of about 20 people were handing out information sheets about the HPV vaccine to parents who were drop-

This is Exhibit "**F**" referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

....
A Commissioner for taking Affidavits
Within the Province of British Columbia

Notice of Liability: Employee | Action4Canada

action4canada.com/liability-notice-employee/

June 5, 2021

Is your job at risk due to the COVID Experimental Injection?

COVID-19
VACCINE
Notice of Liability
Serve Your Employer Today!
Healthcare, Federal, Private or Public
Including Union Executives and
Business Associations
Pexels

Print PDF: Employer Vaccine Notice of Liability

Employers, whether medical or not, are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

According to top constitutional lawyer, Rocco Galati, “both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable”.

Therefore, notify your employer today that you will hold them personally liable for any financial injury and/or loss of your personal income and ability to provide food and shelter for your family if they choose to use coercion or discrimination against you based on your decision not to participate in the COVID-19 experimental treatments.

Take ACTION!

- Print the Notice of Liability (link in blue above)
- Fill in the name of the person you are sending it to, owner and/or management (one notice per person), at the top and then fill in your name and your signature at the bottom (you do not need to get your employer to sign it).
- Keep a photocopy of the Notice for your records
- Then either personally give the signed copy to your employer/owner/manager in person or you can send it by mail.

- **Video record serving the NOL when done in person and use registered mail if sending by post so you have proof of them having received it.**

Action4Canada *accepts no responsibility or liability for any harms or losses that occur as result of delivering this notice. If you do not agree to these terms then please do not use this notice.*

Vax Victims

Vax Victims Canada
If you, or someone you know, has been injured or died due to the COVID experimental injection, then Canadians need to hear your story.
ACTION4CANADA

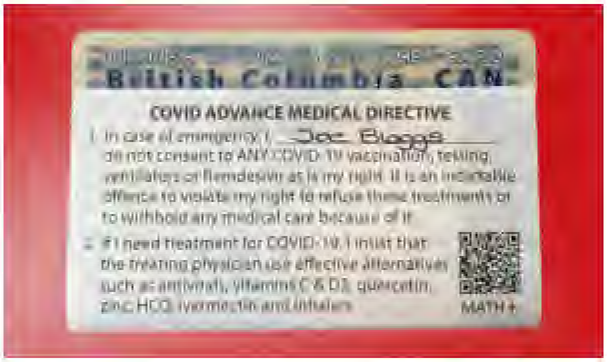
Notices of Liability

COVID-19
VACCINE
Notice of Liability

Mask Notice of Liability

Action4Canada.com

Advance Medical Directive



British Columbia CAN

COVID ADVANCE MEDICAL DIRECTIVE

1. In case of emergency, I, Joe Bloggs do not consent to ANY COVID-19 vaccination, testing, ventilators or Remdesivir as is my right. It is an indictable offence to violate my right to refuse these treatments or to withhold any medical care because of it.
2. If I need treatment for COVID-19, I insist that the treating physician use effective alternatives such as antivirals, vitamins C & D3, quercetin, zinc HCQ, ivermectin and inhalers

MATH+

Charter Rights

CANADIAN
CHARTER OF RIGHTS
AND FREEDOMS
CANADIAN CITIZENS
FOR CHARTER
RIGHTS & FREEDOMS

Calls to Action

CALL TO
ACTION

Join Action4Canada

ACT! For Canada

Laura-Lynn Tyler Thompson

Life Site News

Rebel News

True North

Odessa

Dan Dicks

Epoch Times

C3RF

***Action4Canada** accepts no responsibility or liability for any harms or losses that occur as result of delivering this notice to anyone. If you do not agree to these terms then please do not use this notice. We do not make any representations or warranties about the potential consequences of delivering this Notice of Liability*

ACTION4CANADA

Protecting Faith, Family and Freedom

"Vaccine" Notice of Liability:

Employers (Health Care, Federal, Private and Public) Business Associations, and the like

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How to Serve the Notice of Liability

- Print two copies of the Notice of Liability.
- Fill in the name of the person you are serving it to in the space provided at the top of the first page - on both copies.
- Sign your name and fill in the date in the space provided on the last page - on both copies.
- Keep one copy of the Notice for your records.
- Give the second copy to the person you are serving it to. If they choose not to accept it, then leave it on the floor at their feet.
- If you are serving the Notice in person, be sure to video record yourself serving it (or audio record if video is not possible).
- **If sending by mail, you must use registered mail as that provides proof of delivery.**

Keep all information (eg. Liability Notice copy, video, mailing proof etc.) in a safe place for future use.

NOTE: You do not need a lawyer to serve a Notice of Liability and you do not need consent, or the signature of the person you are serving it to.

Disclaimer: Action4Canada ***accepts no responsibility or liability for any harms or losses that occur as result of serving a notice of liability. If you do not agree to these terms, then please do not use this notice. We do not make any representations or warranties about the potential consequences of serving a Notice of Liability. This information is not intended as legal or health advice.***

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Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: ______________________

Attn: ______________________

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2] . Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

Despite this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections is not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Vaccine development is a long, complex process, often lasting 10-15 years [14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- peopleafter-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

(Referenced on Page 8 of “An Assessment of Covid-19…)[19]. Per the American Council on Science and Health, as well as the National Institutes of Health (NIH), "the estimated age-specific Infection Fatality Rate (IFR) is very low for children and younger adults (e.g., 0.002% at age 10 and 0.01% at age 25) which translates to a survivability rate of 99.99% to 99.998%, whereas the IFR is 0.4% at age 55 and 1.4% at 65 translating to a survivability rate of 99.6% to 98.6% respectively[20] [21]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

7. According to Health Canada's Summary Basis of Decision[22], updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines”.

    Under the Risk Management plan section of the Summary Basis of Decision, it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)”. In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

    In an article titled “Vaccination against SARS-CoV-2 and disease enhancement – knowns and unknowns” published on NCBI they specifically state: “The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)”[23].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[24]. It is further reported that only one percent of vaccine injuries are reported to VAERS[25], compounded by several month’s delay in uploading the adverse events to the VAERS database[26].

    On November 5, 2021, VAERS data release for the period December 14, 2020 to October 29, 2021, showed 856,919 adverse events reports following COVID-19 injections, including 18,078 deaths and 131,027 serious injuries. Of that total, 1,320 adverse injury reports were of miscarriage or premature birth; 3,090 reported cases of Bell’s Palsy; 2,070 reports of serious anaphylaxis; 10,686 reports of blood clotting disorders; and 3,030 cases of myocarditis and pericarditis[27].

    Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths”. He further added, “...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it’s pulled off the market”[28].

9. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

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[19] https://ghorganisation.com/wp-content/uploads/2021/07/GHO-updated-pdf.pdf
[20] https://www.acsh.org/news/2020/11/18/covid-infection-fatality-rates-sex-and-age-15163
[21] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
[23] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7566857/
[24] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/
[25] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/
[26] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/reporting-vaccinations.html
[27] https://childrenshealthdefense.org/defender/vaers-cdc-adverse-events-deaths-covid-vaccines/
[28] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

10. Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[29] [30].

Under the *Crimes Against Humanity and War Crimes Act of Canada*[31], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The Act also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the *Criminal Code of Canada*[32], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[33], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

It is a further violation of the *Canadian Criminal Code*[34], to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216**: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217**: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1**: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

---

[29] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[30] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[31] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[33] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192[35], the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30[36].

Vaccination is voluntary in Canada[37]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms[38] (1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights[39] (2005)**
- **Nuremberg Code[40] (1947)**
- **Helsinki Declaration[41] (1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[42]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[43]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take ANY vaccine including the COVID-19 experimental injection.

Name: ______________________________

Signature: ______________________________

Date: ______________________________

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/1980/1980canlii14/1980canlii14.html
[37] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[38] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[39] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[40] http://www.cirp.org/library/ethics/nuremberg/
[41] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[42] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[43] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

This is Exhibit "**G**" referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

....
A Commissioner for taking Affidavits
Within the Province of British Columbia

Notice of Liability – Elected Officials

action4canada.com/liability-notice-elected-officials/

July 11, 2021

COVID-19
VACCINE
Injection
Notice of Liability
Pexels

Print PDF – Elected Officials Vaccine Notice of Liability

Elected officials are not medical professionals and, therefore, they are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist citizens submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a “vaccine”.

According to top constitutional lawyer, Rocco Galati, “both government and private businesses cannot impose mandatory vaccinations…”

Be proactive and take action and inform the elected officials in your community that they have absolutely no authority or jurisdiction to prescribe medical treatments and that they must cease and desist or be held personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering these experimental injections to members of the public, including minors.

Take ACTION!

- Print the Notice of Liability
- Fill in the name of the person you are sending it to, owner and/or management (one notice per person)
- Keep a photocopy of the Notice for your records
- Record the event when providing the signed copy to the recipient in person.
- **If sending by mail we recommend you send it by registered mail**

***Action4Canada** accepts no responsibility or liability for any harms or losses that may occur as result of delivering this notice to anyone. If you do not agree to these terms then please do not use this notice. We do not make any representations or warranties about the potential consequences of delivering this Notice of Liability*

ACTION4CANADA

Protecting Faith, Family and Freedom

"Vaccine" Notice of Liability:

Elected/Appointed Officials

How to Serve the Notice of Liability

- Print two copies of the Notice of Liability.
- Fill in the name of the person being served in the space provided at the top of the first page - on both copies.
- Sign your name and fill in the date in the space provided on the last page - on both copies.
- Keep one copy of the Notice for your records.
- Give the second copy to the person you are serving it to. If they choose not to accept it, then leave it on the floor at their feet.
- If you are serving the Notice in person, be sure to video record yourself serving it (or audio record if video is not possible).
- **If sending by mail, you must use registered mail as that provides proof of delivery.**

Keep all information (eg. Liability Notice copy, video, mailing proof etc.) in a safe place for future use.

NOTE: You do not need a lawyer to serve a Notice of Liability and you do not need consent, or the signature of the person you are serving it to.

Disclaimer: Action4Canada ***accepts no responsibility or liability for any harms or losses that occur as result of serving a notice of liability. If you do not agree to these terms, then please do not use this notice. We do not make any representations or warranties about the potential consequences of serving a Notice of Liability. This information is not intended as legal or health advice.***

Source: Action4Canada.com

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Rev. November 10th, 2021

“Vaccine” Notice of Liability
Elected/Appointed Officials

On Notice To: ____________________________________

Re: COVID-19 injections recommended, encouraged, advertised, mandated, facilitated, or incentivised in anyway by you to the public

This is your official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist citizens, including minors, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a “vaccine”.

Experimental vaccines are only authorized to be used under an official State of Emergency and only if there are no other adequate, approved or available alternatives. The Federal Government did not enact a State of Emergency for COVID-19 and effective alternatives including Vitamin D, Ivermectin and Hydroxychloroquine have been available from the onset but their use was prohibited.

The emergency measures are based on the claim that we are experiencing a "public health emergency”. There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in “cases” is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, “the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person”.

Despite this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientificflaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a ‘problem’ at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, “the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between “dead” matter and living matter”[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba’s Chief Microbiologist andLaboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/en/sensational-verdict-from-weimar-no-masks-no-distance-no-more-tests-for-pupils/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections is not required or recommended.

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision.This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Vaccine development is a long, complex process, often lasting 10-15 years [14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf
[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
[14] https://www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation
[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/
[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

6. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[19] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

   According to Health Canada's Summary Basis of Decision, updated May 20, 2021[20], the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision, it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[21].

7. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[22]. It is further reported that only one percent of vaccine injuries are reported to VAERS[23], compounded by several month's delay in uploading the adverse events to the VAERS database[24].

   On November 5, 2021, VAERS data release for the period December 14, 2020 to October 29, 2021, showed 856,919 adverse events reports following COVID-19 injections, including 18,078 deaths and 131,027 serious injuries. Of that total, 1,320 adverse injury reports were of miscarriage or premature birth; 3,090 reported cases of Bell's Palsy; 2,070 reports of serious anaphylaxis; 10,686 reports of blood clotting disorders; and 3,030 cases of myocarditis and pericarditis[25].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market"[26].

8. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

9. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[27] [28].**

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[19] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08%20 (pg. 9)

[20] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[21] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7566857/ https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/

[23] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[24] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/reporting-vaccinations.html

[25] https://childrenshealthdefense.org/defender/vaers-cdc-adverse-events-deaths-covid-vaccines/

[26] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[27] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[28] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Messaging from individuals including yourself, has placed pressure on the public to receive injections in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families.

You have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and care home system where family members have been unable to see other family members in the care of these systems, due to the nature of lockdown measures.

As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma,bullying, and segregation through the COVID-19 measures and are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Schools include vaccine and COVID-19 "vaccine" curriculum, which is politically and medically biased, prejudicial, and is a form of undue influence on any minor child.

The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental injection, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

Further to this, suggestions/recommendations from you that people take COVID-19 injections are being made without adequate training and credentials that would qualify you to make medical decisions or recommendations for other people. These recommendations/suggestions have also been made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners, many of which are listed in this document. Among these qualified individuals are those who have made clear certain medical consequences that have resulted from the receiving of COVID-19 injections, meaning recommendation from 'medically unqualified' people such as yourself, have placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

Your actions may further constitute breach of trust and deception.

Under the *Crimes Against Humanity and War Crimes Act of Canada*[29], a crime against humanity means, among other things: murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law inforce at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada[30], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[31], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

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[29] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[30] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[31] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

It is a further violation of the Canadian Criminal Code[32], to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[33] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[34]

Vaccination is voluntary in Canada[35]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Yet, as already mentioned in this document, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts that lockdowns have had on the health and well-being of the citizenry. Officials are not only infringing on human rights, but they are also putting themselves personally at risk of a civil lawsuit for damages and potential imprisonment by attempting to impose these experimental injections on citizens, including minors. Canadian law has long recognized that individuals have the right to control what happens to their bodies, law which is being directly infringed upon by these officials.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont
[33] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[34] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1
[35] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[36] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[37] **(2005)**
- **Nuremberg Code[38] (1947)**
- **Helsinki Declaration**[39] **(1964, Revised 2013)** Article 25, 26

All Canadian law, contrary to misinformation spread by the WHO, does not allow for "implied consent." The Mature Minor doctrine cannot override the wishes and consent of the parents outside of the emergency threat of imminent harm or death. Vaccinations do not fall under the Mature Minor doctrine[40].

In conclusion, administration of vaccinations is defined as a "medical procedure". Therefore, you have no authority or jurisdiction to prescribe medical treatments and you must cease and desist or beheld personally, civilly, and criminally liable for any injuries or deaths that may occur as a result of recommending, encouraging, advertising, mandating, facilitating, incentivising, coercing, or administering ANY vaccine including the experimental COVID-19 injections to members of the public, including myself, and/or including minors.

Name (print): ______________________ Signature: ______________________

Date: ______________________

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[36] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[37] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[38] http://www.cirp.org/library/ethics/nuremberg/

[39] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[40] https://www.bitchute.com/video/W5qSPiy1onXt/

From: [redacted]
To: [redacted]
Subject: Fwd: Vaccine NoL
Date: Wednesday, November 3, 2021 9:12:10 PM
Attachments: [redacted]-Vaccine Notice of Liability.pdf

[EXTERNAL] This email came from an external source. Only open attachments or links that you are expecting from a known sender.

Hello [redacted]

I wanted to send you the attached letter for the sake of information sharing in regards to the vaccine mandate. There are numerous additional documents that indicate more study results and references but this one covers a lot of the main points. It is worded with a fairly strong viewpoint but I am simply sharing it for information at this time.

I had my reservations about these vaccines well over a year ago when they were first talking about them and after multiple personal interactions with first hand medical knowledge and experience, I made my decision to pass on the currently available Covid-19 vaccines.

I know that we are all trying to make the best decisions for ourselves at this point and time, and I'm not trying to convince anyone one way or another, so I hope this sheds some light on an alternative perspective. I disagree with the BCPS vaccine mandate, the covid passport requirements, and the singular method of fighting a viral infection with the experimental vaccinations.

I am always open to talk so feel free to call me anytime.
Regards,

[redacted]

This is Exhibit "**H**" referred to in the
Affidavit of Rebecca Hill
affirmed before me at Vancouver
in the Province of British Columbia
this 24th day of May 2022

....
A Commissioner for taking Affidavits
Within the Province of British Columbia

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: Ministry of FLNRORD - Stuart Nechako - TSN

Attn: BCTS - Stuart Nechako Management

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

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Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

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2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

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7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines”.

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)”. In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, “the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)”[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month’s delay in uploading the adverse events to the VAERS database[25].

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   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths”. He further added, “...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it’s pulled off the market[27]”.

9. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

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[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

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[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

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Based on the *Genetic Non-Discrimination Act, Bill S-201*[32], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

It is a further violation of the Canadian Criminal Code,[33] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
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>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[35]

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont
[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code[39] (1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, “both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable.”[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take ANY vaccine including the COVID-19 experimental injection.

Name: [redacted]

Signature: ______________________________

Date: November 2, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg/
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Businecss Associations, and the like

Name of Employer/Business Assoc: British Columbia Provincial Government
British Columbia Public Service Agency

Attn: Lori Wanamaker

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivizing, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

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> **Causing bodily harm by criminal negligence**
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> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[35]

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations...mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada,* all referenced above.

Therefore, I hereby notify you that you will be held liable for any and all damage and/or harm caused or done to myself and/or my family directly or indirectly, including but not restricted to financial injury and/or loss of my personal income and my ability to provide food and shelter for myself and/or my family. If you use coercion, intimidation, discrimination, or force against me at any time, as well as any and all damage or harm directly or indirectly caused or done to myself and/or my family including mental/psychological/physical damage, including loss of life or in any other manner. In accepting the Covid-19 injection and any subsequent boosters, it will not be done voluntarily, and my personal medical information will not be disclosed voluntarily.

Name: [redacted]

Signature

Date: Nov. 7, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg/

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

November 2, 2021

Ms. Bobbi Sadler, Deputy Minister
BC Public Service Agency
PO Box 9404 Stn Prov Govt
Victoria, B.C. V8W 9V1

Dear Ms. Sadler,

By complying to and implementing the provincial mandates of COVID injections, testing and masking, you are personally liable for any death or injuries as a result of carrying out the mandates. You are complicit in violating the Nuremberg Code, because these are experimental treatments. The staff, supervisors and managers have the right to informed consent. The Canadian Charter of Rights and Freedoms prohibits coercion into experimental medical treatments.

Contrary to the narrative being promoted by our governments, public health agencies and the mainstream media, we are directly observing unprecedented levels of vaccine-associated injury and death. This is documented in official databases such as the *Vaccine Adverse Events Reporting System* (VAERS) (https://openvaers.com/index.php), which is jointly developed and supported by the *US Centers for Disease Control* (CDC) and the *Food and Drug Administration* (FDA). As of October 22, 2021, there are over 837,593 reported adverse events, including 17,619 deaths, and over 27,277 permanently disabled.

This is your formal Notice of Liability. You have been served.

This COVID injection, testing, and masking program must be terminated immediately.

Respectfully,

Concerned Employees
Enclosure

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: BC Public Service Agency

Attn: Bobbi Sadler

Re: COVID-19 injections recommended or administered to employees, staff, supervisors and managers.

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[20] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month's delay in uploading the adverse events to the VAERS database[25].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[26].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[27]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years- of-recorded-vaccine-deaths-according-to-avers/

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[30] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

Under sections 265 and 266 of the Criminal Code of Canada[31], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[32], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

It is a further violation of the Canadian Criminal Code,[33] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
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Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

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[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

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The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
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According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take the ANY vaccine including the COVID-19 experimental injection.

Name: Concerned Employees

Signature: ______________________

Date: November 2, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg/
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Union Executives, Business Associations, and the like

Name of Employer/Union Assoc: BC Provincial Government / BCGEU

Attn: Inspector / [redacted] Cantelon

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

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[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

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[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

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Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment;

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy;

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada, [14] [15] [16] is using as the basis for approval under the interim-order, therefore, fully informed consent is not possible;

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for one year;

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models;[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death; this includes children ages 12-17 years old.[20]

   Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood;

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-_treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugg

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including The World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)[24];"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[25]

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database[27].

   On May 21, 2021, VAERS data release (in the USA alone) showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week[28].

   Dr. McCullough, a highly cited Covid doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[29];"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported;

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

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[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

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[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or.
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada. The federal and provincial governments made it clear that getting the COVID-19

injections would not be mandatory. Even if they do attempt to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose this experimental medical treatment upon their employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

In conclusion, administration of vaccines is defined as a " medical procedure". In what other medical context could non-doctors and non-pharmacists prescribe, promote and help distribute pharmaceutical drugs? This is unauthorized practice of medicine.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to participate in the COVID-19 experimental treatments.

Name: [redacted]

Signature:

Date: Nov 10 2021

Source: Action4Canada.com

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[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Union Executives, Business Associations, and the like

MINISTER'S OFFICE
HEALTH
#
DRAFT REPLY ☐
FYI ☐
SEP 07 2021
☐ REPLY DIRECT
☐ FILE
REMARKS
☐ PHONE CALL
☐ BATCH
☐ MTG REQ/EVENT
☐ BRIEFING NOTE

Name of Employer/Union/Assoc: VSB / VESTA / BCTF

Attn: Adrian Dix[redacted]

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter." [9]On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nOgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

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Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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> **Causing bodily harm by criminal negligence**
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> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
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Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

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Vaccination is voluntary in Canada. The federal and provincial governments made it clear that getting the COVID-19

injections would not be mandatory. Even if they do attempt to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose this experimental medical treatment upon their employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms[37] (1982)** Section 2a, 2b, 7, 8, 9, 15.
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According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

In conclusion, administration of vaccines is defined as a " medical procedure". In what other medical context could non-doctors and non-pharmacists prescribe, promote and help distribute pharmaceutical drugs? This is unauthorized practice of medicine.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to participate in the COVID-19 experimental treatments.

Name: [redacted]

Signature:

Date: Sept. 3rd 2021

Source: Action4Canada.com

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[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: Government of British Columbia.

Attn: Rodney Chapman

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2] . Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

Despite this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections is not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f/
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

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Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Vaccine development is a long, complex process, often lasting 10-15 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- peopleafter-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

(Referenced on Page 8 of "An Assessment of Covid-19...)[19]. Per the American Council on Science and Health, as well as the National Institutes of Health (NIH), "the estimated age-specific Infection Fatality Rate (IFR) is very low for children and younger adults (e.g., 0.002% at age 10 and 0.01% at age 25) which translates to a survivability rate of 99.99% to 99.998%, whereas the IFR is 0.4% at age 55 and 1.4% at 65 translating to a survivability rate of 99.6% to 98.6% respectively[20] [21]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

7. According to Health Canada's Summary Basis of Decision[22], updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision, it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   In an article titled "Vaccination against SARS-CoV-2 and disease enhancement – knowns and unknowns" published on NCBI they specifically state: "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[23].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[24]. It is further reported that only one percent of vaccine injuries are reported to VAERS[25], compounded by several month's delay in uploading the adverse events to the VAERS database[26].

   On November 5, 2021, VAERS data release for the period December 14, 2020 to October 29, 2021, showed 856,919 adverse events reports following COVID-19 injections, including 18,078 deaths and 131,027 serious injuries. Of that total, 1,320 adverse injury reports were of miscarriage or premature birth; 3,090 reported cases of Bell's Palsy; 2,070 reports of serious anaphylaxis; 10,686 reports of blood clotting disorders; and 3,030 cases of myocarditis and pericarditis[27].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market"[28].

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

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[19] https://ghorganisation.com/wp-content/uploads/2021/07/GHO-updated-pdf.pdf
[20] https://www.acsh.org/news/2020/11/18/covid-infection-fatality-rates-sex-and-age-15163
[21] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
[23] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7566857/
[24] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/
[25] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/
[26] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/reporting-vaccinations.html
[27] https://childrenshealthdefense.org/defender/vaers-cdc-adverse-events-deaths-covid-vaccines/
[28] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

10. Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[29] [30].

Under the *Crimes Against Humanity and War Crimes Act of Canada*[31], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The Act also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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Based on the *Genetic Non-Discrimination Act, Bill S-201*[33], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

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[29] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[33] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

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Name: [redacted]

Signature

Date: November.17, 2021

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/1980/1980canlii14/1980canlii14.html
[37] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[38] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[39] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[40] http://www.cirp.org/library/ethics/nuremberg/
[41] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

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[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

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7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month's delay in uploading the adverse events to the VAERS database[25].

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9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact,** in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years- of-recorded-vaccine-deaths-according-to-avers/

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[30] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

Under sections 265 and 266 of the Criminal Code of Canada[31], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[32], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

It is a further violation of the Canadian Criminal Code,[33] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221:** Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[35]

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont
[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take the ANY vaccine including the COVID-19 experimental injection.

Name: [redacted]

Signature:

Date: November 25, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg/

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations and the like

Employer: Interior Health Authority – Columbia House, Invermere, British Columbia

Attention: Adrian Dix
British Columbia Health Minister, MLA
PO Box 9050 STN PROV GOVT
Victoria, BC V8W 9E2
Phone: 250-953-3547 Fax: 250-356-9587
Email: HLTH.Minister@gov.bc.ca

Re: COVID-19 injections recommended or administered to employees.
This is an official and personal Notice of Liability.
You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivizing, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6].

Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
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[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Covid-injections-now-at-4863-more-than-23-previous-years- of- recorded-vaccine-deaths-according -aw

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of- injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug- hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits- of-ivermectin-against-covid-19/

[30] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

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R.S., c. C-34, s. 198

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Duty of persons directing work

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Causing bodily harm by criminal negligence

Sec. 221: Every person who by criminal negligence causes bodily harm to another person is guilty of
an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[35]

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing criminally on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

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- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25,26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If my employment is terminated or status changed to a status which creates a condition where I am declared as a non-employed employee without pay or the ability to work because of what you have done by creating a status whereby I am not employable or if I am disciplined, discriminated against, or harassed in any way, or my employment is terminated or affected by any new technical non-employment name such as unpaid leave of absence or unapproved unpaid leave of absence where I have not consented nor requested to such status change, as a result of my non-consent to any medical treatment as mandated in my employment context, such actions by you are fully liable under the Criminal Code of Canada and the four Charters, Declarations, and Codes stated above. As a result of my natural and legal rights and decisions to simply decline the COVID-19 vaccination and testing mandates, including my decision to not disclose my vaccination status, which was already violated; and/or any injury or adverse effect I suffer from compliance with such policies, then you make me, who has a perfect unblemished record of employment through many years, through no request by me, "a used Registered Nurse without pay or pension and without any ability to work or collect any ongoing income for myself and family." If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada,* all referenced above.

The cost for this ongoing action against me will be One Billion Two Hundred Million legal Canadian dollars paid by each person and institution separately in real legal tender, which is 29,542,000 ounces of 9999 Purity Canadian Maple Leaf Silver Coins. This will be payable immediately with no withholding, delay or taxation of any form to me personally. Criminal filings will occur after October 13, 2021 as a mandate declaration was received verbally by me while on holidays from Heather Dorsey on September 20, 2021at 2:58PM MDT. Heather Dorsey inferred her declaration was given from the Interior Health Authority and higher management authority.

I hereby notify you that if you use coercion or discrimination against me based on my decision not to take any vaccine including the COVID-19 experimental injection, then I will hold you personally liable both criminally and for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family. I will not be prejudiced against nor have any recourse taken against me by those violating my legal rights provincially, federally or internationally for asserting my natural and legal rights in this Notice.

Name: [redacted]

Notary Public: [redacted]

Signature: [redacted]

Date: [redacted]
Employee for: [redacted]

Email: [redacted]
Address: [redacted]
Phone: [redacted]

Source: action canada.com

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg/
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: Coastal Fire Centre

Attn: Clint Parker

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2] . Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

Despite this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections is not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Vaccine development is a long, complex process, often lasting 10-15 years [14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- peopleafter-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

(Referenced on Page 8 of "An Assessment of Covid-19...)[19]. Per the American Council on Science and Health, as well as the National Institutes of Health (NIH), "the estimated age-specific Infection Fatality Rate (IFR) is very low for children and younger adults (e.g., 0.002% at age 10 and 0.01% at age 25) which translates to a survivability rate of 99.99% to 99.998%, whereas the IFR is 0.4% at age 55 and 1.4% at 65 translating to a survivability rate of 99.6% to 98.6% respectively[20] [21]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

7. According to Health Canada's Summary Basis of Decision[22], updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision, it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   In an article titled "Vaccination against SARS-CoV-2 and disease enhancement – knowns and unknowns" published on NCBI they specifically state: "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[23].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[24]. It is further reported that only one percent of vaccine injuries are reported to VAERS[25], compounded by several month's delay in uploading the adverse events to the VAERS database[26].

   On November 5, 2021, VAERS data release for the period December 14, 2020 to October 29, 2021, showed 856,919 adverse events reports following COVID-19 injections, including 18,078 deaths and 131,027 serious injuries. Of that total, 1,320 adverse injury reports were of miscarriage or premature birth; 3,090 reported cases of Bell's Palsy; 2,070 reports of serious anaphylaxis; 10,686 reports of blood clotting disorders; and 3,030 cases of myocarditis and pericarditis[27].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market"[28].

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

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[19] https://ghorganisation.com/wp-content/uploads/2021/07/GHO-updated-pdf.pdf
[20] https://www.acsh.org/news/2020/11/18/covid-infection-fatality-rates-sex-and-age-15163
[21] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf
[23] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7566857/
[24] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/
[25] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/
[26] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/reporting-vaccinations.html
[27] https://childrenshealthdefense.org/defender/vaers-cdc-adverse-events-deaths-covid-vaccines/
[28] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

10. Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[29] [30].

Under the *Crimes Against Humanity and War Crimes Act of Canada*[31], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The Act also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the *Criminal Code of Canada*[32], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

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[30] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[31] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[33] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

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Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take ANY vaccine including the COVID-19 experimental injection.

Name: [redacted]

Signature:

Date: Nov 23, 2021

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/1980/1980canlii14/1980canlii14.html
[37] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[38] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[39] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[40] http://www.cirp.org/library/ethics/nuremberg/
[41] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[42] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[43] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Public) Business Associations, and the like

Name of Employer/Business Assoc: The Province of BC, Ministry of Attorney General, CMSB

Attn: David Hoadley

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2] . Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

Despite this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections is not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f
[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html
[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Vaccine development is a long, complex process, often lasting 10-15 years [14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf
[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1
[14] https://www.historyofvaccines.org/content/articles/vaccine-development-testing-and-regulation
[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688
[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- peopleafter-covid-19-vaccination/2494534/
[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/
[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

(Referenced on Page 8 of "An Assessment of Covid-19…)[19]. Per the American Council on Science and Health, as well as the National Institutes of Health (NIH), "the estimated age-specific Infection Fatality Rate (IFR) is very low for children and younger adults (e.g., 0.002% at age 10 and 0.01% at age 25) which translates to a survivability rate of 99.99% to 99.998%, whereas the IFR is 0.4% at age 55 and 1.4% at 65 translating to a survivability rate of 99.6% to 98.6% respectively[20] [21]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

7. According to Health Canada's Summary Basis of Decision[22], updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision, it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   In an article titled "Vaccination against SARS-CoV-2 and disease enhancement – knowns and unknowns" published on NCBI they specifically state: "The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[23].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[24]. It is further reported that only one percent of vaccine injuries are reported to VAERS[25], compounded by several month's delay in uploading the adverse events to the VAERS database[26].

   On November 5, 2021, VAERS data release for the period December 14, 2020 to October 29, 2021, showed 856,919 adverse events reports following COVID-19 injections, including 18,078 deaths and 131,027 serious injuries. Of that total, 1,320 adverse injury reports were of miscarriage or premature birth; 3,090 reported cases of Bell's Palsy; 2,070 reports of serious anaphylaxis; 10,686 reports of blood clotting disorders; and 3,030 cases of myocarditis and pericarditis[27].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market"[28].

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

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[19] https://ghorganisation.com/wp-content/uploads/2021/07/GHO-updated-pdf.pdf

[20] https://www.acsh.org/news/2020/11/18/covid-infection-fatality-rates-sex-and-age-15163

[21] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7566857/

[24] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/

[25] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[26] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/reporting-vaccinations.html

[27] https://childrenshealthdefense.org/defender/vaers-cdc-adverse-events-deaths-covid-vaccines/

[28] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

10. Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[29] [30].

Under the *Crimes Against Humanity and War Crimes Act of Canada*[31], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The Act also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the *Criminal Code of Canada*[32], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[33], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

It is a further violation of the *Canadian Criminal Code*[34], to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216**: Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217**: Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1**: Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

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[29] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[30] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[31] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[32] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[33] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192[35], the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30[36].

Vaccination is voluntary in Canada[37]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms[38] (1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights[39] (2005)**
- **Nuremberg Code[40] (1947)**
- **Helsinki Declaration[41] (1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[42]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[43]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take ANY vaccine including the COVID-19 experimental injection or to have to show proof thereof.

[redacted]

Name:

Signature:

Nov 19th 2020

Date:

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[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[36] https://www.canlii.org/en/ca/scc/doc/1980/1980canlii14/1980canlii14.html
[37] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[38] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[39] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[40] http://www.cirp.org/library/ethics/nuremberg/
[41] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[42] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[43] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

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[redacted] [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

From: [redacted]
Sent: October 5, 2021 6:37 PM
To: [redacted]
Subject: Vaccine Notice

Hello [redacted]

I have placed the signed document on your office desk as well as attached the electronic version.

Let’s discuss this tomorrow.
I am deeply troubled and anguished with the executive mandate to terminate my employment by our deputy minister Lori Wanamaker for my non participation in the experimental gene therapy injections for COVID-19.

[redacted]

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: Ministry of Citizens' Services - Province of British Columbia

Attn: Ian Bott Director, Application Management

Re: COVID-19 injections recommended or administered to employees

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The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

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[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[4] https://cormandrostenreview.com/report/
[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[8] https://greatgameindia.com/austria-court-pcr-test/
[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[10] https://iapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

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7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month's delay in uploading the adverse events to the VAERS database[25].

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10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years- of-recorded-vaccine-deaths-according-to-avers/

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

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It is a further violation of the Canadian Criminal Code,[33] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[35]

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont
[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] (1982) Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] (2005)
- **Nuremberg Code**[39] (1947)
- **Helsinki Declaration**[40] (1964, Revised 2013) Article 25, 26

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations...mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take the ANY vaccine including the COVID-19 experimental injection.

Name: [redacted]

Signature

Date: 2021-10-05

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg/

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

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From: [redacted]
Sent: Monday, November 1, 2021 3:02 PM
To: [redacted]
Cc: [redacted]
Subject: Vaccine exemption request

Superintendent [redacted]

Note: Inspector [redacted] (as first level excluded) is attending to other very important matters so I am sending this to you to forward as necessary. I discussed this with S.Sgt [redacted] and determined this was appropriate under the circumstances.

I am formally requesting an exemption to the COVID 19 vaccine mandate as stipulated in Lori Wanamakers emails, subject *Executive Message from Lori Wanamaker: COVID-19 Vaccination Policy for the BC Public Service* issued to all PSA employees on November 1 2021. I am requesting an exemption based on the BC Human Rights code, specifically section 13:

"Discrimination in employment

13 *(1)A person must not*

(a)refuse to employ or refuse to continue to employ a person, or

(b)discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person."

Political belief: I hold the political belief that this mandate and indeed covid do not exist in isolation from other agenda now prevalent in Canada and other so-called democratic nations. I hold the political belief that QR codes and other forms of proof of vaccination are symptoms of our rapidly eroding democracy and a sign of impending political oppression. I hold the political belief that mandating a vaccine, especially as a new term of employment, is utterly immoral and a complete contravention of the principles founding this country. I hold the political belief that this mandate is a direct assault on my personal rights and freedoms and that control of 'the person' i.e. ones own body, is fundamental to individual autonomy. I hold the political belief that our current provincial and federal administrations have removed any reasonable mechanism by which a person can reasonably challenge the legality of this mandate; this BC Public Service 'mandate' is an extension of that legal oppression. I am seeking an exemption on the basis that coercing me into receiving this vaccine against my will is a direct violation of my human rights under the BC Human Rights Code. It is absurd and abhorrent to suggest that threatening a persons livelihood is not coercion and that this is somehow tantamount to free choice. A denial of an exemption on this basis is a denial of my ability to hold and maintain a political position; one which does not discriminate against others as a tenet of the belief i.e. not a morally or legally objectionable position.

Physical disability: by not receiving the vaccine, the BC public service is in essence seeking to place me on unpaid leave or even terminate my employment on the basis that I am physically disabled. By not vaccinating against the COVID 19 virus, the public service is stating that something about my physical being renders me unemployable which is again a violation of my rights under the BC Human Rights Code. Furthermore is BC Public Service is rendering me unemployable without any proof that I have placed any other person at risk or that I intend to place another person at risk (i.e. termination without cause). As such I am seeking an exemption on the basis that, as of Nov 22nd 2021, I am physically disabled according to the BC Public Service. Should the employer wish to discuss accommodations that usually follow along with physical disabilities, I am open to this. To say that it is inappropriate to skip directly to threatening my employment in the manner that Lori Wanamaker has now done on several occasions is an understatement.

It is important to note that the BC Public Service appears to be seeking *termination for cause* with respect to individuals who either refuse to vaccinate or refuse to show acceptable proof of vaccination. This is a fundamental change to the terms of our employment and, failing all else, the BC Public Service should be offering severance as per the collective before seeking outright termination. There are those of us who have been with this employer for long periods of time, who've sacrificed a great deal in service to the province and who would continue to sacrifice in service to the province given the opportunity. As I've alluded to above, this is so much more than a health crisis and to term it as such would be a vast over-simplification and injustice.

In addition to the reasons noted above, I have attached the notice of liability previously forwarded to PSA on October 22nd 2021 as well as sent to Inspector Blundell (as first level excluded representative). I want to make it very clear that this email and my response to this mandate i.e. alleging breaches of my human rights (if not given an exemption), is in no way a reflection of my colleagues or management here in Prince George. At a local level I have been treated with utmost respect as a person might reasonably expect from professional law enforcement personnel.

Respectfully,

BRITISH COLUMBIA
SHERIFF
SERVICE

[redacted]

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: MINISTRY OF ATTORNEY GENERAL, PROVINCE OF BC

Attn: LORI WANAMAKER - HEAD OF BC PUBLIC SERVICE

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

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[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[30] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

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It is a further violation of the Canadian Criminal Code,[33] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
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> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
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>
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>
> **Duty of persons directing work**
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>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[35]

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
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According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations...mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take the ANY vaccine including the COVID-19 experimental injection.

Name: [redacted]

Signature:

Date: 2021 – 10 – 22

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg/

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: PSSG / BC Corrections

Attn: Matthew Waters

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhvw4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying eonditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[20] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month's delay in uploading the adverse events to the VAERS database[25].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[26].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[27]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years- of-recorded-vaccine-deaths-according-to-avers/

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[30] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

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Signature:
Date: ✓ November 5, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg/
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
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Name of Employer/Business Assoc: Ministry of Children and Family Development

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Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

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[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[20] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month's delay in uploading the adverse events to the VAERS database[25].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[26].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[27]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-ve [illegible]

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

[30] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

Under sections 265 and 266 of the Criminal Code of Canada[31], a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

Based on the *Genetic Non-Discrimination Act, Bill S-201*[32], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

It is a further violation of the Canadian Criminal Code,[33] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[34] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[35]

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]**.** Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take the ANY vaccine including the COVID-19 experimental injection.

Name: [redacted]

Signature:

Date: Nov. 15, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html

[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg/

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability

Employers (Health Care, Federal, Private and Public)
Union Executives, Business Associations, and the like

Name of Employer/Union/Assoc: BC Provincial Government / BCGEU

Attn: Insp. Cantelon / Stephanie Smith

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable.[5] On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer, Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter." [9]On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[11]

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment;

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy;

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada, [14] [15] [16] is using as the basis for approval under the interim-order, therefore, fully informed consent is not possible;

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for one year;

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models;[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death; this includes children ages 12-17 years old.[20]

   Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood;

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines- treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugg

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death;

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including The World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)[24];"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[25].

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database[27].

   On May 21, 2021, VAERS data release (in the USA alone) showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week[28].

   Dr. McCullough, a highly cited Covid doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[29];"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported;

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

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[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
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> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
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> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada. The federal and provincial governments made it clear that getting the COVID-19

injections would not be mandatory. Even if they do attempt to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose this experimental medical treatment upon their employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

In conclusion, administration of vaccines is defined as a " medical procedure". In what other medical context could non-doctors and non-pharmacists prescribe, promote and help distribute pharmaceutical drugs? This is unauthorized practice of medicine.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to participate in the COVID-19 experimental treatments.

Name: [redacted]

Signatur

Date: 2021·11·03

Source: Action4Canada.com

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[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: Ministry of Citizen's Services

Attn: Gina Power

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[20] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month's delay in uploading the adverse events to the VAERS database[25].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[26].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[27]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

[26] https://childrenshealthdefense.org/defender/vaers-cdc-covid-deaths-vaccine-injuries/

[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

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Based on the *Genetic Non-Discrimination Act, Bill S-201*[32], it is an indictable offence to force anyone to take an DNA/RNA test or deny any service, employment, or education opportunity to anyone who refuses to take such a test. The punishment is a fine not exceeding $1,000,000 or imprisonment for a term not exceeding five years, or both.

It is a further violation of the Canadian Criminal Code,[33] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

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>
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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont
[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent
[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont
[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do
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Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

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Name: [redacted]

Signatur

Date: October 7th, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg/
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
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Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Union Executives, Business Associations, and the like

Name of Employer/Union/Assoc: MCFD, BC Public Service

Attn: Lori Wanamaker, Allison Bond, Shashe Chaudhary and Darryl

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

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[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment;

2. All the treatments being marketed as COVID-19 “vaccines”, are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy;

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada, [14] [15] [16] is using as the basis for approval under the interim-order, therefore, fully informed consent is not possible;

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for one year;

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models;[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell’s Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death; this includes children ages 12-17 years old.[20]

   Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the “vaccine” gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they “have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation.” The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood;

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines- treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugg

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death;

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines.”

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease).” In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, “the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including The World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)[24];”

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[25].

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database[27].

   On May 21, 2021, VAERS data release (in the USA alone) showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old’s more than tripled in one week[28].

   Dr. McCullough, a highly cited Covid doctor, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths.” He further added, “...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it’s pulled off the market[29];”

10. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported;

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada. The federal and provincial governments made it clear that getting the COVID-19

injections would not be mandatory. Even if they do attempt to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose this experimental medical treatment upon their employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

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[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

In conclusion, administration of vaccines is defined as a " medical procedure". In what other medical context could non-doctors and non-pharmacists prescribe, promote and help distribute pharmaceutical drugs? This is unauthorized practice of medicine.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to participate in the COVID-19 experimental treatments.

Name: [redacted]

Signature: [redacted]

Date: 2021 November 3rd.

Source: Action4Canada.com

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[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public) Business Associations, and the like

Name of Employer/Business Assoc: PROVINCE OF BRITISH COLUMBIA

Attn: TONJA JOYCE

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

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[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

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Whereas:

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2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

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[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

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[20] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: “use in paediatric (age 0-18)”, “use in pregnant and breastfeeding women”, “long-term safety”, “long-term efficacy” including “real-world use”, “safety and immunogenicity in subjects with immune-suppression”, and concomitant administration of non-COVID vaccines”.

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that “one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)”. In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, “the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)”[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month’s delay in uploading the adverse events to the VAERS database[25].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old’s with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[26].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was “...scrubbing unprecedented numbers of injection-related-deaths”. He further added, “...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it’s pulled off the market[27]”.

9. Canada’s Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

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[27] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers- of-injection-related-deaths/

[28] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[29] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

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[31] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[32] https://www.parl.ca/DocumentViewer/en/42-1/bill/S-201/royal-assent

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[34] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[35] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

Vaccination is voluntary in Canada[36]. Even if the government attempts to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose ANY vaccine including the COVID-19 experimental injections on employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

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- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
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According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations…mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to take the ANY vaccine including the COVID-19 experimental injection.

Name: [redacted]

Signature:

Date: NOVEMBER 9, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg/
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
Employers (Health Care, Federal, Private and Public)
Business Associations, and the like

Name of Employer/Business Assoc: Province of BC FLNRORD/BC Wildfire Service

Attn: Dimitri Vaisius Wildfire Officer, Cobble Hill Fire Base South Island Zone/ Coastal Fire Centre

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising, and using coercion to insist employees, submit to ANY vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency". There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season[1].

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronaviruses[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person".

In light of this warning, the current PCR test utilization, set at higher amplifications, is producing up to 97% false positives[3]. Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and quite possibly fraudulent. An international consortium of life-science scientists has also detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2[4].

In November 2020, a Portuguese court ruled that PCR tests are unreliable[5]. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive[6]. Feb 16, 2021, BC Health Officer Bonnie Henry, admitted PCR tests are unreliable[7]. On April 8, 2021, the Austrian court ruled the PCR was unsuited for COVID testing[8]. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter"[9]. On May 8, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason[10]. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross-examination in a trial before the court of the Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses[11].

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injections are not required or recommended.

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[1] https://www.bitchute.com/video/nQgq0BxXfZ4f

[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Whereas:

1. The Nuremberg Code[12], to which Canada is a signatory, states that voluntary informed consent is essential before performing medical experiments on human beings. It also confirms that the person involved should have the legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved so as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experiment's subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

2. The treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023[13], and hence qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and many are unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

3. Most vaccines are trialed for at least 5-10 years[14]. COVID-19 injections have only been in trials for just over a year so there is no long-term safety data available and therefore fully informed consent is not possible.

4. No other coronavirus vaccine (i.e., MERS, SARS-1) has ever been approved for market due to antibody-dependent enhancement, which results in severe illness and death in animal models[15].

5. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[16], and antibody-dependent enhancement leading to death; this includes in children ages 12-17 years old[17].

   Dr. Byram Bridle, a pro-vaccine Associate Professor of Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[18] on COVID-19 shots. The Spike Protein added to the "vaccine" gets into the blood and circulates throughout the individuals over several days post-vaccination. It then accumulates in the tissues such as the spleen, bone marrow, liver, adrenal glands, testes, and of great concern, it accumulates in high concentrations in the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation". The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc.

   There is also a high concentration of the Spike Protein getting into breast milk, and subsequent reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

6. People under the age of 30 are at a very low risk of contracting or transmitting this respiratory illness. According to the statistical expert David Spiegelhalter of the University of Cambridge and Office of National Statistics (ONS) of the United Kingdom, risk of death from COVID for the age group between 15 and 24 is 1 in 218,399[19]. According to Centre for Disease Control and Prevention (CDC), survival chances in the age category of 20-29 with no underlying condition, for males is 99.9997% and for females 99.9998%, and with underlying conditions 99.9037% and 99.9466 respectively[20]. Despite these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death.

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[15] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[16] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young- people-after-covid-19-vaccination/2494534/

[17] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[18] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

[19] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[20] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

7. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines".

   Under the Risk Management plan section of the Summary Basis of Decision[21], it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)". In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including the World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)"[22].

8. As reported to the Vaccine Adverse Events Reporting System (VAERS) in the United States, there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[23]. It is further reported that only one percent of vaccine injuries are reported to VAERS[24], compounded by several month's delay in uploading the adverse events to the VAERS database[25].

   On September 17, 2021, VAERS data release for the period December 14, 2020 to September 10, 2021, showed 701,561 adverse events reports following COVID-19 injections,including 14,925 deaths and 91,523 serious injuries. Of that total, 19,827 adverse injury reports were among 12–17-year old's with 19 reported deaths and included 488 reports of myocarditis from the Pfizer jab and 106 reports of blood clotting disorders, again from the Pfizer injection[26].

   Dr. McCullough, a highly cited COVID doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths". He further added, "...with a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[27]".

9. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, and is extremely time-consuming for physicians to use hence, many adverse events are going unreported there.

10. **Safe and effective treatments and preventive measures already exist for COVID-19 yet the government is prohibiting their use[28] [29].**

Under the *Crimes Against Humanity and War Crimes Act of Canada*[30], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general

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[21] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[22] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[23] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-Ovid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-avers/

[24] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[25] http://vaxoutcomes.com/thelatestreport/

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Name: [redacted]

Signature:

Date: November 22, 2021

Source: **action4canada.com**

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[36] https://web.archive.org/web/20080414131846/http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/97vol23/23s4/23s4b_e.html
[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html
[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights
[39] http://www.cirp.org/library/ethics/nuremberg/
[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/
[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/
[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

Vaccine Notice of Liability
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Union Executives, Business Associations, and the like

Name of Employer/Union/Assoc: B. C. GOVERNMENT

Attn: PERRY THERRIEN

Re: COVID-19 injections recommended or administered to employees

This is an official and personal Notice of Liability.

You are unlawfully practising medicine by prescribing, recommending, and/or using coercion to insist employees submit to the experimental medical treatment for Covid-19, namely being injected with one of the experimental gene therapies commonly referred to as a "vaccine".

To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[1]

The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure this so-called pandemic. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus[2]. Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one single molecule, then you can find it because that molecule is nearly in every single person."

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[2] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

[3] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603

[4] https://cormandrostenreview.com/report/

[5] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[6] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/

[7] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html

[8] https://greatgameindia.com/austria-court-pcr-test/

[9] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/

[10] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/

[11] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/

Based on this compelling and factual information, the emergency use of the COVID-19 experimental injection is not required or recommended.

1. The Nuremberg Code,[12] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment;

2. All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[13] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy;

3. None of these treatments have been fully approved; only granted emergency use authorization by the FDA, which Health Canada, [14] [15] [16] is using as the basis for approval under the interim-order, therefore, fully informed consent is not possible;

4. Most vaccines are trialed for at least 5-10 years,[17] and COVID-19 treatments have been in trials for one year;

5. No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and deaths in animal models;[18]

6. Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart[19], and antibody dependent enhancement leading to death; this includes children ages 12-17 years old.[20]

   Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a new peer reviewed scientifically published research study[21] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood;

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[12] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

[13] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[14] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[15] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-_treatments/authorization/applications.html

[16] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[17] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[18] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[19] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19-vaccination/2494534/

[20] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[21] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugg

7. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune system. The overall survival rate of minors is 99.997%.[22] In spite of these facts, the government is pushing the experimental treatment with the tragic outcome of a high incidence of injury and death;

8. According to Health Canada's Summary Basis of Decision, updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real-world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines."

   Under the Risk Management plan section of the Summary Basis of Decision,[23] it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.

   The report specifically states, "the possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2 has been flagged as a potential safety concern that requires particular attention by the scientific community, including The World Health Organization (WHO), the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)[24];"

9. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined[25].

   It is further reported that only one percent of vaccine injuries are reported to VAERS,[26] compounded by several months delay in uploading the adverse events to the VAERS database[27].

   On May 21, 2021, VAERS data release (in the USA alone) showed 262,521 reports of adverse events following COVID-19 injections, including 4,406 deaths and 21,537 serious injuries, between December 14, 2020, and May 21, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week[28].

   Dr. McCullough, a highly cited Covid doctor, came to the stunning conclusion that the government was "...scrubbing unprecedented numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths it's pulled off the market[29];"

10. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported;

11. **Safe and effective treatments and preventive measures exist for COVID-19, apart from the experimental shots, yet the government is prohibiting their use.**[30] [31]

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[22] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[23] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[24] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[25] https://vaccineimpact.com/2021/cdc-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/

[26] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[27] http://vaxoutcomes.com/thelatestreport/

[28] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[29] https://leohohmann.com/2021/04/30/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths/

[30] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine?

[31] https://alethonews.com/2021/05/26/five-recently-published-randomized-controlled-trials-confirm-major-statistically-significant-benefits-of-ivermectin-against-covid-19/

Under the *Crimes Against Humanity and War Crimes Act of Canada*[32], a crime against humanity means, among other things, murder, any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law, conventional international law, or by virtue of its being criminal according to the general principles of law are recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission. The *Act* also confirms that every person who conspires or attempts to commit, **is an accessory after the fact**, in relation to, or councils in relation to, a crime against humanity, is guilty of an offence and liable to imprisonment for life.

Under sections 265 and 266 of the Criminal Code of Canada,[33] a person commits an assault when, without the consent of another person, he applies force intentionally to that other person, directly or indirectly. Everyone who commits an assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, or an offence punishable on summary conviction.

It is a further violation of the Canadian Criminal Code,[34] to endanger the life of another person. Sections 216, 217, 217.1 and 221.

> **Duty of persons undertaking acts dangerous to life**
>
> **Sec. 216:** Everyone who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.
>
> R.S., c. C-34, s. 198
>
> **Duty of persons undertaking acts**
>
> **Sec. 217:** Everyone who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.
>
> **Duty of persons directing work**
>
> **Sec. 217.1:** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.
>
> **Causing bodily harm by criminal negligence**
>
> **Sec. 221**: Every person who by criminal negligence causes bodily harm to another person is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or,
> (b) an offence punishable on summary conviction.

Domestically, in the seminal decision of Hopp v Lepp, [1980] 2 SCR 192,[35] the Supreme Court of Canada determined that cases of non-disclosure of risks and medical information fall under the law of negligence. Hopp also clarified the standard of informed consent and held that, even if a certain risk is only a slight possibility which ordinarily would not be disclosed, but which carries serious consequences, such as paralysis or death, the material risk must be revealed to the patient.

The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. In other words, a patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even if Remote." Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.[36]

Vaccination is voluntary in Canada. The federal and provincial governments made it clear that getting the COVID-19

injections would not be mandatory. Even if they do attempt to mandate it, there is no law, nor can there be, as it is a violation of Human Rights, International Agreements, etc. Employers are infringing on human rights and putting themselves personally at risk of a civil lawsuit for damages, and potential imprisonment, by attempting to impose this experimental medical treatment upon their employees. Canadian law has long recognized that individuals have the right to control what happens to their bodies.

---

[32] https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html

[33] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-57.html#docCont

[34] https://laws-lois.justice.gc.ca/eng/acts/c-46/page-51.html#docCont

[35] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2553/index.do

[36] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

The citizens of Canada are protected under the medical and legal ethics of express informed consent, and are entitled to the full protections guaranteed under:

- **Canadian Charter of Rights and Freedoms**[37] **(1982)** Section 2a, 2b, 7, 8, 9, 15.
- **Universal Declaration on Bioethics and Human Rights**[38] **(2005)**
- **Nuremberg Code**[39] **(1947)**
- **Helsinki Declaration**[40] **(1964, Revised 2013) Article 25, 26**

According to top constitutional lawyer, Rocco Galati, "both government and private businesses cannot impose mandatory vaccinations...mandatory vaccination in all employment context would be unconstitutional and/or illegal and unenforceable."[41]

There is no legislation that allows an employer to terminate an employee for not getting a COVID-19 shot. If an employer does so, they are inviting a wrongful dismissal claim, as well as a claim for a human rights code violation[42]. For those employees who are influenced, pressured or coerced by their employer to have the COVID-19 shot, and suffer any adverse consequences as a result of the injection, the employer, and its directors, officers, and those in positions carrying out these measures on behalf of the employer, will be opening themselves up to personal civil liability, and potential personal criminal liability, under the Nuremberg Code, the Criminal Code of Canada, and the *Crimes Against Humanity and War Crimes Act of Canada*, all referenced above.

In conclusion, administration of vaccines is defined as a " medical procedure". In what other medical context could non-doctors and non-pharmacists prescribe, promote and help distribute pharmaceutical drugs? This is unauthorized practice of medicine.

Therefore, I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family if you use coercion or discrimination against me based on my decision not to participate in the COVID-19 experimental treatments.

Name: [redacted]

Signature:

Date: Nov 9 2021

Source: Action4Canada.com

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[37] https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html

[38] https://en.unesco.org/themes/ethics-science-and-technology/bioethics-and-human-rights

[39] http://www.cirp.org/library/ethics/nuremberg

[40] https://www.wma.net/what-we-do/medical-ethics/declaration-of-helsinki/

[41] https://www.constitutionalrightscentre.ca/employee-rights-the-covid-19-vaccine/

[42] https://www.chrc-ccdp.gc.ca/en/about-human-rights/what-discrimination

TAB 3

No. VLC-S-S217586
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General
British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester,** Peter **Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)**

Defendants

Application Record

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Lawyers for the Applicants

INDEX

TAB

1. *Notice of Civil Claim, Filed August 17th, 2021.*
2. *Applicant's (Defendant's) Response to Civil Claim dated October 14th, 2021.*
3. *Application (Defendant's) Response dated January 17th, 2022.*
4. *Application (Defendant's) Response dated January 19th, 2022.*
5. *Notice of Application (Defendant's) dated January 12th, 2022.*
6. *Notice of Application (Defendant's) dated January 17th, 2022.*
7. *Notice of Application (Def\endant's) dated April 28th, 2022.*
8. ***Respondents' (Plaintiffs') Amended Response to Notice of Application Dated May 18th, 2022***
9. ***Respondents' (Plaintiffs') written argument dated***

TAB 1

SUPREME COURT
OF
BRITISH COLUMBIA
SEAL
17-Aug-21
REGISTRY

Court File No. VLC-S-S-217586
Registry No.
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar**, **North Delta Real Hot Yoga Limited**, Melissa Anne **Neubauer**, Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau**, Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General **British Columbia Ferry Services Inc.** (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada**, Brittney **Sylvester**, Peter **Kwok**, **Providence Health Care**, **Canadian Broadcasting Corporation**, **TransLink (British Columbia)**

Defendants

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

1. (a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above- named registry of this court within the time for response to civil claim described below, and
2. (b) serve a copy of the filed response to civil claim and counter claim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

(a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

Table of Contents of the Claim

Page

Part 1: Statement of Facts
- The Parties........5
- The Plaintiffs and their personal facts........5
- The Defendants........82

• THE FACTS........85

A/ "COVID 19" THE TIMELINE........85

B/ THE COVID-19 MEASURES
- Federal measures........103
- Provincial measures........104

Page

- Orders of Provincial Health Officer Bonnie Henry……………………………105
- Ministerial Orders…………………………………………………………………106
- Reckless and Unlawful Statements and Actions of Leaders………………...114

C/ IGNORING AND FAILING TO ADDRESS MEDICAL EXPERTS' EVIDENCE

- The Nature of Viral Respiratory Illness (or Disease) and COVID-19……….122
- Contrary Views of the Experts to WHO protocol……………………………125
- Covid measures worse than virus……………………………………………148

D/ THE SCIENCE & MEDICINE OF COVID-19

- Summary (Overview)…………………………………………………………160
- The Covid -Measures Unscientific, Non-Medical, Ineffective, and Extreme……………………………………………………162

E/ HYPER – INFLATED, DISTORDETED TOTAL NUMBER OF CV-19 "CASES" & "DEATHS"……………………………………180

F/ GLOBAL POLITICAL, ECONOMIC AGENDA BEHIND UNWARRANTED MEASURES

- The Non-Medical measures and Aims of The Declared
- Pandemic- The Global Agenda………………………………………………188
- Bill Gates- Vaccines, Pharmaceuticals & Technology………………………211
- The WHO / Gates/ Trudeau and Dr. Teresa Tam……………………………212
- Dr. Bonnie HENRY – Vaccines and the WHO………………………………244

G/ CONSEQUENCES OF MEASURES TO THE PLAINTIFFS AND OTHER CITIZENS, AND VIOLATION OF CONSTITUTIONAL RIGHTS……………………………………………247

H/ THE COVID-19 VACCINE- "WE DO NOT GET BACK TO NORMAL UNTIL WE HAVE A VACCINE"………………………255

- Microchipping /Immunity Passports/ Social Contact Vaccine Surveillance & 5G……………………………………………259
- Authorized COVID "Vaccines"…………………………………………………261
- Vaccines in General…………………………………………………………290

I/ THE MEDIA……………………………………………………………………303

- Negligence……………………………………………………………………304

Page

J/SUMMARY……309

Part 2: Relief Sought……312

Part 3: Legal Basis……356

CLAIM OF THE PLAINTIFF(S)

Part 1: STATEMENT OF FACTS

- **THE PARTIES**

- **The Plaintiffs and their personal facts**

1. The Plaintiff **"Action4Canada"**, is a grassroots organization centred in British Columbia, whose facts, in support of its claim for relief, are as follows:

   (a) Action4Canada was co-founded in August of 2019;

   (b) The activities of Action4Canada are in direct response to government legislation that undermines Canada's ***Constitution***, the ***Charter***, and Canadian democratic values.

   (c) At the onset of 2020, Action4Canada took note of the ongoing emergency measures that were being enacted in response to the Covid-19 pandemic. Many concerned citizens reached out to Action4Canada, to voice the hardships they faced due to these measures such as loss of job/income, business closures, school closures, and the re-scheduling of emergency surgeries. Action4Canada stepped up to advocate for those concerned citizens, and has continued to listen to their pleas, and find ways to take action for them.

   (d) Action4Canada advocates, educates and takes action in pursuit of upholding the Rule of Law, the Constitution and democratic governance in accordance with Canada's constitutional order and the Rule of Law.

2. The Plaintiffs **Kimberly Woolman** ("Kimberly"), **The Estate of Jaqueline Woolman** ("Jaqueline") are residents of British Columbia, whose facts, in support of their claim for relief, and who have suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

   (a) Kimberly is the adult daughter of Jaqueline Woolman, who passed away on January 30th, 2021. Jaqueline's eldest daughter passed away in August 2005, and her husband passed away in July 2011. Kimberly moved to British Columbia from Ontario to help take care of their mother, who had developed dementia in or about 2018.

   (b) Jaqueline's remaining three (3) grown children, Sheldon, Kimberly and Michelle all lived within a few blocks of Jacqueline's Long-term care residences: New Horizons (Discovery Harbour), and eventually Yucalta Lodge both located in Campbell River, British Columbia.

   (c) Once diagnosed with dementia, a decision was made in April 2019 to have her placed in a private long-term care, at New Horizons (Discovery Harbour) on 850 14th Avenue, in Campbell River, British Columbia. The decision came after Jaqueline had experienced two (2) falls, and two (2) hip surgeries on both hips, the first fall and surgery took place in December 2017, and in January 2018 she has her second fall, while in the New Horizons care home, and her surgery was also in January of 2018.

(d) Kimberly and Michelle had many issues with New Horizons for advocating for their mother's health, and on April 4th, 2019 they were banned without explanation from visiting Jacqueline.

(e) After multiple complaints filed against New Horizons care home by Kimberly and her siblings with regards to Jaqueline's care, punitive restrictions were put in place by the home. As a result of those restrictions, the children had Jacqueline transferred to a different care home, Yucalta Lodge, which operates as a public (publicly-funded) under the Vancouver Island Health Authority at 555 2nd Ave, Campbell River, British Columbia in early 2019. Jacqueline's transfer to the Yucalta Lodge facility was completed in May 2019, with Michelle's assistance through her work connections as the scheduler at a social work office.

(f) In May 2019, upon completion of Jaqueline's transfer, Jae Yon Jones, the manager at Yucalta Lodge, constantly changed the rules, contradicted herself and outright lied about many issues brought forth by Kimberly and her siblings in relation to their mother. Kimberly and her siblings tried to resolve these issues in many meetings, to no avail. These issues went on to persist, and only became amplified by the Covid-19 restrictions put in place in 2020.

(g) Sometime in 2019, Jaqueline's doctor approved allowable alcohol shots to manage her pain. By March 2020, Nursing staff were not offering Jaqueline any alcohol, without any medical reason as to why. A decision was made after the Covid-19 pandemic began, to put Jaqueline on fentanyl, which was later increased from 25mcg to 37.5mcg. however Jaqueline was no longer asking for any alcohol at that point because she would become too sedated. Similarly, also in March of 2020, the staff at Yucalta Lodge forced Jaqueline to quit smoking, a habit that helped her remain calm, by administering a nicotine patch for Jaqueline, without the consent of Michelle and Kimberly.

(h) Jaqueline was left to waste away in bed, obtaining bed sores as a result of staff removing her access to her wheelchair, which in turn resulted in muscle atrophy.

(i) On April 24th, 2020 Kimberly visited the Yucalta Lodge to take her mother supplies as she had done on numerous occasions. Kimberly was stopped at the door by staff who informed her that she could not enter due to newly implemented Covid-19 restrictions. Kimberly pulled up documentation on her phone that stated she could enter, as she did not understand what the security measures were about. The Director, Jae Yon Jones took the phone from Kimberly's hand, informing her that she could not come in. Kimberly decided to leave the items for her mother, and was told that the items would have to be "quarantined" for a few days.

(j) After the interaction that took place on April 24th, 2020, Kimberly went to visit her mother from outside of her room's window. There were two (2) nurses inside with Jaqueline, without any PPE equipment on. Kimberly was confused, as she had thought that the new measures had mandated that PPE equipment was necessary in all spaces at the time. Kimberly decided to take a picture, to document the nurses at Yucalta Lodge failing to follow Provincial health mandates, while denying entry to concerned family members such as herself. As Kimberly was outside the window, many staff members passed by, and one staff member took a photo of her license plate as she entered her car.

(k) On April 24th, 2020, after Kimberly had left the Yucalta Lodge premises, and returned home, the police began banging on Kimberly's apartment door. This lasted for about five (5) or ten (10) minutes. Kimberly was terrified they were going to break the door down. The Police officers then circled the building in their car, and drove past her apartment several times before leaving. They returned several times, over the course of several days either in their cruisers around the parking lot outside of Kimberly's apartment, or banging on the inside apartment door, again without notice, and without identifying themselves. Kimberly was distraught that the someone from Yucalta Lodge may have notified the police that she had purportedly defied their Covid-19 policies.

(l) On April 29th, 2020, Kimberly posted the photo of her mother, Jaqueline in her room with the two (2) nurses who had no PPE-equipment to her Facebook page, and was subsequently asked to remove it by the Yucalta Lodge staff. As a result of the photo on Kimberly's Facebook page, she was informed that she could no longer attend at Yucalta Lodge property. Yucalta Lodge alleged that Kimberly, and Jaqueline's entire family were security threats to staff safety. Kimberly was told all calls to her mother would go through management. At that time, the Manager also assured Kimberly that when her visitation restrictions were removed, she would be notified. They were later removed in May of 2020, and no one in the family was notified.

(m)After the visits stopped in April of 2020, Jaqueline was calling Kimberly and Michelle constantly, while having breakdowns. She was often found trying to leave the building, thinking she could go to the airport or other places in her state of dementia.

(n) In June of 2020, Kimberly was on a zoom call with her mother when the activities-worker entered the room with Jaqueline wearing a mask. Kimberly commented to Jaqueline on how the efficacy of masks was questionable when it came to the prevention of the spread of viruses. Shortly afterwards, Michelle received a letter dated June 12th, 2020 from Jae Yon Jones, Manager outlining her 'disrespectful behaviour', despite Michelle not even being on the zoom call in question. Michelle was then informed that all zoom sessions had been cancelled, and she was no longer allowed on Yucalta Lodge property, including anywhere near Jacqueline's window.

(o) From June 12th, 2020 onwards, Michelle, and Kimberly's calls to the nurses phone on the unit to speak with their mother were repeatedly denied, and staff told them that they had to go through the manager or social worker to speak with their own mother. Yucalta Lodge staff consistently failed to answer the questions posed by Jaqueline's children as to whether or not the process that they had to go through in order to speak to their mother was standard protocol for all clients, or a sanction placed on their family alone.

(p) Sometime in June 2020, Jacqueline's son Sheldon went to Yucalta Lodge to see his mother and was confronted with security guards as if he were a threat. He was also told that he was not allowed in the building and later the Manager confirmed that he too was now banned from the property. This was only the second time during Jacqueline's entire stay at Yucalta Lodge that he was ever there to see here in person.

(q) On June 15th, 2020, Kimberly and Michelle received another written notice that all Zoom visits were cancelled, and told to direct all issues regarding Jacqueline's health to her Doctor. Michelle replied to this email notice by asking what the reason for the cancellation was, and if all resident's zoom sessions were cancelled. This question was never answered, or addressed in any manner. Instead, Michelle received a letter detailing her "disrespectful behaviour" towards all staff by simply asking questions. Michelle was told to not be present on the property. At that point, all three

(3) of Jacqueline's children had been banned arbitrarily without cause, from the physical property, in addition to being banned via phone and zoom calls.

(r) On July 3rd, 2020 Kimberly and Michelle found out that visits had been re-instated since May 2020 and they had not been notified. Yucalta Lodge had two (2) full months to notify the children that they could have been seeing their mother despite being previously assured that they would be notified when they could see their mother again. Kimberly had, at the time spoken to a new care-worker who was very kind, and obliged their requests to take their mother out for drives and informed them that other clients were having visits from their family members. The odd time that Kimberly and Michelle were able to try to talk to their mother, the new care-worker would be the one to answer the phone. They never stopped calling to try to talk to their mother.

(s) On July 10th, 2020 Yucalta Lodge claimed the new nurse was misinformed. By July 13th, 2020 the children were informed that they could only have 'supervised' visits with their own mother, although they only allowed Michelle to do so. All sorts of harsh conditions were laid out for the visits such as "social distancing in a car", wearing masks at all times, and 14-day "quarantines". Michelle began being followed by the staff when she would pick up Jaqueline, and so she would often have to drive to remote locations to meet Jaqueline's son, Sheldon, and Kimberly so that they could see their own mother without the surveillance of the Yucalta Lodge staff.

(t) In one instance, Michelle picked up her mother with her mask that had horizontal slits to breathe and not fog up her glasses on. This was subsequently reported to the director Mae Jon Jones as Michelle having "holes" in her mask, and the punitive action for that was another fourteen (14)-day quarantine for Jacqueline. The same care worker who dropped off Jaqueline to Michelle had the same gaps on the sides of her face and nose.

(u) Several times, Jacqueline had been prepared for the outings with soiled briefs, despite Michelle making constant reminders to staff prior to picking her up, it persisted.

(v) Staff workers were bringing Jacqueline to Michelle's car in her chair until sometime in July 2020, when she was delivered by two (2) or more security staff. This was another tactic by the manager to convey that there is something dangerous about Jacqueline's family, specifically Michelle as they decried that only Michelle was allowed to pick up her mother, and indeed see her during these drives. When Michelle pulled in to pick up Jacqueline, security staff were observed coming from another location outside, likely sent to intimidate her.

(w) On July 14th, 2020 Jacqueline's son, Sheldon called Yucalta Lodge to talk to Jaqueline, and his call was denied. He was told that he would have to go through the Manager to seek approval for his phone call.

(x) On September 3rd, 2020 Michelle called the Yucalta nurses' phone, as directed to talk to her mother, and was denied three (3) times. The first time she was told that she had to call the Manager, or head nurse and then was told not to call again. She called called back anyway, and was transferred to Louise Smith, the head Registered Nurse, who told her that she could not talk to her mother without the Manager's approval. Michelle repeatedly asked if this is the policy for all clients and family members, to which she was given a repetition of the "policy" as an answer.

(y) On September 14th, 2020 Michelle sent a notice that she would be stopping payment for Jaqueline's care if her Rights were not respected, including her ceasing restriction of family members visiting with her in person and on the phone. No response to this notice was ever received.

(z) September 19th, 2020 Michelle went to pick up Jacqueline. Jaqueline's birthday is September 21st, and so they had planned to celebrate at Michelle's house, alongside Kimberly. When Michelle presented to pick up Jacqueline, she was slumped in her chair, could not move her feet/legs at all on her own. Michelle was unable to transfer Jacqueline to the car without hurting her. The security guards kept watch the entire time and when asked to help, refused to do so. Michelle asked staff workers leaving the building for help, they too refused her. Michelle called her brother Sheldon for help, but he did not answer his phone. Jacqueline was in a great deal of pain, and could hardly express herself. As a result, Jaqueline was unable to go home to celebrate her birthday with her family but was returned into the home by the security guards who refused to assist her to get into her daughters' car.

(aa) On September 21st, 2020, Jacqueline's birthday, Michelle called and spoke with a person named "Melissa" asking to speak to her mother, and was told that she had to go through Manager's, Ms. Jones. Her call to Ms. Jones was denied.

(bb) On September 22nd, 2020, Michelle called the Vancouver Island Health Authority complaint line and spoke with a person named "Sophia" who sounded very surprised by the Manager, and other staff's behaviour. She then provided the process to file a formal claim against Yucalta Lodge with the Vancouver Island Health Authority, which Michelle did.

(cc) In October of 2020, due to Jacqueline's decline in health and threat of death, the family managed to schedule a visit in Jacqueline's room with her. This included Sheldon, Kimberly and Michelle. More rules were set in place, and the threat of this visit being cancelled was constantly put forth to the children. They all felt that it might be the last time they would see their mother alive. They agreed to washing their hands, masks, and a questionnaire. They would not agree to their temperatures being taken.

Kimberly's temperature goes up when she was in pain, as the result of a car accident, and Michelle was at the end of menopause. Kimberly and Michelle's requested were obliged, and they were escorted to Jaqueline's room by the Social Worker, and a security guard as they were a perceived threat within the facility.

(dd) They noticed on their way out after the visit, that several staff members were sitting around a table talking, and none of them were wearing masks, or gloves.

(ee) Sometime later in October of 2020, the children noticed during Zoom sessions that Jacqueline's wheel chair was not beside her bed. Their belief was that this had been the case since they had stopped them from going in to see Jaqueline in March, 2020, which lead to her experiencing muscle atrophy. The children further believe, that they removed access to her wheelchair to deliberately cause atrophy in her muscles so that she could no longer move around independently, around the same time that they took her smoking rights away.

(ff) Throughout November, and December 2020, the children were able to have Zoom visits at request to the Social Worker. The last two (2) visits included an automatic timer of forty (40) minutes which cut the meeting off automatically.

(gg) During the Zoom call of December 10th, 2020 Michelle asked the operator click to allow for recording, and she obliged this request. Michelle also asked her why there was a timer, and she stated that they have always been forty (40) minutes. This was not true, as they have visited on Zoom with their mother for an hour or more during past zoom calls.

(hh) Jacqueline's rapid decline could easily be seen and heard in pictures and audio/video recordings, and had seen an increase since the covid-19 related measures began.

(ii) From February 20th, 2020 until her death on January 30th, 2021, the children clearly discerned that her cognitive abilities and speech were in major decline due to the lack of any stimulation, increases in medication, hopelessness, helplessness, depression, and despair in missing her family. Jacqueline always expressed to her children how thankful she was for her children, and constantly said she did not know what she would do without them every time they talked to her before she became completely sedated due to the drugs she was being prescribed.

(jj) Jacqueline was cut off from all her friends and family in Ontario, as none of them have been able to get through to her since at least March 2020. She had been isolated completely and treated even worse than prisoners in solitary confinement. Toward the end, Jaqueline was unable to hold up the phone to speak with her own children.

(kk) Jaqueline's condition became grave, as both staff and her doctor admitted, yet Michelle and Kimberly were not allowed to be with her throughout her final days.

(ll) Other residents of the care home were able to engage with their families without having security surrounding them, and without having to have their phone calls cleared by management.

(mm) Following each car outing Michelle and Kimberly had with their mother, she would not be allowed out for another fourteen (14) days. In prison, even people in solitary are allowed out for an hour a day for fresh oxygen. Jacqueline was only getting out for approximately **one (1) hour every fourteen (14) days**, and by that point, she had not been outside since September 19th, 2020.

(nn) On December 21, 2020 the family made arrangements with Chris MacDonald (social worker) for several zoom sessions with their mother over Christmas holidays, while he was to be off work.

(oo) On December 22, 2021 Kimberly and Michelle had a zoom session with Jacqueline during which, Jacqueline complained of 'chest pain'. Michelle called for a worker to tend to her. One worker came rather quickly, and was told Jacqueline is having chest pain. After 28 minutes another came in with antacids. At no time was indigestion mentioned. Kimberly and Michelle asked why antacid and why no one is checking any of Jacqueline's vital signs. The second 'care worker' walked out of the room. Shortly after that, Jacqueline was crying and the timer on the Zoom meeting cut the session. The timers were new. Previously there was no timer and they talked with their mother for an hour; sometimes more each time. The timers were punitive.

(pp) On December 24th, 2020, as a punitive measure to the Dec 22nd zoom call, all previously arranged Zoom calls were cancelled. Again, all phone calls were either ignored, or staff continued to tell Kimberly, Michelle, and Sheldon that they could not talk to their own mother due to the 'Safety Plan'.

(qq) Sheldon spoke with a staff member named Joanne, and asked her if she would put on the film "Scrooge, A Christmas Carol" for Jacqueline that night as it is family tradition to watch the film around Christmas. She agreed and when Sheldon asked to speak with Jacqueline he was told he as to talk with the manager or social worker, none of whom were in the office for at least a week. He was denied again. Joanne then agreed to set up a phone call for the children with their mother on Christmas Day.

(rr) On December 25th, 2020 there was no call from Yuculta Lodge so the children called repeatedly later in the day to wish their mother a 'Merry Christmas'. They were denied again, and the "Safety Plan" was the excuse provided by Yuculta Lodge. They were again told that they could only talk to their mother with management's permission, none of which were available for at least a week.

(ss)On December 31, 2020, Michelle requested (FOIA) a hard copy of the "Safety Plan" that since June, 2020, all staff stated was the reason no one could communicate with Jacqueline Woolman on the phone. Family questioned staff repeatedly asking what the safety plan has to do with the children speaking with their mother. They never answered, only continually referred to the "Safety Plan" as the reason they wouldn't put any of our or other family and friend's calls through to Jacqueline.

(tt) On January 13th and 14th, 2021 Michelle called the Social Worker as directed to speak with her mother, and left messages. Both went to voice mail, none were returned. All through this time, the family tried desperately to speak with their mother. All calls were DENIED claiming orders per the 'Safety Plan', or ignored and sent to voice mail with no returned calls.

(uu) On January 20, 2021 Michelle Woolman received a written response (Request ID: 29609074) to her FOIA request for the Safety Plan. A copy of the "Safety Plan" has to date, never been received. This letter states in part; "They (Yuculta) have advised me that they follow the Island Health's Safety Plan and that there is no written plan in regards to the family." This legal document confirms, since June, 2020 until Jacqueline's death, six (6) months later the staff lied about the contents of the safety plan.

(vv) On January 21, 2020, at approximately 1:00 p.m. Michelle received an email from Philip Friesen (approximately 300 kms away) stating in part; "I would like to ask that you no longer directly contact the Yucalta site by telephone and email, and no longer consider Chris MacDonald as your point of contact." Mr. MacDonald, the family's 'designated contact' at the time to speak with their mother, had been ignoring all of our calls and requests to talk to their mother. Mr. Friesen offered to set up regular zoom visits for Wednesdays at 10:00a.m.. The very next morning, Michelle received a call that Jacqueline Woolman was palliative. Jacqueline was palliative and non-communicative at that time of Mr. Friesen's email and beforehand for 2 days.

(ww)On January 22, 2021at 09:39 a.m., Michelle received a call from "Greg" at Yuculta informing her "your mom has taken a bit of a turn, so she's palliative now, ah, she hasn't been eating for a couple of days". He directed Michelle to call Philip Friesen (Director in Victoria, BC) to set up visits. Michelle asked Greg to take the phone to Jacqueline and place at her ear so she could hear Michelle's voice. Frist, he claimed he couldn't because he was not on a remote phone. Then Michelle asked him to call back on the portable phone and he refused to do so.

(xx) Michelle made arrangements with the Director in Victoria for 1:00 p.m. hrs for all three (3) adult children to visit their mother that same day. Sheldon, Kimberly and Michelle all attended and were escorted by security to Jacqueline's room.

(yy) The first thing they noticed was her two (2) wing back chairs had been removed. Then they noticed there were no liquids for her anywhere in the room. When staff brought back the chairs, they were asked why Jacqueline wasn't getting any fluids. They replied that they offer them and she declines, then said “she has to ask for them.” The children informed the staff ‘she can’t ask’, as she couldn’t speak. Jacqueline was non-communicative. Staff refused to accommodate her need for hydration and walked out of the room as they always did.

(zz) Michelle then asked the security guard who was sitting outside Jacqueline’s door, if he would ask for some swabs and cups. He did so immediately and they began swabbing Jacqueline’s mouth with water. After a short time Jacqueline began to respond and perked up a little bit. She recognized who they were and they even got her to smile a few times. Family stayed for just over an hour. While there, family noticed they stuffed a picture of Jaqueline’s husband (married 52 years until his passing) in a drawer where she couldn’t see it, and a 64 year old picture of her father that was on the wall in a frame was removed from the frame and had been deliberately folded (ruined) and bent. The frame and glass were intact. It had not fallen from the wall.

(aaa) After Jaqueline’s children’s visit, on their way out at the lobby, the Manager, Ms. Jae Yon Jones was there and Sheldon asked her (holding up the ruined 64 year old picture of our grandfather) ‘Who did this?”. He was not physically close to her (at least 25 feet) and he was not threatening. She did not answer the question and turned to walk to her office calling the police as she did so.

(bbb)On January 30th, 2021 Jaqueline died. Michelle had to make arrangements through the Director in Victoria for pick up of the now late Jacqueline's belongings. Michelle was told no family member was permitted on the property and to arrange for someone else to attend. Mr. Friesen then offered to hire a moving company to which Michelle replied she had already made arrangements with a family friend to do the task. Then the (interim) Manager, Yuculta, Chris MacDonald (the 'social worker' beforehand) insisted on a moving company to do so. Michelle informed him she already had a contract with Mr. Friesen (offer, consideration, acceptance) and that he would be held accountable if he did not allow access to the family friend.

(ccc) The Covid-19 measures while purportedly having the intention of increasing safety, actually had an adverse reaction on Jaqueline's health, rapidly increasing her decline, and eventual death. Kimberly, Michelle, and Jaqueline's estate seek relief against the Vancouver Island Health Authority for the undue hardship that Jaqueline faced as a result of their enactment of Covid-19 measures that saw her treated like a prisoner.

(ddd)The children were not able to hold a proper funeral with other family members to give their last respects as is tradition. There was no proper grieving and healing for Jaqueline's death. No proper funeral, or ceremony. Jaqueline's treatment resulted not only in pain and suffering, and mental distress to Jaqueline but also to her children in suffering trauma and severe depression as a result. All of Jacqueline's adult children have been traumatized by treatment Jacqueline suffered in both facilities; especially Yuculta Lodge.

3. The Plaintiff **Jane Doe #1** ("Jane"), is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:
    (a) Jane is a Nurse Aid in the Luther Court long-term care home for seniors, located in Victoria, British Columbia and has expressed deep-seated concerns with regards to the ill-treatment of her care home clients.
    (b) Jane has witnessed clients live in an abusive, patronizing, and stressful environment. As seniors having to make a big adjustment to accommodate Covid-measures, they often forget to comply with masking mandates. It is during those moments that Jane has witnessed them being policed and abused for such "mistakes".
    (c) Jane is also quite concerned for her own health, as she noted that Bonnie Henry, who has previously been supportive of Nurses Unions, shared sentiments that Nurses should not be in the profession unless they vaccinate. Jane is distressed by such coercive statements, which violate her constitutional rights.
    (d) Jane has also asked the British Columbia Health Authority to provide an FOI on a request for the arbitration that Bonnie Henry signed on in 2019

stating, in support of the Nurses Union, that masks are useless. However, the Health Authority has refused to oblige this request.

(e) The Plaintiff states, and the fact is that, the measures enacted by British Columbia Chief Medical Officer Bonnie Henry, has created a stressful environment for many like Jane, who have watched the Long-term care system become similar to a jail/prison. Jane feels concern not only for herself, but also for her clients. The measures failed to uphold health and safety for seniors and in fact the measures have led to deplorable conditions which in fact have caused and/or accelerated the untimely and premature deaths of many seniors.

(f) The Plaintiff, Jane Doe #1, does not wish to reveal her identity for fear of reprisal, and dismissal, by her employer.

4. The Plaintiff(s) **Amy Muranetz** and **Brian Edgar** are residents of British Columbia, whose facts, in support of their claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, with respect to using the B.C. Ferries Inc. transportation system are as follows:

(a) **Amy Muranetz** ("Amy") is a Victoria, British Columbia resident and mother, who shares custody of her daughter with her daughter's father, who resides in Delta, British Columbia. As such, Amy has been using the British Columbia Ferries every other week for the past four-and-a-half (4.5) years as she shares joint custody of her daughter.

(b) On November 2nd, 2020 Amy had an incident on British Columbia Ferries that left her distressed. She was, and is currently living on Vancouver Island, and boarded the ferry at 5:00 p.m. at the Swartz Bay terminal to Tsawwassen terminal, as a walk-on passenger with her daughter. Amy made her medical exemption to masking known to the reception, and was let through with her daughter. Once aboard the ferry, Amy purchased her return ticket for 7:00 p.m. from the gift shop.

(c) As Amy began to board the ferry at the Tsawwassen terminal reception desk, to make her way back home, she was stopped by the ticket seller who asked her where her mask was. In reply, Amy stated her medical exemption. She was then asked where her medical documentation of such was, but Amy did not have any documents to show on her, as none are required. The ticket seller proceeded to threaten Amy, stating that she would not be allowed on the ferry. Amy simply continued on through the gateway.

(d) After making her way onto the ferry, Amy was stopped on the front bow of the ship by five (5) British Columbia ferries employees, and the Chief Steward, who stated that Amy would not be let on to the ferry. Amy proceeded to share personal, and confidential medical information in response, to indicate proof of her medical exemption, however the British Columbia ferries employees then proceeded to threaten her with force. Amy was escorted off the bow by security. Brittany Sylvester, the terminal manager at Tsawwassen Ferry, escorted Amy down to the main waiting area. Amy broke down as a result of the traumatic, and embarrassing experience that she had just gone through.

(e) A first aid attendant employee came to Amy's assistant, as she was having trouble breathing, and began having PTSD flashbacks to being four (4) years old, and remembering dealing with a very aggressive sexual attack. The first aid attendant assured her that they would get her home on the 9:00 p.m. ferry, however he also asked if Amy could hold a mask up to her mouth, and suggested that they could, perhaps, smuggle her via a van onto the ferry. Amy recorded this interaction.

(f) Amy continued to be pressured to leave the premises, although she had no place to go if she did. Amy was repeatedly asked where she was going to go, and she continued to cry, and plead that they stop pressuring her.

(g) It was then suggested to Amy by the first aid attendant that perhaps the main ticket agent who initially threatened her, had stereo-typed her as an 'anti-masker'. Brittany, the manager then argued with him, stating "no, she wasn't stereo-typing, she was doing her job". Brittney then began to ask Amy if she had been asked about masks before, and Amy informed her that she would be recording their conversation. Brittney then ordered the first aid attendant to leave Amy's side and demanded that all staff leave the area. Amy was then informed that Brittney would be calling the police.

(h) As the room emptied, Amy was left by herself as police arrived on the scene. The Delta police officers then proceeded to drive her to a Tim Horton's coffee shop in Tsawwassen, and left her there. Amy then called a cab to her daughter's father's house. Amy filmed the entire incident, as she was quite distraught by their conduct.

(i) The following morning, November 3rd, 2020, Amy found a local clinic that provided over-the-phone consultations. The clinic emailed Amy a letter stating that, as she suffers from anxiety/Post-traumatic stress disorder, the British Columbia Ferries must take that into consideration with regards to her masking exemption.

(j) On November 4th, Amy returned to the Tsawwassen ferry terminal with the intention of returning home. She purchased a ticket at the ticket ATM, and was asked by reception about where her mask was. Amy simply stated that she had an exemption, and, when asked if she had a letter, did not hesitate to produce the one she had procured from the clinic the previous day. The receptionist asked Amy if she had a mask on her person, which she did, and then they let her go through.

(k) At approximately 11:10 a.m., Amy was in the BC Ferries cafeteria, and just about to eat a salad when Brittney, the terminal manager approached her. Brittney stated, "you know why I'm here". Amy simply replied by noting that she had a letter, and was more than willing to show Brittney that letter, however Brittney stated that Amy would need to exit the ship before she would read her letter. Amy declined, and told Brittney she could read it then, and there, however Brittney refused this suggestion, and that is when Amy began recording the interaction. Brittney then stated that the ferry would not leave the harbour so long as Amy was on it, and that she was calling security. Amy asked why, as she had been more than willing to produce her medical exemption letter, to which Brittney replied that she was now banned from travelling due to what had "happened the other day".

(l) Brittney left Amy for a few minutes, as about five (5) or six (6) security guards and employees began to gather, and two (2) Delta Police Department Officers arrived. Amy produced her letter to the police, and although they appeared just as confused as she was, they asked her to leave the vessel.

(m) Amy quietly stood up and, was escorted off of the ferry. She then asked Brittney to refund her trip. The two (2) police officers escorted Amy to a car, where one drove her to her ex's home. To date, British Columbia Ferries employees have made no further note about Amy being able to return home to her city, and life. She is under great distress, although she has gone to great lengths to prove that she has a masking exemption. As a result of the Defendants' abusive and illegal conduct, she has suffered damages in mental distress, anxiety and violations to her constitutional rights.

5. **Brian Edgar** is a resident of Mill Bay, British Columbia.
   - (a) Brian travelled from Departure Bay, Nanaimo on the 8:25AM ferry scheduled to travel to Horseshoe Bay on October 17th, 2020. Brian, and his friend Karla arrived at the terminal, and paid for their vehicle, and themselves. They then parked in the vehicle waiting area. They walked out of the area to look for some friends in long-term parking who were coming with them. They were travelling to Vancouver.
   - (b) They arrived on deck five (5) and started walking to the back of the boat, passing the Chief Steward's office, and just as they walked by, a man came out and told them masks are mandatory on board, and that if they did not want to wear them they would have to go upstairs onto the outer decks. It was clear that most of the people in that area were not wearing masks and anyone who was wearing a mask was very well distanced from the group not wearing masks. Because of this situation, Brian felt it was a good place to be without infringing on anyone so he joined the group and remained there until it was time to return to the vehicle.
   - (c) While on board a couple things occurred that Brian was not witness to. One was that one of his new friends returned from the bathroom with her two (2) year old daughter and said that another passenger had stood in front of her blocking her passage back to where their group was seated. The other passenger told her she had to wear a mask. There was more interaction verbally and other passengers were commenting as well. As she got past the

individual blocking her passage, someone yelled out "your baby is f***ed". Her baby heard all of this. Shortly before returning to the car, Brian was told that RCMP had been called to meet the ship because of something that had happened on board.

(d) Brian returned to the car and waited to disembark. Shortly thereafter, the boat docked but the unloading did not begin. Brian recalls being held on board for approximately twenty (20) minutes before cars were allowed to disembark. During that time, Brian could see there were people with dogs (presumably RCMP) and others that appeared to be police or security.

(e) When they were allowed to disembark, they were guided out of the flow of traffic and brought to a halt in front of the traffic that was waiting to board the ferry. They were detained there for fifteen (15)- twenty (20) minutes. An RCMP officer and a BC Ferries employee approached them. The Officer asked Karla to produce her License, which she did. The rest of the group were asked for ID, and declined. They were then notified that somehow they had gathered information, which indicated that their group was connected to some incident that had occurred on board and that they were being banned from further travel aboard any British Columbia Ferries vessel for the rest of that day.

(f) They expressed that they had plans to return home that evening and had done nothing wrong and had been involved with no incidents aboard the vessel. Karla let them know that she had remained in her vehicle for the duration of the ferry ride. They were informed that as a private service British Columbia

Ferries had the right to ban them from travel for the day, as British Columbia Ferry Services Inc., operating as BC Ferries (BCF), is a former provincial Crown corporation, now operating as an independently managed, publicly owned Canadian company. The RCMP officer returned Karla's license and they were allowed to drive away, feeling both confused, and inconvenienced by this interaction with British Columbia ferries.

(g) The BC Ferries is realistically the only daily or regular means of travel from the Islands to the mainland and therefore an **essential** service fir B.C. residents and BC Ferries is abusing its authority and **not** applying the law. The responsible minister, in omitting to properly regulate this abuse is violating these platintiff's s.7 and s.15 ***Charter*** rights of the Plaintiffs.

6. The Plaintiff **Jane Doe #3** ("Jane") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

   (a) Jane is a nineteen (19)-year old young woman residing in Abbotsford, British Columbia with her parents.

   (b) Jane has fought, and survived through two bouts of cancer, has had her left leg amputated, has a hearing disability, and is currently experiencing heart failure.

(c) On October 16th, 2020 Jane attended at St. Paul's Hospital in Vancouver, British Columbia upon referral from her pediatric oncologist/cardiologist at Surrey Memorial hospital, due to her experiencing sudden onset of heart failure.

(d) Upon Jane's arrival at approximately 10:30 p.m., with her parents, at St. Paul's Hospital, they were offered masks which they refused citing their exemptions, which were honoured without question.

(e) As Jane and her mother transitioned through various meetings with doctors, and various waiting areas, their mask exemptions continued to be honoured. Jane's father was also allowed to continue into the acute ER ward to join them, all the while having his own masking exemption honoured in addition to his wife, and daughter's exemptions.

(f) At approximately 3:30 a.m. on October 17th, 2020 a Dr. Angela M. approached Jane and her parents to speak with them. Jane clearly outlined her care needs, including 24/7 parental support and Dr. Angela M. confirmed that this need would be upheld. Neither Jane, nor either of her parents wore masks during this entire interaction.

(g) At approximately 5:20 a.m. on October 17th, 2020 an attendant sought out Jane, and her parents to take them to the room that they would be staying in, room 5B. Neither Jane, nor either of her parents wore masks during this interaction.

(h) Upon their arrival at 5B, Jane and her parents were approached, and subsequently attacked by a nurse named Andrea. Andrea attacked Jane by asking her "Don't you know we are in a Pandemic? Don't you care about people?" Jane simply replied that while she did of course care for others, she was experiencing heart failure, and as such would not engage in any action that would increase that risk. Her parents also stated that neither of them were able to physically tolerate masks, and were as such exempt as well.

(i) Upon hearing Nurse Andrea's loud accusations, the individual who was sharing a room with Jane began to yell out "What is going on out there? Is someone not wearing a mask? My family has to wear masks? I am afraid, very afraid."

(j) Jane, and her parents calmly went on to explain that there was no provincial, or city-wide mask mandate, and that a requirement to wear a masks when one is exempt is a violation of the Human Rights Code. Jane, and her parents also added, that masks produced an anxiety/trauma response.

(k) Jane, and her parents were then informed that they had to sign a waiver stating that they were declining service from the hospital, so as to illustrate that the hospital was waiving all responsibility, and placing that upon Jane and her family. However, Jane, and her parents were not declining service, in fact, they were at the hospital seeking care, and treatment for Jane's heart failure. Jane's parents explained that not only does her condition require constant parental supervision, but also that, due to Jane's hearing disability, they could not wear masks when communicating with her.

(l) In response to the vast explanation provided by Jane's parents, even as their own child experienced heart failure, the nurses handed them a copy of a document entitled "Essential Visits During COVID-19 Recovery". Jane's parents noted that the document did not, in fact mention anywhere that the wearing of masks is mandatory. Dr. Angela M. returned to visit the family, and expressed to them that her hands were tied with regards to hospital policy.

(m) Jane felt that the situation was compromising her, and placing her at risk. As such, she asked who else the family could speak with. Dr. Angela M. said that she would go to speak with her boss, Dr. Pritchard. Unfortunately, Dr. Pritchard also stated that the masking exemption would not be allowed. Dr. Angela M. then informed the family that if they could not comply, the choice was theirs.

(n) As Jane and her family waited in the hallway to speak to an administrator, they were approached by a nurse named Jodi, who harshly informed them that they had already been told to wear masks multiple times, and that this had been documented throughout their stay at the hospital. Jane and her family noted that they had already spoken to Nurses Andrea, and Sapna, along with Dr. Angela M. who were all acquainted with their exemptions.

(o) Jane and her family were then told that they needed to leave the unit, or face the threat of security. Nurse Jodi escorted the three to the door of the unit, and left upon being asked who else the family could speak with. Nurse Jodi never returned, so Jane's mother sought her out. Jane's mother was again, escorted to the door of the unit by Nurse Jodi, who simply stated that an individual named Janet Silver was the only person that they could speak to, but that she was not working at the time, and that she would not come up to the floor. Nurse Jodi then walked away without providing any further information by way of documentation, nor orally.

(p) At 7:00 a.m. Jane, and her parents realized they had no choice but to leave St. Paul's Hospital, as they had no one else to speak to. Jane and her parents followed up with the referring physician, Dr. Hoskings, of the British Columbia Children's Hospital, however it took days before contact was achieved.

(q) During that time period, Jane continued to suffer from lack of sleep, swelling, inability to walk, and overall distress.

(r) Since that time, Jane, and her parents have tried to reason with Wynne Chui, a clinical nurse specialist, and Dr. Virani of the Heart Function Clinic. Both individuals work out of St. Paul's Hospital. Despite their attempts to appease Jane, and her parent's requests, it was determined that Jane would not be able to receive in-patient care in a way that honoured her exemptions in all circumstances.

(s) As a result of this entire situation, Jane, and her parents feel abandoned by their health-care system. St. Paul's Hospital negligently placed Jane at risk of severe heart failure, and as such, Jane and her parents remain scarred, and anxious as to who, and what system they can rely on for the necessary care Jane requires going forward.

(t) Since October 2020, Jane has not been able to access medical treatment through the public health system which is causing her immeasurable pain, suffering, stress and anxiety as well as endangerment of her very life.

7. The Plaintiff **Ilona Zink** ("Ilona") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

   (a) Ilona Zink has been investing in her business since the age of sixteen (16) when she achieved a level one Makeup Artistry Certification. Shortly thereafter, she went on to attain two (2) additional advanced makeup diplomas that covered advanced photography, theatrical and film makeup, aesthetics, hair styling, colour analysis, and nail technician. In addition, Ilona completed the STAR personality profiling program. By the age of twenty-four (24), she launched her first salon 'Ilona's Aesthetics Inc.'

   (b) In 2007, Ilona launched Garrison Studio in the Garrison Crossing, Chilliwack, British Columbia area. Ilona was generating approximately $100,000 annually, prior to re-locating to the Okanagan. Upon her move to the Okanagan, she settled into Kelowna, British Columbia, and began starring in a local makeover show entitled "Garage Makeovers", in addition to re-launching the Kelowna location of Garrison Studio.

(c) From 2007, until the beginning of the Covid-19 pandemic in 2020, Garrison Studio successfully survived three (3) years of heavy construction in the area, including 8 months of road closures. Ilona invested into building the salon from the ground up, including the necessary expenses such as plumbing, utilities, permits, and all of the salon supplies. The community was just as enthusiastic about the arrival of Garrison Studio as Ilona was passionate about it.

(d) When March of 2020 hit, and the Province of British Columbia began enacting measures that ordered businesses to close, her business was hit hard. In the entire mall, Ilona's was the only business that was forced to close on March 9th, 2020. To make matters worse she was required by mall management to maintain and upkeep her storefront "daily" as though it were operating. Ilona witnessed all the other stores in the mall remaining open and making money while she was forced to stay closed. She was also informed that any vandalism would not be at the responsibility of mall management.

(e) In an attempt to keep up with customer service, Ilona forwarded the salon phone number to her home line. However, over the course of a three (3)-month period only nine (9) clients ever reached out.

(f) Not only did Ilona's business suffer, but her income as a landlord also suffered. Her tenant decided that she was not going to pay her any further rent. The government informed tenants that they did not have to pay rent, and informed Ilona that she could not evict her to seek a paying tenant. Thus, neither Ilona's business, nor the tenant were bringing in any income, yet she still had a $3000/month payment to shell out for her home as well as an additional $300/month for property taxes.

(g) As a consequence of the tenant not paying rent, Ilona was put in a precarious position with the landlord/house financier as she was in a rent to own contract. Ilona was forced into court proceedings to protect and uphold her contractual agreement to remain in her home.

(h) When Ilona contacted the government seeking financial support, she was informed that as a self-employed individual she was ineligible for such support. She was also ineligible for a business loan, as such a loan required $50,000+ in staff payroll which does not exist for the type of salon that Ilona was running.

(i) As a single mother to a 14-year-old daughter, Ilona became overwhelmed by the simple fact that she was unable to purchase groceries, let alone foot bills such as rent, utilities, phone, car payments, and many other such necessary payments. As a result, Ilona's mental health has suffered immensely.

(j) Ilona was finally able to apply for CERB support payments in late May of 2020, approximately two-and-a-half (2.5) months after she was forced to close her doors on March 9th, 2020. However, after being closed for only 8 weeks at that point, her business had already suffered irreparable damage. Ilona had already fallen behind on all necessary payments both business and personal in nature, and thus, her credit score dropped so low that she was denied the chance to open up a bank account. Due to falling behind on internet service provider payments, Ilona has also lost access to her business email, thus making it difficult for her to collect pertinent evidence. Now a fifty-seven (57)-year-old woman, Ilona feels that the government has wiped out everything she has invested in her business, and by extension, her life since the age of sixteen (16), in a single move with their highly unjust, and baseless Covid-measure orders.

8. The Plaintiff **Federico Fuoco** ("Federico"), is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) Federico Fuoco is the owner of the restaurant 'Gusto', which serves up authentic Italian food in the centre of downtown Vancouver, British Columbia, and has been an active restauranteur for the past twenty-one (21) years. He was also sole shareholder and director of "Fire Productions

Limited" and "F2 Productions Inccorporated", two (2) companies duly incorporated under the laws of British Columbia which were forced to cease operation due to the Covid-measures and their enforcement.

(b) Federico lost one of his restaurants, 'Federico's Supper Club' as a result of the 2020 lockdowns, despite having spent countless dollars on masks for staff, and safety features within the restaurant. His loss also had a domino effect on his staff, and as such he is fearful, and anxious of the newer, stricter measures currently being imposed by Bonnie Henry.

(c) On March 29th, 2021 British Columbia health officer Bonnie Henry announced that all restaurants must close their indoor services effective midnight of the following day, March 30th, 2021.

(d) Federico, like countless other restauranteurs in the Province, was caught completely off-guard by this announcement that was made without prior consultation or forewarning.

(e) For Federico, this complete lack of consultation by the Bonnie Henry was reminiscent of the last-minute decision to cut off liquor service at 8:00 p.m. on New Year's Eve 2020, and with the upcoming Easter holiday, he had, like many other restauranteurs in the Province, spent thousands of dollars on food supplies in preparation for the Easter weekend.

(f) Federico chose to remain open, so that both he, himself, and his staff could continue to gain a livelihood. That all came to an end on Thursday April 1st, 2021 when he was served with a business closure order by his local health inspector, Greg Adamson. Federico was given no prior warning(s), and at the time he was served with this Closure Order. Federico only had two customers drinking tea in his restaurant at the time. After serving the closure order, the health inspector directed his attention to the customers and employees, harassing them, and instruction them to leave.

(g) Federico complied with the ban on indoor dining, over the Easter long weekend. He closed as per his annual norm on Good Friday, and Easter Sunday. On Saturday April 3rd, 2021, he was open in compliance with the most recent health orders, but in contravention of the Closure Order he was served with.

(h) At 1:00 a.m. on Monday, April 5th, 2021 Federico found a Business License Suspension, and Closure Order duct-taped to the glass of his front door at Gusto restaurant, indicating that the suspension would last until April 20th, 2021 at minimum.

(i) On Tuesday, April 6th, 2021 Federico received a Liquor License suspension as "an establishment cannot have a liquor license without a valid business license in place." Federico was devastated, as he had already spent thousands of dollars on renewing all of the licenses related to his business for the year.

(j) When Federico approached Kathryn Holm, the Vancouver Chief License inspector if the extension could be reduced, in order to allow him to open on April 20th, 2021 he was met with flat out hostility. Holm responded by letting Federico know that not only would she not oblige his request, but she also threatened to extend the closure indefinitely, meaning only the City Council could override her decision.

(k) Federico has always tried to remain in full compliance with safety recommendations, and orders from Bonnie Henry for the safety of everyone, including his staff, however he is adamant that the inequity and inconsistency of these orders that penalize restaurant owners above others is completely arbitrarily, negligent, and target the forced closure of only small, independent businesses in favour of multi-national corporations, and denies any concept of evenly applied justice. For example, while customers cannot stand up at Federico's bar to taste wines, even if socially distanced, Bonnie Henry has exempted and allowed for people to engage in wine-tasting at wineries in B.C. This is obviously because Bonnie Henry owns a winery.

9. The Plaintiff **Valerie Ann Foley** ("Valerie Ann"), is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) Valerie Ann is a single mother residing in Richmond, British Columbia. She is a 'person with disability' and has respite care.

(b) On December 5th, 2020 at approximately 1:10 p.m., Valerie Ann boarded the Pacific centre skytrain in downtown Vancouver, British Columbia, when she noticed a transit officer following her.

(c) The transit officer, Peter Kwok with badge #325 then began harassing Valerie Ann about not wearing a mask, and she responded by simply producing her exemption card, which she was not required to do by law.

(d) The transit officer continued to harass Valerie Ann for further proof of a masking exemption. He then informed Valerie Ann that she either had to put on a mask, or cover her face. Valerie Ann informed him that she needed a healthy amount of oxygen to breathe.

(e) The transit officer refused to leave Valerie Ann alone, and continued harassing her, and threatening to place her under arrest for refusing to wear a mask, or face covering. The transit officer then grabbed Valerie Ann by her left arm and began punching her in her side, back, and ribs.

(f) This caught the attention of other passengers, and one of the passengers in the back of the train began yelling for the transit officer to leave Valerie Ann alone. The transit officer momentarily let Valerie Ann go, and then grabbed her again and slammed her against the wall twice.

(g) Valerie Ann tried to move away from the transit officer, and sit back down in her seat, but he grabbed her by her right arm and dragged her right off of the Skytrain as it pulled to a stop. The transit officer then handcuffed Valerie to a railing, where two (2) other transit officers came to his assistance. While Valerie Ann was handcuffed to the railing an announcement was made over the transit loud-speaker reminding travelers to wear a mask but explicitly stated: "unless you are exempt".

(h) The two (2) other transit officers escorted Valerie to an elevator where she was taken out to the street, still handcuffed, and detained in the back of a police car. After twenty (20) minutes, two (2) police officers arrived and performed a thorough search of Valerie's person, and her belongings.

(i) After waiting inside the police car for an additional twenty (20) to thirty (30) minutes, the police officers drove Valerie Ann to a garage in Vancouver where she was told she was going to have her photo, and fingerprints taken.

(j) Valerie Ann did not actually get out, and get her fingerprints taken. Instead, the two (2) police officers drove her to Lansdowne mall in Vancouver, British Columbia, to where her car was parked by the Skytrain station. The police officers asked Valerie to sign a document, that she did not properly understand, however she felt undue influence to sign in their presence and did so. Valerie Ann was told that the police officers needed to seize her phone, and they did so.

(k) Valerie Ann was, and remains well aware that masks are mandatory in public spaces in British Columbia, except for those with qualifying medical exemptions. Such measures are not being enforced properly, and Valerie Ann's experience is one such example of the extremes that people are not resorting to, to uphold the covid-19 restrictions. She has been physically and psychologically traumatized and injured by the illegal conduct and assault of the transit officers.

10. The Plaintiffs **Linda Morken** ("Linda") and **Gary Morken** ("Gary"), are residents of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) Linda Morken resides with her husband, Gary Morken in East Sooke, British Columbia.

    (b) On Friday, February 5th, 2021, at approximately 1:40 p.m. Linda was shopping with her husband Gary for groceries at Village Foods Market in Sooke, British Columbia.

    (c) The store did not have any dedicated personnel stationed at its entrance, so Linda and Gary were not questioned about their lack of masks. They often shop at that same store, without masks on.

    (d) After about twenty (20) minutes of shopping, Linda decided to ask an employee where the plastic bags could be found. Linda required a plastic bag for the oysters that she was planning on purchasing.

    (e) The employee informed Linda that she required a mask to shop in the store. Linda replied that she had a masking exemption, and then repeated her question about the location of the plastic bags. The employee pointed

Linda in the direction of the plastic bags, and then informed her that they do not accept exemptions in their store.

(f) As Linda moved through the store, she asked another employee for clarity on the location of the plastic bags along the way. The employee provided her with directions, and made no mention as to her lack of mask.

(g) Upon Linda's return to the Fish monger with plastic bag in hand, Linda was informed by another employee that she would have to leave the store as she was not wearing a mask. Linda informed him that she was exempt, and would be leaving the store shortly, after paying for her groceries.

(h) The employee stated that exemptions were not honoured in their store, and left the scene, seemingly to go and inform a supervisor, of Linda and Gary's presence in the store.

(i) Several other customers had overheard the employees' statement. A few of them became disrespectful toward Linda and Gary. One man proclaimed himself to be a lawyer, and then proceeded to inquire as to what Linda's exemption was. Linda was well aware that she was within her rights to keep details of her exemption confidential.

(j) One woman spoke up in defense of Linda and Gary. The woman identified herself as a lawyer and informed the inquisitive onlookers that some people were exempt from wearing masks. She herself, along with everyone else in the store was masked.

(k) The store manager then approached Linda and Gary, with an angry and hysterical demeanor. He only identified himself as the store manager, but refused to identify himself by name. He stated that they did not allow exemptions in the store, that there were no exemptions, and that all of his employees and customers must be masked.

(l) Linda and Gary made attempts to explain their exemptions, but were told that they must leave the store immediately and that they would not be allowed to pay for their groceries.

(m)Linda stated that she would be waiting to talk to the police upon their arrival, but that she and Gary would be waiting for them in the store. Neither Linda nor Gary raised their voices as they advocated for themselves. The store manager continued to engage in boisterous, angry theatrics throughout the entire encounter.

(n) Gary went on to wait in the area just outside of the doors, but Linda remained inside, choosing to stand quietly out of the way of any other customers.

(o) While Linda was waiting, she noticed an empty till. She approached the till, placed her groceries on it, and the cashier began cashing her out. Linda was already finalizing payment for her groceries via credit card, when the store manager ran over, yelling that the groceries could not be paid for. Linda informed him that the transaction had already been approved, and suggested that he calm down.

(p) Linda informed that store manager that she would stand out of the way, and continue to wait for the arrival of the RCMP officers, which she did.

(q) As Linda stood waiting, another employee shouted at her to leave the store and never return. Linda replied that she would be leaving soon, however she would be back to shop in the store once they realized that they were the ones breaking the law by not honouring masking exemptions.

(r) Linda later learned from her husband Gary, that the store manager, along with one of the employees were harassing him throughout the duration of the time that Linda stood inside waiting for the RCMP officers to arrive.

(s) Two (2) RCMP vehicles arrived. A truck driven by RCMP Constable Steve James ("Constable James"), and a car driven by RCMP constable Kathleen Biron ("Constable Biron"). Upon their arrival they spoke to Gary, along with the store manager and his assisting employee.

(t) RCMP constable James then approached Linda, and informed her that she was not allowed to shop in the store without a mask. Linda attempted to calmly assert her exemption.

(u) Constable James informed Linda that masks were mandated, and that she must have one on to be inside the store. Linda attempted to speak, but she was silenced by constable James, who told her that if she said anything more, she would be placed under arrest.

(v) Linda asked what exactly she would be arrested for, and constable James informed her that she would be arrested for not wearing a mask in an indoor public space. Linda attempted to speak again, and constable James silenced her again, stating that she had done enough talking.

(w) Immediately following this, the time was approximately 2:00 p.m. when Linda was arrested, handcuffed, and subsequently escorted from the store by RCMP Constable Steve James, and Kathleen Biron.

(x) While still in the store, and during the process of Linda's arrest, Constable Steve James stated that the reason for Linda's arrest came as a result of her failure to wear a mask while frequenting a public space.

(y) Neither of the Constables made mention to Linda at that time of trespassing, or assault. She was only informed that the reason for her arrest was due to her non-compliance with masking measures in place.

(z) Linda was not asked for her name, or identification. Both Constables also failed to inform her of her rights at any time during her handcuffing, arrest, removal from store, and subsequent detainment within the police car.

(aa) As Linda was being placed in the backseat of the RCMP car, she refused to get in until she was told where she was doing. She asserted that she would not be going anywhere until her husband was informed about where she was being taken. Linda was extremely fearful that they would attempt to detain her at a "quarantine centre".

(bb) Linda was informed that she would be taken to the RCMP detachment on Church Street in Sooke, British Columbia. Linda told Gary that she would see him there, and was then taken away without another word from either constable.

(cc) RCMP Constable Kathleen Biron drove Linda to the Sooke RCMP detachment.

(dd) Upon Linda's arrival at the garage of the Sooke RCMP detachment, constable Kathleen Biron formally placed her under arrest, and charged with assault. Linda was shocked upon learning her charge, as she had not assaulted any individual at the store.

(ee) Linda questioned the charge of assault, however Constable Biron advised her not to speak any further, and began reading off Linda's rights to her.

(ff) Linda then requested that the handcuffs be removed, as she was experiencing significant pain in her wrists, and shoulders. They were not removed. Linda recalls having a very difficult, and painful time attempting to exit the police cruiser, with her hands still behind her back.

(gg) Linda was then brought from the garage, into an office area of the RCMP detachment.

(hh) Linda was asked whether she was experiencing any flu-like symptoms such as fever, cough, or any sort of sickness in general. Linda answered "not at all". She was then asked to wear the mask that constable Biron had provided, which she refused, asserting her exemption.

(ii) Linda went on to answer questions about her identification, and place of residence. Linda had, in the presence of the constables, left her purse which carried her identification with her husband Gary prior to getting inside their vehicle. Therefore, Linda did not have any physical forms of identification on her person at the RCMP detachment.

(jj) Linda had only her Vaccine Choice Canada business cards, and a Vaccine Choice Canada "Stand Up for Freedom" pin on her person at the time.

(kk) Linda could feel the adrenaline of stress coursing through her body throughout the entire ordeal, which increased her heart rate to very rapid levels.

(ll) Linda has had a long-standing heart condition, that is well known to, and well documented by her family physician.

(mm) After a considerable amount of time had passed, Linda's handcuffs were finally removed, and she was instructed to remove her jacket, sweater, jewelry, watch, and shoes. Linda was very cold, so she requested to have only her jacket, sweater, and shoes back. Her requests for those items of clothing were denied, and she was told that she would get them back only upon her release.

(nn) Linda was never given the opportunity to discuss her experience in having had her rights violated at the store, or at the detachment. Each time that Linda tried to speak, she was silenced. Although both Linda and Gary made note that Constable James made considerable efforts to discuss the events that took place with the store manager, and employees.

(oo) Linda suggested that the constables take note of the poster that had recently been issued by the British Columbia Office of the Human Rights Commissioner in hopes that they would see that she and Gary had the right to be exempt from masking.

(pp) Linda's person was then thoroughly searched by the Constables.

(qq) Linda's indicated legal counsel, was then telephoned by the RCMP constables, as Linda herself was placed in a small, and cold room. There was a single phone in the room, and Linda was instructed not to touch it until it rang, at which point it would be her legal counsel on the line. Linda waited in that room for about thirty (30) minutes, until the constables informed her that they were not able to reach her legal counsel.

(rr) Linda was then placed in a cell, and was later given a blanket after expressing that she felt cold.

(ss) Linda was extremely uncomfortable, and began experiencing joint pain due to not having a sweater, jacket, or shoes with her. Her shoulders, and wrists were still in pain due to being handcuffed. Linda experienced amplified symptoms of her diagnosed illnesses as a result of being too cold. Her diagnosed illnesses include Hemochromatosis, Psoriatic Arthritis, CFS, Fibromalgia, and Sjogren's Syndrome.

(tt) Linda once again requested that constable Biron return her articles of clothing to prevent her arthritic pain from worsening in the cold. Linda was simply informed that the heat was turned up. Although Linda did not have her watch, she estimated that she was left in this state for three (3) – four (4) hours.

(uu) At some point during Linda's time in the cell, she was informed that the constables had returned to the store to review video footage of the events that had taken place.

(vv) Upon their return, constable Biron informed Linda that she was being released. While Linda was still confined to her cell, she was asked to provide Gary's phone number so that he could be called to pick her up.

(ww)Linda informed Constable Biron that Gary did not have a cell phone, but that he was likely waiting for her in the detachment parking lot. Constable Biron then asked Linda to describe Gary's truck and provide her with his full name. She also informed Linda that they could not find her drivers license in the system, although Linda assured her that it was active, and updated.

(xx) Linda was then asked to re-state her address, and the spelling of Gary's name, and for confirmation that Gary and Linda resided at the same place of residence.

(yy) Constable Biron recorded the information that Linda relayed onto the blue latex gloves that she was wearing, and left Linda in the cell for approximately another thirty (30) minutes.

(zz)Upon her release from the Sooke RCMP detachment, Linda was given back her belongings, and presented with two fines. One fine was for the "Failure to wear a face covering indoor public space – CRMA 3(1)" in the amount of $230. The second was for the "Failure to comply with direction from an enforcement officer – CRMA 6" also in the amount of $230.

(aaa) When Linda inquired about her assault charge, she was informed that video footage had confirmed that no such assault had taken place. Linda was informed that an individual at the store had claimed that she had purposefully coughed on the cashier. Linda understood that the video confirmed that she was standing alone, at a distance from others, where she coughed once. Linda noted herself that, in any event, it would have been difficult to cough on the cashier as they were situated behind plexiglass.

(bbb)Linda requested a copy of the video footage from the store, and was informed that she could attain it via FOI, or through legal counsel and that the RCMP would not be providing her with a copy.

(ccc) Linda requested to register a formal complaint with the RCMP officers against the store owner, and employee(s) for falsifying claims of assault. As a result, Linda felt shamed, and humiliated by the staff, and customers. Constable James informed her that the assault was a concern raised by the staff, and that had determined that no such assault had ever taken place.

(ddd)Constable James also stated that the store was within its rights as it was private property, and went on to compare it to Linda's home. Linda replied that during operational business hours, the store is open to the public and as such, is not private property. Constable James continued to insist that it was, though neither himself, nor Constable Biron ever made any mention of trespass.

(eee) Constable James also informed Linda that he has looked up the documents on masking exemptions from the British Columbia Office of the Human Rights Commissioner. He stated that they follow orders given to them from the RCMP. Linda realized that Constable James may have never been informed of the legalities with regards to masking exemptions.

(fff) Linda stated once again, that she wished for the RCMP to lay charges against the store, and its staff for making frivolous, vexatious claims against Linda, causing her immense distress. This request was once again denied, and Linda was released.

(ggg) When Linda was re-united with Gary, he informed her that Constable Biron had presented him with a ticket that, without checking, he had assumed was for Linda. Gary simply placed it in the glove compartment. However, Linda had her own blue ticket sheet with her, and upon re-inspection, Gary realized that he himself had been issued with a ticket for frequenting an indoor public space without a mask on.

(hhh) Both Linda, and Gary remain extremely distraught, and mistrustful of the RCMP's lack of knowledge of the law surrounding masking exemptions, and their abusive and false arrest. For individuals with such serious health complications, this is deeply concerning. They both suffered physically and psychologically from the RCMP officers' misconduct.

11. The Plaintiff **Pastor Randy Beatty** ("Randy"), is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) Randy Beatty is a pastor at the Living Waters Fellowship located at 2222 Regent Rd, Black Creek, British Columbia V9H 1A1.

    (b) Randy maintains that Bonnie Henry's Orders are in violation of the constitutional right to worship, assemble, and Section 176 (1-3) of the ***Criminal Code.***

    (c) Due to Bonnie Henry's Orders, Randy's church has been subjected to three (3) encounters with the RCMP thus far, as of April 7th, 2021.

    (d) During the first encounter, which was on February 21st, 2021, an officer came to "educate" Randy, and his congregation, following their morning service. They were informed that they were in violation of Covid-19 orders and would be fined if they continued to hold any services. The officer was respectful and considerate. They asked him why the big stores, liquor stores, bars and restaurants were allowed to be open, but the church was forbidden to hold service. He replied, "We are in a tough position. A neighbour had called in a complaint."

    (e) Social Media slander has been rampant for the church, and on FB Merville and Black Creek, Rant and Rave were also debating the church holding services, and causing backlash against them. Threatening messages have been left on the church answering machine.

(f) On March 14th, a police car was parked outside the church property watching, but they made no contact.

(g) On March 22nd, Randy received a call warning of tickets for the church, and its attendees. This conversation was followed up with an email informing Randy of the health officers' directives and that if anyone else submitted a complaint, Randy was told that he was under threat that the RCMP would issue a ticket of $2300 to the church and a second ticket of $230 per person for each attendee at the church service.

(h) In addition to s. 176 of the ***Criminal Code***, the harassment by Police violated the freedom of conscience, belief, religion, and association contrary to the ***Constitution Act, 1867*** and s.2 of the ***Charter***.

12. The Plaintiff **Michael Martinz** ("Michael") is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) On Wednesday March 3rd, 2021 Michael Martinz was returning to Canada from a two (2)-week fly fishing expedition in Colombia via Houston and San Francisco on United flight UA5689. The flight arrived in Vancouver at approximately 1:00 p.m.

(b) Upon exiting the aircraft, Michael walked through Vancouver Airport without a face mask using his British Columbia medical doctor issued medical exemption. He arrived at the automated kiosks in the customs area and filled out his entry information, and proceeded to enter the serpentine queue to speak with a CBSA officer.

(c) Shortly after Michael entered the serpentine queue a CBSA officer politely asked him if he had a face covering. Michael replied that he had a medical exemption, and offered the officer to have a look at his documents.

(d) The officer took the exemption document from Michael and examined them, and immediately asked what the exemption was for. Michael replied that he was under no obligation to provide that information to the officer. The officer acknowledged that Michael was correct, and returned to his original position behind the CBSA stations. The officer returned moments later, and escorted Michael to the far side of the CBSA stations, near the south wall declaring that he did not want Michael "out in the open with the other passengers without a face mask on". Michael complied, and followed the officer.

(e) At the furthest south CBSA station Michael was greeted by another CBSA officer, who asked him some generic questions, including asking him as to why he was traveling during a pandemic. He then questioned Michael as to why he had not booked a designated covid quarantine hotel. Michael replied that he had no intention of staying at a quarantine hotel or taking their PCR test, citing both his section 6 **Charter** rights, and section 14(1) of the ***Quarantine Act*** prohibiting medical tests which penetrate his body.

(f) The officers then informed Michael that he would have to speak with a Health Canada agent and state his case to that individual. Michael's documents were stamped, and retained, and it was indicated to Michael that the officer was handing off the documents to the Health Canada agent.

(g) Michael was then led to the far northern wall of the entrance hall and placed behind a plastic paneled wall. He was informed, once again that they did not want him out with the other passengers unmasked. Michael was then approached by another CBSA officer, who engaged him in generic conversation. During this time the officer offered to collect Michael's luggage, and returned with the luggage on a cart.

(h) Soon after Michael obtained his luggage, the Health Canada agent arrived with two (2) RCMP members at her side. The CBSA officer departed at this point.

(i) The Health Canada agent declared that she was a Registered Nurse and began asking Michael a series of questions regarding his health status. He replied in the negative to all questions, which were in relation to flu-like symptoms. The agent then began to state to Michael as to why such covid measures are in place, and threatened to fine him for non-compliance. Michael asserted his s. 6 **Charter** rights, and told her that he had no interest in complying with unconstitutional orders. The agent probed

Michael as to why he had a medical exemption, to which he again replied that he was under no obligation to disclose that information. The agent did not like this answer, and instructed Michael that she needed to know, and encouraged him to cooperate. Michael obliged, and informed her of the underlying cause. The agent then tried to co-erce Michael into taking a PCR test by telling him that it "only enters your nose about an inch". Michael replied "one inch or one millimetre is still a contravention of section 14(1) of the ***Quarantine Act***". The agent then left, seemingly angered by Michael's response.

(j) After roughly twenty (20) minutes, the agent returned. She exclaimed that she could fine Michael $3,450.00 for every day that he was not in the Covid hotel, and other fines for missing the day eight (8) PCR test. He politely re-asserted his rights, and that he would not be complying. She then told him that he was in contravention of s.58 of the ***Quarantine Act***.

(k) When she departed, Michael quickly referenced the ***Quarantine Act*** which he had previously downloaded. Michael noted that what text he could read on her paper work as she rapidly flipped through and pointed to sections was the word Covid appearing many times. This word appears nowhere in the ***Quarantine Act***, as he noted. He was highly suspicious of her unlawful behaviour at this point.

(l) Another twenty (20) minutes later, the agent returned, with and the RCMP escort. She informed Michael that she had contacted his doctor with regards to his exemption, and that his doctor had confirmed it as being valid. She then produced a ticket, and fined Michael for $3,450.00

(m) She then discussed what further enforcement actions could be taken against him.

(n) At approximately 2:00 p.m. on the afternoon of June 11th, 2021 Michael landed at the Calgary (YYC) International Airport on a flight from Denver, Colorado. He was returning from a trip abroad to Oklahoma City, and various locations in Costa Rica seeking new life opportunities.

(o) He had left Canada on May 22nd, 2021, with his spouse Kari Strobel and she accompanied him for the duration of the trip and throughout the re-entry process.

(p) Upon their arrival at Calgary, and as soon as they exited the aircraft for United flight UA5388, they proceeded to walk through a very empty airport towards the customs and immigration area. They both carry medical mask exemptions provided by their physician. While they were in the CBSA line up a female CBSA officer approached them asking if they needed masks. Michael replied that they did not and they produced their paperwork. The officer was courteous, reviewed their paperwork and asked no further questions before walking away.

(q) After a period of twenty (20) to thirty (30) minutes in the line-up, it was their turn to engage with a CBSA officer. Michael presented their paperwork, Passports, PCR tests, and 'Arrive Can' printout, and informed him that they would not be staying in the Government Quarantine facility, and that they would be exercising their section 6, 7, and 9 **Charter** rights. The CBSA officer asked some questions about their travel, whether they had anything to declare, and then directed us to the Health Canada station at the East side of the customs area.

(r) The CBSA officer expressed no concerns about their non-compliance with the illegal travel order. As directed, they approached the Health Canada unit. They were met by a very curt and disrespectful woman that began asking questions in a "rapid fire" fashion.

(s) Michael informed her that they would not be taking the arrival PCR test, and that they would not be staying at the Government Quarantine Facility. She began threatening them fines and produced some paperwork, which she filled out in rapid succession, and erroneously checked the box indicating that they had failed to answer relevant questions in contravention to Sec 15(1) of the ***Quarantine Act***. This is a false statement. When she provided the form for Michael to sign, he noticed that she had transcribed his name incorrectly including his last name, and Michael pointed this out to her, which she then corrected. Michael produced his phone to take a picture of the document and she loudly exclaimed that no photos are allowed in this area.

(t) Michael then asked if he was going to be provided a copy of this document to which she replied that he would. He then signed the document, although felt that he was under duress to do so, and handed the form back to her.

(u) Michael's wife, Kari refused to sign her copy.

(v) They then moved on to the next station where Michael again explained their situation, and a Health Canada official in the neighbouring wicket found great humour in his statements regarding section 14.1 of the ***Quarantine Act*** being poorly written for this situation. They were all able to have a laugh, and the process of having their paperwork stamped lasted no longer than four (4) to five (5) minutes and they were on their way to collect their luggage.

(w) Upon leaving the arrival hall, an airport official was directing compliant travelers toward the PCR testing station, and Michael informed her that they were declining the tests and she said "Okay" with a smile and that was that. Michael was surprised at the stark difference in his experiences, and was taken aback at how a federal order and could be carried out so disparately between regions, that is between Vancouver and Calgary.

12. The Plaintiff **Makhan S. Parhar** ("Makhan") is a resident of British Columbia, whose facts, in support of his claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) In January, 2020 discussions of Covid-19 began to frequent the media, and **Makhan S. Parhar**'s yoga studio, incorporated as "North Delta Real Hot Yoga Ltd." in Delta, British Columbia started suffering financially as people started to become afraid of attending class. Regular students and even long-term students began cancelling memberships, or asking to have a hold put on. The new year, January to March is the time that the studio usually has the most influx of new students and revenue.

    (b) By March, 2020 Makhan's studio was barely hanging on as class numbers had dwindled due to the fear of contracting Covid-19. He had no intention of closing down, he simply could not afford to shut down. What little amount the studio had left in memberships, was essential for them to pay their bills.

    (c) Makhan had no idea that a 'state of emergency' was declared, as he was stressed in his own life about paying upcoming bills, and keeping his now struggling business running. Makhan sent an email advising students to continue classes to keep their immune system healthy.

    (d) This email triggered many people, and people started calling Delta City Council, Delta Police, the MLA's and the media. Immediately, Makhan started receiving mass amounts of hate emails and phone calls. He also started receiving horrible reviews, and had to close the Studio Facebook page.

(e) Makhan started to receive calls from the media, and spoke with CBC only. The day that he spoke to them, March 19th, 2020 and in the days following, he had horrible and negative articles written about him by every media outlet in the Vancouver area.

(f) A Delta By-law enforcement officer attended at Makhan's studio, and asked why they did not shut down. He told them it was his business, and that he needed to stay open. The By-law enforcement officer then asked if Makhan, and his patrons were "social distancing" inside the studio, and Makhan stated that he did not know that he had to do so. He also informed the officer that business was very slow, and patrons were spaced out by default as a result of that. The officer said he would be by the next day to check if the studio was in compliance.

(g) However, two (2) hours later, the By-law officer came back with a supervisor and they told Makhan that his business licence was suspended by Delta City Council to which Makhan replied that he was just told that the one officer would be coming back the next day to check if the studio was in compliance with social distancing protocols. The supervisor ignored this, and said that they were acting on orders from Delta council. Any subsequent questions that Makhan tried asking were ignored.

(h) At that point, Makhan felt hopeless, and depressed, a feeling that has grown worse since that day.

(i) The hate that Makhan has experienced after the studio closing, and the articles spun by media outlets has been overwhelming. He has even been recognized at stores such as The Home Depot. Throughout the past several months, he has stopped going to stores unless absolutely necessary. When he does go out, he is never alone, and lives in constant fear that someone will stir up an altercation with him.

(j) In August 2020, Makhan was denied boarding at the gate by Air Canada after agreeing to wear a mask for a flight. They were not honouring his medical exemption, and as such Makhan gave in and agreed to wear one. At the gate, just before boarding, they denied his boarding because they did not trust that he would keep the mask on. Air Canada subsequently banned Makhan for life and refused to refund his money. He had to go through his credit card company to get that money back.

(k) On October 27th, 2020 Makhan was returning from visiting friends at Flatoberfest in South Carolina. The final leg of three (3) flights was from San Francisco to Vancouver. Makhan was handed a covid-19 quarantine form by the flight attendant just as the plane started its descent. Makhan did not fill it out, and at about 9:30 pm he went to Canadian customs and handed his passport to them. They asked for the quarantine form, and Makhan answered that he did not fill it out, and did not have any plans of doing so. He was then asked to go speak to the health officer.

(l) Makhan explained the same to the health officer. He was informed that he needed to fill it out as RCMP officers stood off to the side. Makhan filled out the form and signed it.

(m)The following day, October 28th 2020, Makhan went on with his regular life. Around approximately 4:30 pm, he received a phone call from his daughter. She told him that the police were at their home. Constable Jacob Chong with badge #262 took the phone from Makhan's daughter and informed him that, as he was not at home, he would be writing Makhan a $1,150.00 violation ticket, and leaving it there. He refused to tell Makhan his first name at the time, and informed him that he would be back to check on Makhan the following day.

(n) Makhan's daughter was traumatized and afraid after this encounter. She did not want to come home after school the following day.

(o) The following day, October 29th 2020, Makhan stayed home all day. Constable Chang with badge #262, of the New Westminster Police Department came at approximately 7:30 pm with and unidentified officer holding badge #330. He would not answer any questions that Makhan asked of him with regards to what jurisdiction he was operating under. He served Makhan another ticket and told him to toss the ticket from the previous day.

(p) The next four (4) days saw Makhan going about his business, and this entailed him being outside of the home most of the day. The police came several times and he was home once during their visits.

(q) On November 2nd, 2020 at approximately 11:15 pm, Makhan was coming home and noticed a New Westminster Police SUV outside of the parking garage. As he recognized Makhan's car, he turned on his emergency lights. Makhan pulled into the underground and waited for the police. Constable Hildebrand with badge #323 approached the car and told him he was under arrest. He told Makhan to get out of the car.

(r) After Makhan parked and got out of the car, he was arrested and put in handcuffs. He asked several times, if he had committed a crime. The constable refused to answer his questions. Makhan stated several times that this was a false arrest.

(s) Constable Chris Faris with badge #337 started reading Makhan his rights. Makhan repeated the same questions as to whether or not he had committed a crime, or if there was a victim or a complainant. The officer refused to specify the charge and took Makhan to the station.

(t) At the police station, Makhan told all the police that this was a false arrest.

(u) Makhan declined a phone call to a lawyer, and was placed in a cell.

(v) The police damaged his $70 track pants by cutting the draw-strings out of them, and when he asked if they would be reimbursing him the cost of the pants, they replied "no".

(w) After falling asleep, Constable Hildebrand woke Makhan up and told him that he needed to confirm his name and birthdate in order to get out in the morning. Makhan declined, and Constable Hildebrand repeated himself. Makhan stated that he needed to think about the lawfulness of answering. He repeated himself and he said it was to get Makhan out in the morning. Makhan was fatigued at that point, he stated that he was under duress and provided him the information he requested.

(x) Later that night, or in the early morning, Constable Jacob Chong with badge #262, woke Makhan up and told him that he was issuing another violation ticket.

(y) On the morning of November 3rd, 2020 while Makhan was in the holding cell, he received a call from duty counsel. Makhan told the guard that he did not ask for a lawyer. The guard told him that duty calls all the detainees in jail to help get them out. Makhan decided to speak to the duty counsel. He told Makhan that his bail hearing would be before noon and that he would then find out from the Crown what the matter with Makhan would entail.

(z) At around 3:00 pm, Makhan started to worry about his release, as he still had not heard from the duty counsel. Makhan asked the guard to speak to his lawyer, and provided the lawyer's name. The guard looked up the phone number, and returned twenty (20) – thirty (30) minutes later. He held up a phone and informed Makhan that it was his bail hearing.

(aa) Makhan had trouble hearing the other end of the phone-line. In addition, there was a very loud vent in his cell.

(bb) The Crown prosecutor spoke for twenty (20)-thirty (30) minutes, and stated that they wanted Makhan detained up until the trial. The Duty Counsel suggested that Makhan be released on his own recognizance. In the end, the judge allowed Makhan out as long as a surety signed and would be responsible for him adhering to his bail conditions.

(cc) The judge said that Makhan's surety would have to come to the Court during business hours. It was 4:20pm at that point, and the Court Registry was closed. Makhan spent another night in jail. He was told that he could call someone, and that he would be transferred to a bigger jail for the night. A female police officer got Makhan to sign off on his bail conditions while a justice of the peace was on the phone.

(dd) At approximately 6:00-7:00 pm, Makhan arrived at the North Fraser pre-trial Detention Centre. He was placed on 'Droplet Protocol'. The nurse told him that he would be swabbed. Makhan refused any swabs, or anything placed inside of his bodily cavity. Makhan was segregated immediately after intake. He asked for a phone call, but was repeatedly denied. He was told that he could not interact with the general population until he had obtained a negative test result.

(ee) Makhan told them that he had a bail surety, but needed to phone someone. He stated repeatedly that no one knew of his arrest, and he simply wanted to inform them of such. The prison staff showed Makhan no sympathy.

(ff) Makhan was given a bagged vegetarian dinner, and informed them he was vegetarian for future meals. He was fed three (3) meals a day. Breakfast was at about 7:30 am. Lunch was usually brought at about 10:45 – 11:00 am, and dinner was at about 4:30 pm on Wednesday, Thursday and Friday. On Friday, Makhan was released just as dinner was served, so he did not eat dinner.

(gg) Both Wednesday, and Thursday night's dinners and Thursday's lunch contained meat, therefore Makhan did not get to eat the full meals. He had previously requested, as denoted above, that he was a vegetarian, and the prison denied his request for vegetarian meals.

(hh) On Thursday, when Makhan realized that he might be in jail until after the weekend, and maybe longer. Makhan cleaned the cell by dipping his shower towel (though he was not actually allowed to shower), in the toilet, and wiping down the top bunk, and other areas of the cell.

(ii) Makhan was not allowed to shower nor use the phone because he was not allowed to leave his cell. He asked repeatedly for phone use. The supervisor told him the same thing repeatedly. Makhan required a negative covid-19 test result to be allowed out of his cell. However, the supervisor agreed to take a number and make a call on Makhan's behalf.

(jj) That same day, Makhan asked for, then begged multiple times to get clean underwear and socks. The guards kept agreeing, but the requested garments were never delivered. Finally, very late on Thursday, one (1) of the guards provided Makhan with the requested garments.

(kk) Out of fear that he would be in jail past the weekend and for weeks ahead, Makhan was left in very little choice but to submit himself to a Covid test. This was done in hopes of getting a negative result. Makhan was told that if the test was positive they would contact him, however he never heard from them.

(ll) Thus far, Makhan has had his first court appearance, pre-trial conference, and awaits another pre-trial conference on May 5th, 2021. His bail conditions instruct him to abide by all regulations stipulated by Bonnie Henry. A trial date is set for July 20th, and 30th, 2021.

(mm) Makhan remains very distraught, for himself, and his family's sake.

13. The Plaintiff **Melissa Anne Neubauer** ("Melissa") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

(a) Melissa is a Teacher at the Clearwater secondary school, in Clearwater, British Columbia.

(b) Melissa was on a medical leave from work from March 9th, 2020 – June 30th, 2020 due to having a break down in March of 2020, and being admitted to the mental health unit at Royal Inland Hospital in Kamloops, British Columbia.

(c) By June 30th, 2020, school was finished for the Summer, and as such Melissa physically returned to her work in September of 2020, when school was back in session again.

(d) When Melissa returned for health and safety training the first week of school in September 2020, the Principal of the school, Darren Coates insisted that she wear a mask. Melissa explained that she was exempt. Melissa was then required to have her doctor complete a four(4)-page medical form to allow her exemption. After that, a Disability Accommodation Plan was created for Melissa, which restricted her movement within the school. Restrictions included limiting her access to a washroom, only allowing her access to the building at certain times, and through a specific door, and limiting her access to the office supplies room. These restrictions made Melissa's job difficult.

(e) Melissa made efforts to follow the restrictions, however the principal often harassed her both verbally, and in writing to do a "better job" at following them.

(f) In February 2021, the principal sent Melissa a letter outlining further restrictions on her movements in the school. Melissa only worked half-days at that point, and one of the new restrictions mandated that she was not allowed to be in the hallways between 8:00 a.m. and 3:20 p.m., meaning that she would not be able to exit the building on days that she finished work mid-day, and she would be unable to arrive on days that she started work mid-day. The new restrictions also prevented Melissa from using the washrooms during those times, and the suggested solution was that she leave her class unattended, and use the washroom when there were no students in the hallways. The restriction also meant that any preparation that Melissa needed to do using the printer/photocopier had to be done outside of her contractual workday.

(g) The principal called two (2) meetings: on February 17th, 2021, and February 19th, 2021 as he felt Melissa still was not following the restrictions correctly. Melissa then received a call from the Human Resources Deparement on February 22nd, 2021 telling her that she was being placed on administrative leave pending an independent medical exam by a psychiatrist. The purpose of this medical exam was to confirm that Melissa's family doctor and psychiatrist were providing accurate medical information, and to determine if she was competent to be in a position of responsibility as a teacher. Melissa's first day off of work was February 23rd, 2021. The Independent Medical Exam took place on March 31st, 2021, and Melissa was finally allowed to return to work April 28th, 2021.

(h) Since returning to work she has been wearing a plastic face shield and have not experienced restrictions with her movement around the school, until

May 5th, 2021 when the principal handed Melissa a surplus letter. This letter means that Melissa no longer has a job after the end of the current school year, in June 2021. The school district has an obligation to find Melissa another position in the district, but the position does not have to be in the same community that she currently lives in. As there are no positions available in Melissa's current community of Clearwater, British Columbia, she is being forced to move. Melissa has a mortgage and is at risk of losing her home should her position get suspended, and she will be forced to sell her home and move if her job is relocated to another region. Melissa strongly feels that she was chosen to receive the surplus letter because she did not comply with the masking mandates in the school, and because she is being discriminated against due to her medical conditions. Furthermore the government (Crown) and its Ministers of Education, Health, Public Safety, as well as Chief Medical Officer Bonnie Henry are breaching her constitutional rights, by way of commission, and omission, in not protecting her rights.

14. The Plaintiff **Jane Doe #3** ("Jane") is a resident of British Columbia, whose facts, in support of her claim for relief, and who has suffered actionable damages directly as a result of the Covid measures imposed and enforced by, and on behalf of the named Defendants, are as follows:

    (a) Jane is a Licensed Practical Nurse ("LPN") at Royal Inland Hospital in Kamloops, British Columbia where she resides.

(b) At the beginning of 2020, Royal Inland Hospital had made a goal to reduce the number of patients being admitted in order to prepare for the "First Wave" of Covid-19 patients. Normally the hospital census is running at 115-120 %. This information was given to Jane, and her team each morning by the charge nurse. Through May 2020 to the middle of June 2020, the Hospital census had been declining greatly, around 80%. Patients had been told not to admit themselves unless it was absolutely critical requiring immediate medical attention.

(c) Jane's father had been one of those patients that had ignored his medical needs in order to stay clear of a hospital in fear of getting Covid-19, causing the severity of his condition to progress. Shortly after, he had suffered a heart attack and was admitted to the hospital anyways. The hospital informed him that they would need to put off a scheduled surgery he had scheduled in Kelowna, British Columbia due to Covid-19 measures "until further notice". He was then put on more medication to alleviate symptoms he was having.

(d) As Jane was working in the Hospital, she was feeling concerned that beds would fill up due to an influx of Covid patients, but they never did. The hospital census stayed at 80% for some time, and then declined even further. Nurses that worked casual shifts soon started to worry that there was not enough work for them to obtain any shifts. During this period, Jane was extremely worried about her father for whom she was caring at his house regularly.

(e) After the hospital began to open up for surgeries around October of 2020, the census began to climb again. The increase in patient census was not related to Covid-19 but from patients who had put their health on hold from the beginning of the year. Jane observed that Covid-19 precautions were not at all organized, and that Nurses would get emails one (1) – two (2) weeks later pertaining to someone who had tested positive with no actual record of the person's name. Instead, room numbers those patients had stayed in were referred to, but who had been in the rooms could not be tracked, nor could the location of where those people had gone, and who else they had interacted with. This then led to further intervention, patients considered high risk for covid-19 were tested on admission. At various times, there would be patients considered high risk in rooms with three other patients, most of whom suffered from cognitive decline and would not know to stay away from the closed curtain with a precaution sign pinned to it.

(f) Throughout the later Fall months of 2020, Jane would often read on social media that the Hospital was overrun with Covid patients, and that it was over census. This was not true, although Jane did not work on the "Covid Floor", she knew nurses that did and they reported to her that there was an average of eight (8) patients total at the time. Although, it was true that the hospital was over census, that was normal pre-pandemic for the hospital.

(g) By February 2021 Covid-19 Vaccines were being distributed to the staff. While at work on one shift in February 2021, Jane heard a "Code Blue" meaning cardiac/respiratory distress being called out over the loud speaker on the vaccine distribution floor. This had not been the only one as Jane had been told by multiple nurses. It was around late February, when "the big outbreak" at Royal Inland hospital went to main stream news. And ninety (90) people had been reported to be positive cases (approximately sixty (60) of these were hospital staff).

(h) Nurses were already scarse and this had put even more strain on the remaining nurses as the nurses who tested positive had to quarantine at home for fourteen (14) days. This had also created fear amongst all of the Kamloops community.

(i) Despite all of this, many Nurses that had been working on the Covid floor and had been around other nurses who had tested positive, without a mask were not testing positive. Jane noted that this did not make any sense. Also, nurses who had taken the vaccine had adverse reactions and tested positive fir Covid-19. One nurse with an underlying heart condition, but previously with no need for treatment, suddenly came down with an exacerbating heart condition characterized by extreme fatigue and heart palpitations as well as becoming significantly ill, and has since been unable to return to work for more than six (6) hours.

(j) In March 2021 Jane had been pulled to the Covid floor. There was one patient considered "Red" meaning that they were covid positive and were in an isolation negative pressure room. However, Jane's patient, whose test was pending, was put in an room with three (3) other patients, one of whom had severe dementia and would be unable to identify danger. Later that night, Jane checked that patient's results only to find out they were negative and there was only one (1) active Covid positive case in the hospital.

(k) By the end March 2021, Jane had asked her family doctor, Dr. Victor De Kock for a mask exemption due to her increased anxiety and history of asthma that had become exceptionally worse due to the consistency of wearing something over her face for twelve (12) hours a day. This was denied by Dr. Victor De Kock, as he stated that he had been ordered by 'Interior Health' not to give out exemptions, especially not to health care workers.

(l) On April 8th, 2021 Jane made another Appointment to attempt to get a mask exemption as her mental health was becoming noticeably worse. Jane recorded Dr. Victor De Kock this time, as she stated "I can not breath" and that her anxiety was getting out of control. He had again refused to provide her with an exemption, and prescribed her anxiety medication along with a refill on her inhaler.

(m) Throughout March and April of 2021, Vaccines were being pushed on staff. Staff that refused to get the shot were being shamed by others, for allegedly "putting others in harm's way". Work began to be too much for Jane, and new information about shedding vaccines had emerged while Interior Health remained silent about it. Jane had been researching the information on the transmitting and/or shedding that can occur via coming into contact with vaccinated people, and was very distressed about her well-being. Jane remained fearful that she would lose her job, and because she was concerned about the possibilities of shedding, she decided to take a stress leave from work, with May 1st being her final day of work. She is presently still on stress leave, relying on Employment Insurance, and awaiting further information that can guarantee her safe return to work.

(n) Jane has not revealed her name on this action for fear of reprisal and/or dismissal by her employer for being a Plaintiff.

- **The Defendants**

23. The Defendant, Justin Trudeau, is the current Prime Minister of Canada, and as such, a holder of a public office.

24. The Defendant, Dr. Theresa TAM, is Canada's Chief Public Health Officer and as such a holder of a public office.

25. The Defendant Her Majesty the Queen in Right of Canada**,** is statutorily and constitutionally liable for the acts and omissions of her officials, particularly with respect to **Charter** damages as set out by the SCC in, ***inter alia*, *Ward v. City of Vancouver*.**

26. The Defendant Attorney General of Canada is, constitutionally, the Chief Legal Officer, responsible for and defending the integrity of all legislation, as well as responding to declaratory relief, including with respect constitutional declaratory relief, and required to be named as a Defendant in any action for declaratory relief.

27. The Defendant Omar ALGHABRA is the Federal Minister of Transport, and as such a public office holder.

28. The Defendant Her Majesty the Queen in Right of British Columbia, is statutorily and constitutionally liable for the acts and omissions of her officials, particularly with respect to **Charter** damages as set out by the SCC in, ***inter alia*, *Ward v. City of Vancouver*.**

29. The Defendant Attorney General of British Columbia, is, constitutionally, the Chief Legal Officer for British Columbia, responsible for and defending the

integrity of all legislation, as well as responding to declaratory relief with respect to legislation, including with respect to its constitutionality, and required to be named as a Defendant in any action for declaratory relief.

30. The Defendant John HORGAN, is the current Premier of British Columbia, and as such a holder of a public office.

31. The Defendant Dr. Bonnie HENRY, is British Columbia's Chief Medical Officer, and as such a holder of a public office.

32. The Defendant Mike FARNWORTH, is the current Minister of Public Safety and Solicitor General and, as such, a holder of public office.

33. The Defendant, Adrian DIX, is the current Minister of Health for the Province of British Columbia and as such a holder of a public office.

34. The Defendant Jennifer WHITESIDE, is the Minister of Education for British Columbia, and as such, a public office holder.

35. The Defendant, The Canadian Broadcasting Corporation ("CBC"), is Canada's publicly-funded broadcaster and governed, **inter alia**, under the Federal **Broadcast Act,** with a public mandate as Canada's national, publicly-funded broadcaster.

36. The Defendant, British Columbia Ferry Services Inc., operating as BC Ferries, is a former provincial Crown corporation, now operating as an independently managed, publicly owned Canadian company, under Crown license and authority.

37. The Defendant, Mable Elmore is the current British Columbia Parliamentary Secretary for Seniors' Services and Long-Term Care.

38. The Defendant, The Royal Canadian Mounted Police ("RCMP") are the federal and national police service of Canada, providing law enforcement at the federal level, as well as the Province of British Columbia under renewable memorandum and contract.

39. The Defendant, Vancouver Island Health Authority provides health care services through a network of hospitals, clinics, centres, health units, and long-term care locations in British Columbia.

40. The Defendant, Brittney Sylvester is the current BC Ferries Terminal Manager (Relief) at the Tsawwassen, British Columbia, Canada Ferry Terminal.

41. The Defendant, Providence Health Care is a Catholic health care provider that operates seven facilities in Vancouver, British Columbia, Canada. Providence Health Care was formed through the consolidation of CHARA Health Care Society, Holy Family Hospital and St. Paul's Hospital on April 1st, 1997.

42. The Defendant, TransLink (British Columbia), is the statutory authority responsible for the regional transportation network of Metro Vancouver in British Columbia, Canada, including public transport, major roads and bridges.

43. The Defendant, Peter Kwok, is a Translink Transit officer with Badge #325.

- **THE FACTS**

A/ "COVID- 19"- THE TIMELINE

44. **In 2000** Bill Gates steps down as Microsoft CEO and creates the 'Gates Foundation'' and (along with other partners) launches the 'Global Alliance for Vaccines and Immunization ('GAVI''). The Gates Foundation has given GAVI approximately $4.1 Billion. Gates has further lobbied other organizations, such as the World Economic Forum ("WEF") and governments to donate to GAVI including Canada and its current Prime Minister, Justin Trudeau, who has donated over $1 Billion dollars to Gates/GAVI.

45. **In 2002** Scientists engage in "gain-of-function" (GOF) research that seeks to generate viruses *"with properties that do not exist in nature"* and to *"alter a pathogen to make it more transmissible (to humans) or deadly."* [1] [2]

46. In **November, 2002,** China's Guangdong province reports the first case of ''atypical Pneumonia'', later labeled as SARS. In the same month at the University of North Carolina (UNC) Ralph Baric announced the creation of a **synthetic** clone of a mouse coronavirus.

47. On **October 28th, 2003** the Baric group at UNC announces a **synthetic** recreation of the SARS virus.

48. **In 2005** Research demonstrates that Chloroquine is a potent inhibitor of SARS coronavirus infection and transmission. It was deemed a safe drug by the WHO in 1979, except in high doses. [3] [4]

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[1] https://www.ncbi.nlm.nih.gov/books/NBK285579/

[2] https://www.sciencemag.org/news/2014/10/us-halts-funding-new-risky-virus-studies-calls-voluntary-moratorium

49. From **2009** to the present, the "Bill and Melinda Gates Foundation" donates millions to the 'Imperial College of London''(ICL), and further funded the debunked modeling, by Neil Ferguson, at the ICL, that set the COVID-19 'pandemic'' declaration in Motion and acceleration, through the WHO and governments around the globe following suit.

50. **In January 2010** Bill Gates pledges **$10 billion** in funding for the World Health Organization ("WHO") and announces "the Decade of Vaccines." In fact, Bill Gates and GAVI are the second and third largest funders of the WHO after the US government under the Presidency of President Trump. The USA, through its President, cut off funding to the WHO for loss of confidence in it. (Various other countries have also expelled the WHO on allegations of corruption, attempted bribery of its officials, and lack of confidence).

51. **In May 2010**, the Rockefeller Foundation writes a Report, later leaked, unintentionally from within the organization, with a study of a future pandemic scenario, where an unknown virus escapes, and a "hypothetical" scenario on what the appropriate response would be, and its core scenario entitled "how to secure global governance in a pandemic". The Plaintiffs state , and the fact is, that the scenario scripted in this May 2010, Report is what has unfolded during the "COVID-19" so-called "pandemic".

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[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1232869/

[4] https://apps.who.int/iris/bitstream/handle/10665/65773/WHO_MAL_79.906.pdf?sequence=1&isAllowed=y

52. **In 2011** a review of the literature by the British Columbia Centre for Disease Control to evaluate the effectiveness of social distancing measures such as school closures, travel restrictions, and restrictions on mass gatherings to address an influenza pandemic concluded that *"such drastic restrictions are not economically feasible and are predicted to delay viral spread but not impact overall morbidity."* [5]

53. **In May, 2012,** the 194 Members States of the "World Health Assembly" endorse the 'Global Vaccine Action Plan (GVAP) led by the Bill and Melinda Gates Foundation in collaboration with GAVI, and the World Health Organization (WHO).

54. **In 2014** Under President Obama, the National Institute of Health (NIH) **halts federal funding** for gain-of-function (GOF) research. The funding hiatus applies to 21 studies "reasonably anticipated to confer attributes to influenza, MERS, or SARS viruses such that the virus would have enhanced pathogenicity and/or transmissibility in mammals via the respiratory route." NIH later allows 10 of the studies to **resume.**

55. **In 2015** NIAID awards a five-year, $3.7 million grant to conduct gain-of-function studies on the "risk of bat coronavirus emergence." Ten percent of the award goes to the Wuhan, China, Institute of Virology.

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[5] Social Distancing as a Pandemic Influenza Prevention Measure
https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

56. **In January, 2015** at a public appearance, Bill Gates states: " We are taking things that are genetically modified organisms and we are injecting them into little kids' arms; we just shoot them right into the vein''.

57. In 2018 the World Economic Forum ("WEF") puts forward a proposal for future "Vaccine Passports".

58. **In 2017** Dr. Marc Lipsitch of the Harvard School of Public Health tells the *New York Times* that the type of gain-of-function experiments endorsed by Dr. Fauci's NIAID have "done **almost nothing** to improve our preparedness for pandemics, and yet risked creating an accidental pandemic."

59. **In 2019** NIAID awards a six-year renewal grant of $3.7 million to EcoHealth Alliance and the Wuhan Institute of Virology (in China) to continue their gain-of-function studies on bat coronaviruses.

60. At the January, 2019, World Economic Forum in Davos, Switzerland, **on January 23rd, 2019,** on a CNBC interview Bill Gates boasts that he expects to have a "twenty-fold" return on his $10 Billion vaccine investment with the next few decades.

61. British and French researchers **publish** a study (May 5, 2020) estimating that COVID-19 could have started as early as **October 6, 2019.**

62. On **October 18th, through 27th, 2019** Wuhan, China hosts the Military World Games, held every four years, where more than 9,000 athletes, from 100 countries complete. The telecom systems for the Athletes' Village are powered with 5-G technology "showcasing its infrastructure and technological prowess''.

63. **On October 18, 2019 -** The Bill & Melinda Gates Foundation, the World Economic Forum and the Johns Hopkins Center for Health Security convene an invitation-only "tabletop exercise" called **Event 201** to map out the response to *a hypothetical global coronavirus pandemic.*

64. **In November-December, 2019, -** General practitioners in northern Italy start noticing a "**strange pneumonia.**"

65. **On December 2nd and 3rd, 2019** Vaccine scientists attending the WHO's Global Vaccine Safety summit confirm **major problems** with vaccine safety around the world.

66. **On December 3rd, 2019,** At the Global Vaccine Safety Summit in Geneva Switzerland, Prof Heide Larson, MA PhD, Director of the "Vaccine Safety Project", stated:

> "I think that one of our biggest challenges is, as Bob said this morning, or yesterday, we're in a unique position in human history where we've shifted the human population to vaccine-induced, to dependency on vaccine-induced immunity and that's on the great assumption that populations would cooperate. And for many years, people lined up the six vaccines, people were there; they saw the reason. We're in a very fragile state now. We have developed a world that is dependent on vaccinations. We don't have a choice, but to make that effort."

67. **On December 18th, 2019,** researchers at the Massachusetts Institute of Technology (MIT) report the development of a novel way to record a patient's **vaccination history,** by using smart-phone readable nano-crystals called ''quantum dots'', **embedded** in the skin using micro-needles. In short, a vaccine

chip embedded in the body. This work and research are funded by the Bill and Melinda Gates Foundation.

68. **On December 31,2019** - Chinese officials inform the WHO about a **cluster** of "mysterious pneumonia" cases. Later, the *South China Morning Post* reports that it can trace the first case back to **November 17th , 2019.**

69. **On January 7th, 2020** - Chinese authorities formally **identify** a "novel" coronavirus.

70. **On January 11, 2020 -** China records its **first death** attributed to the new coronavirus.

71. **On January 20, 2020 -** The first **U.S. coronavirus case** is reported in Washington State.

72. **On January 23rd, 2020,** Shi Zheng-Li releases a paper reporting that the new corona virus (COVID-19) is 96% identical to the strain that her lab isolated from bats in 2013 but never publicized.

73. **On January 30, 2020 -** The WHO declares the new coronavirus a **"global health emergency."**

74. **In January, 2020** - A study of US military personnel confirms that those who received an influenza vaccine had an increased susceptibility to coronavirus infection. [6]

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[6] https://www.sciencedirect.com/science/article/pii/S0264410X19313647

75. On **February 5th, 2020** - Bill and Melinda Gates announce **$100 million** in funding for coronavirus vaccine research and treatment efforts. **On February 11th, 2020** the WHO gives the virus its name: 'COVID-19''.

76. **On February 28th, 2020** - The WHO states that most people will have mild symptoms from SARS-CoV-2("COVID19") infection and get better without needing any special care.

77. **On February 28th, 2020 ,** the WHO announces that more than 20 vaccines are in development globally.

78. **On February 28th, 2020,** the WHO states – "Our greatest enemy right now is not the virus itself. It's fear, rumors and stigma." [7]

79. **On March 5th, 2020** - Dr. Peter Hotez of Baylor College told a US Congressional Committee that coronavirus vaccines have always had a "unique potential safety problem" — a "kind of paradoxical immune enhancement phenomenon." [8]

80. On **March 11, 2020** - The WHO declares COVID-19 a **pandemic.**

81. On **March 16th, 2020 -** Neil Ferguson of Imperial College London, scientific advisor to the UK government, publishes his computer simulations warning that there will be **over two million** COVID-19 deaths in the U.S. unless the country adopts "intensive and socially disruptive measures." **Imperial College London receives funding from Bill and Melinda Gates Foundation.**

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[7] WHO Director-General's opening remarks at the media briefing on COVID-19 - 28 February 2020 https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---28-february-2020

[8] https://www.c-span.org/video/?470035-1/house-science-space-technology-committee-hearing-coronavirus&start=1380

82. On **March 16th, 2020 -** Dr. Anthony Fauci tells Americans that they must be prepared to "**take more drastic steps**" and "hunker down significantly" to slow the coronavirus's spread.

83. On **March 16th, 2020** - NIAID launches a **Phase 1 trial** in 45 healthy adults of the mRNA-1273 (COVID-19) coronavirus vaccine co-developed by NIAID and Moderna, Inc. The trial skips the customary step of testing the vaccine in **animal models** prior to proceeding to human trials.

84. On **March 17th, 2020** – Prime Minister Trudeau asks for lockdown measures, under the **Federal Quarantine Act,** banning travel. On **March 18th, 2020** British Columbia declares its emergency under the ***Emergency Program Act [RSBC 1996] c. 111.***

85. **On March 19th, 2020** - The status of COVID-19 in the United Kingdom is downgraded. COVID-19 is no longer considered a high consequence infectious disease (HCID). The Advisory Committee on Dangerous Pathogens (ACDP) in the UK is also of the opinion that COVID-19 should no longer be classified as an HCID (High Consequence Infectious Disease). [9] [10]

86. **On March 20th, 2020,** documents in three (3) countries outline Government's policy on coronavirus was going to use applied psychology in order to ramp up

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[9] https://www.gov.uk/topic/health-protection/infectious-diseases

[10] https://prepforthat.com/uk-officials-covid-19-no-longer-high-consequence-infectious-disease/

fear in the population, in order to get the population to adhere more closely to the Government's policy over the response to Coronavirus.[11]

87. **On March 24th , 2020** - Global medical experts declared that efforts to contain the virus through self-isolation measures would negatively impact population immunity, maintain a high proportion of susceptible individuals in the population, prolong the outbreak putting more lives at risk, damage our economy and the mental stability and health of the more vulnerable. [12] [13]

88. **On March 24th, 2020** - Professor Peter Gotzche issues a statement - *"The coronavirus mass panic is not justified."*

89. On **March 24th, 2020 -** Bill Gates announces funding for a company that will blanket Earth with $1 billion in **video surveillance satellites.**

90. **On March 26th, 2020** Microsoft announces it is acquiring 'Affirmed Networks'' focused on 5-G and "edge" computing''.

91. On **March 26th, 2020** - Dr. Fauci publishes an **editorial** in the *New England Journal of Medicine* stating that "the overall clinical consequences of Covid-19 may ultimately be more akin to those of a severe seasonal influenza," with a case fatality rate of perhaps 0.1%.

92. On **March 30th, 2020,** Dr Michael J. Ryan, Executive Director of the Health Emergencies Programme at the World Health Organization publicly stated, during a press conference that:

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[11] https://childrenshealthdefense.eu/eu-issues/brian-gerrishs-testimony-to-reiner-fullmich-our-oppressors-are-very-frightened-people/

[12] https://off-guardian.org/2020/03/24/12-experts-questioning-the-coronavirus-panic/

[13] https://www.europereloaded.com/twenty-two-experts-questioning-the-coronavirus-panic-videos-scientific-common-sense/

> "And at the moment in most parts of the world due to lock-down most of the transmission that's actually happening in many countries now is happening in the household at family level.
> In some senses transmission has been taken off the streets and pushed back into family units. Now we need to go and look in families to find those people who may be sick and remove them
> and isolate them in a safe and dignified manner".

93. **March 31, 2020**, Dr. Theresa Tam states that, "it is not clear that masks actually help prevent infections, and may increase the risk for those wearing them."

94. On **April 2nd, 2020** - Bill Gates states that a coronavirus vaccine "is the only thing that will allow us to return to normal."

95. **In April, 2020**- A review of the scientific literature conducted by Denis Rancourt, Ph.D., with regards to the use of masking, concluded there is **no** scientific evidence to substantiate the effectiveness of masking of the general public to prevent infection and transmission. [14]

96. **On April 6th, 2020** - German epidemiologist, Knut Wittkowski, releases a statement warning that artificially suppressing the virus among low risk people like school children may *"increase the number of new infections"* as it keeps the virus circulating much longer than it normally would. [15]

97. On **April 6th, 2020 -** Dr. Anthony Fauci states, "I hope we don't have so many people infected that we actually have **herd immunity."**

98. **On April 9th, 2020** - Canadian public health officials stated – "In a best-case scenario, Canada's total COVID-19 deaths can range from 11,000 to 22,000."

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[14] https://www.researchgate.net/publication/340570735_Masks_Don't_Work_A_review_of_science_relevant_to_COVID-19_social_policy

[15] Stand Up for Your Rights, says Bio-Statistician Knut M. Wittkowski. American Institute for Economic Research. April 6, 2020 https://www.aier.org/article/stand-up-for-your-rights-says-professor-knut-m-wittkowski/

And “In the bad scenarios, deaths go well over 300,000.” (As of May 21, 2020, the total reported deaths from COVID 19 in Canada was 6,145.) The number of deaths attributed to COVID-19, is in line with typical yearly seasonal viral respiratory illness deaths in Canada. However, the Covid-death numbers are inflated based on the parameters dictated by the WHO to list a death as a Covid-death, namely anyone who has the Covid-19, at time of death ,regardless of whether another clear primary cause of death is evident apart from the simple presence of the covid-19 virus.

99. **On April 10th, 2020** - John Carpay, president of the Justice Centre for Constitutional Freedoms in Canada stated there is reason to conclude that the government’s response to the virus is deadlier than the disease itself. [16]

100. On **April 15th, 2020** - Bill Gates pledges another $150 million to coronavirus vaccine development and other measures. He states, “There are **seven billion** people on the planet. We are going to need to vaccinate nearly everyone.”

101. **On April 18th, 2020,** US News reports corona virus tests are ineffective due to lab contamination at the EDC and the CDC’s violation of its manufacturing standards.

102. On **April 24th, 2020** - The Ontario government took the "extraordinary step" to release a database to police with a list of everyone who has tested positive for COVID-19 in the province.[17]

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[16] https://www.jccf.ca/the-cost-of-the-coronavirus-cure-could-be-deadlier-than-the-disease/

[17] https://toronto.ctvnews.ca/mobile/ontario-takes-extraordinary-step-to-give-police-list-of-all-covid-19-patients-1.4910950?fBritish Columbialid=IwAR10jfu_5OYg5BPZJKMyygiN2P47dK_wbZzFMgC8WEpFxilhEFt81cGnfgc

103. On **April 30th, 2020** - Bill Gates writes that "the world will be able to go back to the way things were . . . when **almost every person on the planet** has been vaccinated against coronavirus." Gates also states that "Governments will need to expedite their usual drug approval processes in order to deliver the vaccine to over 7 billion people quickly."

104. **On May 5th, 2020,** Neil Ferguson resigns from the UK government's Scientific Advisory Group for Emergencies (SAGE) after flouting and breaking his own social distancing rules. **On May 6th, 2020**, an anonymous soft-ware engineer (ex-Google) pronounces Neil Ferguson's COVID-19 computer model "unusable for scientific purposes''. In fact, Ferguson's COVID-19 model has been a laughing-stock and debacle.

105. **On May 11th, 2020**, UK Chief Medical Officer Whitty states that COVID-19 is 'harmless' to the vast majority''.

106. **On May 14th, 2020**, Microsoft announces that it is acquiring UK-based 'Metaswitch Networks'', to expand its Azure 5-G strategy.

107. On **May 19th, 2020** - Health Canada approves human trials of a SARS-CoV-2 (COVID-19) vaccine without clear evidence that prior animal testing to identify the potential risk of pathogenic priming (immune enhancement) has been conducted.

108. **On May 21st, 2020** - Four Canadian infectious disease experts, Neil Rau, Susan Richardson, Martha Fulford and Dominik Mertz state - "the virus is unlikely to

disappear from Canada or the world any time soon" and "It is unlikely that zero infections can be achieved for COVID-19." [18]

109. **By May 2020** - Over six million Canadians have applied for unemployment benefits and 7.8 million Canadians required emergency income support from the Federal government, [19] because of economic shut-downs and closures dictated by Covid-measures.

110. **By May, 2020** - Estimates of the Federal deficit resulting from their response to SARS-CoV-2 (COVID-19) ranges up to $400 billion. [20] (This exceeds the Canada's national budget for a year). By April 20th, 2021, according to the Federal Budget released, the national debt has climbed to $1.2 Trillion.

111. On **May 20th, 2020** - Dr. Teresa Tam, Canada's Chief Medical Officer, publicly advised the use of non-medical masks for the general public to provide an *"added layer of protection"* that could help prevent asymptomatic or pre-symptomatic Covid-19 patients from unknowingly infecting others. Dr. Tam's advice is not supported by scientific evidence. [21]

112. Throughout the "pandemic" Bonnie Henry was on record saying masks do not work and was also part of the 2015 nurses arbitration as an expert witness, reporting the same.[22]

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[18] https://nationalpost.com/opinion/opinion-we-are-infectious-disease-experts-its-time-to-lift-the-covid-19-lockdowns

[19] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[20] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[21] https://www.politico.com/news/2020/05/20/canada-non-medical-masks-provinces-reopen-271008

[22] https://action4canada.com/masks/

113. **On May 21st, 2020** - A letter from Mark Lysyshyn, MD, Deputy Chief Medical Health Officer with Vancouver Coastal Health states – "Although children are often at increased risk for viral respiratory illnesses, that is not the case with COVID-19. Compared to adults, children are less likely to become infected with COVID-19, less likely to develop severe illness as a result of infection and less likely to transmit the infection to others." Dr. Lysyshyn further states – "Non-medical masks are not needed or recommended. Personal protective equipment such as medical masks and gloves are not recommended in the school environment." [23]

114. On **May 22nd, 2020** - Prime Minister Justin Trudeau told reporters that "contact tracing" needs to be ramped up across the county. Trudeau stated that he "strongly recommends" provinces use cell phone apps when they become available, and that this use would likely be mandated.

115. On or about **May 25th,2020**, the Federal government announced potential **Criminal Code** provisions, making it a criminal offence to publish "misinformation" about the COVID-19. "Misinformation" quickly evolves to mean as any opinion or statement, **even from recognized experts**, which contradicts or criticizes measures taken and/ or mandated by the WHO, to be implemented globally by national and regional governments.

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[23] http://www.vch.ca/Documents/COVID-VCH-Schools-May-21-2020.pdf

116. **As of June 9th, 2020,** neither Prime Minister Trudeau, nor British Columbia Premier Horgan are willing, and in fact refusing to disclose what medical advice, and from whom, they are acting upon.

117. The Plaintiffs state and the fact is, that the Defendants and their officials, were stepping up compulsory face-masks in order to maintain a physical and visual tool to maintain panic, fear, and to enforce compliance of their baseless measures due to increasing public resistance, and of their groundless and false basis. The masks, further act as a visual and present symbol of intimidation and show of who is in power, and do not act to medically assist but to publicly muzzle, panic, instill fear, and exert compliance to irrational and ineffective COVID measures from the Plaintiffs and others. The Plaintiffs state and the fact is, that these measures were up-stepped after a Canadian survey was released that revealed, **inter alia**, that:

(a) 50% of Canadians did not believe Justin Trudeau was being honest about the COVID-Measures ;

(b) 16% of the Canadians believe that the COVID-Measures are being used to effect mandatory vaccination and contract tracing and other surveillance;

(c) 19% of the Canadians do not believe that COVID-19 is no more harmful then a common flu; and

(d) 7% of the Canadians believe that COVID-19 does not exist at all and is being mis-used as pretext for other, ulterior motives.

118. On **June 3rd, 2020** Federal Minister of Transport, Omar Alghabra, announced that face-masks are required by **all,** when taking public transportation in Canada whether by plane, train, ship, or transit.

119. Between **April 1st and June 15th, 2020** the Canadian Civil Liberties Association (CCLA) reports that approximately 10,000 Covid related charges were laid across Canada.

120. **On June 17th, 2020,** the Toronto Hospital for Sick Children, considered the world's Premier Children's hospital completed an advisory report, publicly released days later, to the Minister of Health and Education, with respect to recommendations for the re-opening of school in September, 2020. The report was prepared by two experts (in Virology) , upon the **contribution and review** of another **twenty (20)** experts as well as the "SickKids Family Advisory Networks". The 11-page report is resound and clear on the facts stat:

(a) Children are at extremely **low** risk when it comes to COVID-19;

(b) Schools should re-pen in a normal setting in September, 2020 in Ontario;

(c) That **no** mask should be worn by children because of no evidence of effectiveness and in fact masks pose a health risk for children;

(d) Social distancing should not be employed; and

(e) That masks and social distancing pose significant physical and psychological health risks to children.[24]

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[24] "COVID-19: Recommendations for School Re-opening", Toronto Hospital for Sick Children, Report dated June 17th, 2020.

121. **On June 23rd, 2020**, the Justice Centre for Constitutional Freedoms calls for, in a 69-page report, an end to the lock-down measures based on an analysis of the lack of medical and scientific evidence for their imposition and the infliction of unwarranted and severe **Charter** violations.[25]

122. **On June 26th , 2020**, Sweden's COVID-19 expert, Anders Tegnell, blasted the WHO'S response to COVID-19 and states that the "world went crazy" and further stingingly criticized the WHO as "mis-interpreting data" in branding Sweden as one of eleven (11) countries who are seeing a "resurgence" in COVID-19 cases. The Plaintiff state, and the fact is, that Sweden was one of the few countries in the World who did **not** adopt, wholesale, the WHO protocol and in fact faired much berter then the countries who did, including Canada, in that there was no economic shut-down in Sweden. Dr. Tegnell further stated that the lockdowns "fly in the face of what is known about handling virus pandemics.[26]

123. **On June 30th, 2020,** the Ontario Civil Liberties Association called for the extraordinary step, calling on the public to engage in "civil disobedience" of the masking By-Laws, based on the overwhelming scientific and medical evidence, that masks are ineffective and pose health risks.

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[25] "Unprecedented and unjustified: a **Charter** Analysis of Ontario's Response to COVID-19" June 22nd, 2020.

[26] "Daily Mail Online", Daily Mail.com, June 26th, 2020

124. **As of June 23rd**, 2021 it has come to light that a Portugal court ruling revealed that only 0.9% of 'verified cases' died of COVID, numbering 152, not the 17,000 deaths that have been claimed[27]

125. Since the summer of 2020, to the present, the saturated criticism of the Covid measures, from the world scientific, medical and legal community has been overwhelming, with an avalanche of peer-reviewed studies that indicate that: lockdowns do not work; masks do not work; social distancing does not work. As well as Public Health Officers, including Bonnie HENRY, warning that the Covid-19 "vaccines" will **not** ensure immunity, will further not prevent re-transmission of the virus to and from the people vaccinated.

126. Meanwhile, from the summer of 2020, to the present, the avalanche of the preponderance of the scientific and medical evidence also clearly demonstrates that the harms, including the death-toll, from the measures themselves exponentially **far** out-numbers the harm and deaths from the virus.

127. The Plaintiffs state, and the fact is, that the lockdowns themselves, of schools and businesses, and to independent business, and that community is that their lockdowns are both unnecessary, ineffective, and wholesale destructive.

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[27] https://americasfrontlinedoctors.org/frontlinenews/lisbon-court-rules-only-0-9-of-verified-cases-died-of-covid-numbering-152-not-17000-claimed/

- **B/ THE COVID-19 MEASURES**

- **Federal Measures**

128. On or about March 17th, 2020 Justin Trudeau announces a lock-down and invoked the following legislation with respect to "pandemic":

    a) The **Federal Quarantine Act,** stipulating the lock-down of flights to Canada, and that Canadians returning to Canada, self-isolate and quarantine themselves for a 14- day period;

    b) Various pieces of legislation setting out financial assistance for various persons and sectors.

Trudeau further and effectively shut down Parliament. Parliament has only "convened", sparingly, to pass spending measures, with an amputated, hand-picked, selection of 25 MPs, notwithstanding that technology such as "Zoom", exists to accommodate and convene the entire Parliamentary contingency of the 338 MPs, to date it has not happened. Parliamentary Communities rested in a legislative coma until April, 2020, where after some sit virtually.

129. Justin Trudeau held (holds) daily press conferences to "inform" Canadians, and further issues decrees and orders, such as "stay home", which decrees and fiats have no legal effect, notwithstanding, that they were acted upon by Municipal and Provincial enforcement officers, but at that no time has the Federal Parliament invoked the Federal **Emergencies Act** .

- **Provincial Measures**

130. In British Columbia, the government followed suit as set out below.

131. On **March 17, 2020**, Bonnie Henry issued a notice under purportedly the ***Public Health Act*** **(the *"PHA"*)** that the transmission of the infectious agent SARS-CoV-2, had caused cases and outbreaks of an illness known as COVID-19 in British Columbia.

132. On March 18, 2020, the British Columbia Provincial Government declared a "state of emergency" under the ***Emergency Program Act [RSBC 1996] c.111***.

133. The declaration of a public health emergency further purports to empower Bonnie Henry (the Chief Provincial Health Officer), to issue verbal orders that had immediate effect.

134. The purported rationale for the emergency in the period between January 1st to March 31st, 2020, was that there were three (3) reported deaths attributed to the COVID-19 virus in Canada. Two (2) in Ontario, and one (1) in British Columbia.

135. In the following months, the mortality rate attributed to COVID-19 increased but was mainly concentrated in care home facilities, and especially those that were understaffed and without sufficient medical supplies, just like every other previous year where the elderly die, in similar numbers, from the complications of yearly influenza.

136. In its "emergency" response, the Provincial Government closed large sectors of the British Columbia economy: closing restaurants, fitness facilities, shopping centres, religious and other peaceful gatherings, issued travel bans, cancelled

medical treatments, as well as purported to prohibit constitutionally protected association and assembly for protests.

137. While hospitals prepared for an influx of COVID-19 patients, many medical procedures and operations were cancelled under the Provincial Government's directives. As a result, many died from cancelled surgeries and non-seeking of medical treatment. However, the high number of intensive care COVID-19 patients did not materialize. Most people infected with COVID-19 experienced mild to moderate influenza-like symptoms that dissipated quickly.

138. By **June 24, 2020**, the British Columbia Provincial Government and Public Health Officer's restrictions on non-essential travel, hotels, and film industries were lifted. By **September 2020**, on site, and in person instruction at public schools, was reintroduced, after having been locked down.

139. The authority to exercise emergency powers under Part 5 of the ***PHA*** purportedly ends when the Provincial Health Officer provides notice that the emergency has passed (s. 59(1)).

- **Orders of Provincial Health Officer Bonnie Henry**

140. The Provincial Health Officer has issued more than fifty (50) orders purportedly under the authority of Part 5 of the ***Public Health Act [SBC 2008] c. 28,*** including verbal orders (the "PHA Orders").

141. Most of the Provincial Health Officer's ***Public Health Act [SBC 2008] c. 28*** Orders do not reference the medical or scientific basis for issuing the order and do not satisfy the requirements of s. 52 of the ***Public Health Act [SBC 2008] c.***

28, and further constitute the constitutional violation of "dispensing with Parliament under the pretext of Royal Prerogative". In a word, Bonnie Henry is illegally and unconstitutionally acting and governing as if she were the Queen.

132. Order of the Provincial Health Officer, Bonnie Henry, was issued on February 5th, 2021.

133. Order of the Provincial Health Officer was issued on April 21st, 2021.

134. Order of the Provincial Health Officer dated June 30th, 2021.

134. In British Columbia, like elsewhere, the deaths caused by the **covid-measures themselves** far outnumber the deaths purportedly caused by Covid-19.

142. Despite the relatively low number of persons infected by COVID-19 in British Columbia, the Public Health Officer failed to provide notice that the emergency had passed and the Lieutenant Governor in Council continued to extend the emergency declaration under *EPA*, through a series of indefinite and unjustified extensions to the present day.

143. British Columbia is currently in the longest state of "emergency" in its history.

- **Ministerial Orders**

144. Furthermore, As of **June 17, 2020**, the British Columbia Provincial Government had issued thirty(30) orders under the authority of s. 10(1) of the ***Emergency Program Act [RSBC 1996] c.111***, including orders that were later repealed and replaced. More orders have been issued since then. All of the orders issued

by the Minister contain provisions stating that they apply only for so long as the declaration of the state of emergency is in effect, which has, to date, been in perpetuity.

145. Most of the Provincial Government's orders do not reference a specific sub-paragraph under s. 10(1) but instead rely on the general provision in s. 10(1) that the Minister may "do all acts and implement all procedures necessary to prevent, respond to or alleviate the effects of any emergency or disaster.", without specifying the "effects" and how those "effects" justify the state of emergency.

146. The Plaintiffs state, and fact is, that reality is that either all or most of the Ministerial orders were not necessary to "prevent, respond or alleviate" any of the effects of COVID-19 to the population of British Columbia.

147. The Provincial Government also failed to establish legally binding conditions on the use of sub-delegated powers to suspend, waive or otherwise alter statutory provisions for the following Ministerial orders and subsequent orders replacing them:

a) Ministerial Order M083 which issued on March 26, 2020, after the initial declarationof a provincial state of emergency. This order applied to municipalities, regional districts and the City of Vancouver. Ministerial Order M083 was repealed and replaced by a new order on May 1, 2020, M139, subsequently in turn repealed and replaced by a new order, M192, on June 17, 2020.

b) M139, Local Government Meetings and Bylaw Process (COVID-19) Order No. 2,which repealed and replaced M083, Local Government Meetings and Bylaw Process (COVID-19) Order;

c) Ministerial Order M089, Residential Tenancy (COVID-19) Order, 30 March 2020.

d) Ministerial Order M179, Commercial Tenancy (COVID-19) Order, 29 May 2020;

e) Ministerial Order M416, Food Liquor premises, Gatherings and Events (COVID-19) Order No. 2;

f) Ministerial order M425 was issued on November 24th, 2020;

g) Ministerial Order M172 was issued on April 21st, 2021.

141. Indeed, the Ministerial Orders and ***Public Health Act [SBC 2008] c. 28*** Orders (collectively, the "orders") were and continue to be, inconsistent, contradictory, and contrary to reasonably established medical and scientific principles and research, and do not satisfy the requirements of s. 9 of the ***Emergency Program Act [RSBC 1996] c.111*** and s. 52 of the ***Public Health Act [SBC 2008] c. 28***, including for, but not limited to, the following reasons:

(a) discouraging the public from wearing masks on the basis that they were ineffective;

(b) mandating that masks be worn in public places;

(c) closing in-house dining but permitting take-out;

(d) not mandating that cooks in public dining establishments wear maskswhile preparing food for take-out;

(e) allowing in-house dining for groups of the same household, that could sitnext to groups of different households;

(f) failing to enforce these orders;

(g) allowing shopping in large warehouse grocery and "big box" franchisessuch as Walmart, Costco, and others (the "Big Box Stores");

(h) prohibiting and interfering with religious gatherings contrary to s.176 of the ***Criminal Code***;

(i) prohibiting peaceful gatherings if unrelated to work contrary to constitutional rights as set out below in the within Notice;

(j) limiting shopping in shopping malls;

(k) prohibiting certain travel throughout British Columbia but allowing travelers from other provinces to travel within British Columbia;

(l) admitting that the limit on the size of gatherings is arbitrary and was never grounded in science.

142. The effects of these restrictions placed on the Plaintiffs and other British Columbians, have caused damage disproportionate to any threat posed by COVID-19, including but not limited to the following:

(a) Significant increase in overdose deaths. For example, approximately five people die per day in British Columbia due to an overdose, which is more than the number of people attributed to COVID-19 related deaths in British Columbia;

(b) Increase in suicide rates;

(c) Increase in depression and mental-health illness;

(d) Loss of gainful employment;

(e) Increase in domestic violence, including child battery;

(f) Increase in bankruptcies and foreclosures;

(g) Increase in divorces and deteriorations in personal relationships;

(h) Decrease in critical services for the homeless and low income;

(i) Increase in deaths due to medical treatments/surgeries being denies. 40% increase in cancer deaths forecasted as people were too fearful to see their physician to receive early diagnosis;

(j) Increase in insurance premiums;

(k) Such other effects as may be proved at trial.

143. The Plaintiffs state, and fact is, that placing this in perspective, in 2018, three-

hundred and fourteen (314) British Columbians died in motor vehicle incidents. In 2019, nine-hundred and eighty-four (984) people died from illicit drug use in British Columbia and in 2020, one-thousand, five-hundred and forty-eight (1,548) people died from illicit drug use.

144. In contrast, there were 678 deaths in British Columbia attributed to COVID-19 by the end of week 50 in 2020.

145. The Plaintiffs state, and fact is, that ten-fold times more people are dying from the Covid measures than from Covid-19 itself.

146. This kind of economic harm has impacted and will continue to impact British Columbians and all those who do business in British Columbia for decades by making British Columbian goods and services less competitive in the global marketplace.

147. The Plaintiffs, like many British Columbians, have experienced, and continue to experience, severe economic hardship as a result of the Orders.

148. Meanwhile the Provincial Government, the Provincial Health Officer, and her staff continue to enjoy economic security through salaries, other benefits, and pensions. All government salaries, other benefits, and pensions are at public expense and far less subject to market conditions than the millions of British Columbians' lack of economic security caused by the continued state of "emergency".

149. Neither the Provincial Government nor the Public Health Officer to-date have conducted a risk assessment to assess the likelihood and severity of the

negative consequences of the Orders, including those negative outcomes to economic, physical,emotional, and mental wellbeing mentioned but not limited to the Restriction Effects.

150. The net, summary effect, of the orders contained above are as follows:

(a) Ordering the shut-down of all business, except for 'essential'' businesses which were tied to food, medicine, doctors, and hospitals;

(b) A 'social distancing'' of two (2) meters;

(c) No 'public gathering'' of more than five (5) persons, who are un-related, with 'social distancing'' of two (2) meters, which was later increased to ten (10) persons;

(d) Restaurant and bar shut-downs, except for take-out service;

(e) The physical closure of all public and private schools, daycares, and universities;

(f) The mandatory use of face-masks, mandated by the Ministry of Health, to all the Medical Regulatory Medical Services Colleges, to direct all their licensed members to impose mandatory masking of all patients, employees, and members, in their place of work;

(g) The shut-down of all park amenities including all play-grounds and facilities for children;

(h) The elimination of one-on-one, and all other programs for special-needs children, and those suffering from neurological and physical disabilities;

(i) Banning all public gatherings over five (5) persons, notwithstanding a social distancing of two (2) meters, including the banning of religious services, including a restriction on marriages, funerals, and other religious actions and ritual and rites.

151. On May 21st, 2021, Dr. Bonnie Henry, and her department announced the availability of the Covid vaccines for twelve (12) to seventeen (17) year olds, without the need for their parents' consent, notwithstanding:

(a) That the Vaccines have NOT undergone required trial and safety protocols but were all made under and "emergency" basis;

(b) That there has NOT been a recorded death or life-threatening case of any twelve (12) to seventeen (17) year old in Canada;

(c) That twelve (12) to seventeen (17) year olds are not at risk of Covid-19;

(d) That, in the absence of informed consent, it constitutes medical experimentation and thus constituted a "crime against humanity" emanating from the Nuremberg trials, and principles following the medical experimentations by the Nazi regime and codified in Canada, as a Criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act;***

(e) And that on June 5th, 2021 Dr. Joss Reimer, Medical Lead for the Manitoba Vaccine Implementation Task Force, in asserting that the various vaccines can be mixed, publicly declared that the Covid-19 vaccinations are a "big human experiment";

(f) That many twelve (12) to seventeen (17) year olds do not possess the intellectual capacity to give informed consent;

(g) And by doing so Dr. Bonnie Henry, and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

- **Reckless and Unlawful Statements and Actions of Leaders**

152. The Plaintiffs state, and the fact is, that Trudeau, and the other Co-Defendants reckless in their groundless, ignorant, and arrogant dictates, without legal basis, so as to cause and instill a general atmosphere of fear, panic and confusion. Such decrees by Trudeau, and others, including Henry, included, but are not restricted to the following:

(a) With respect to Prime Minister Justine Trudeau, he made the following (mis)statements, for example:

(i) Prime Minister Justin Trudeau told Canadians: "**People should be staying home, self-isolating with family.**"[28]

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[28] Retrieved at : https://ottawacitizen.com/news/local-news/covid-19-confirmed-cases-latest-news-and-other-developments-in-ottawa/

(ii) **"We've all seen the pictures of people online who seem to think they're invincible," Trudeau said. "Well, they're not. Go home and stay home."**[29]

(iii) Justin Trudeau has issued a stern warning to Canadians who ignore social distancing advice, telling citizens to **"go home and stay home!"** – and leaving open the possibility his government could take more extreme measures as the number of confirmed coronavirus cases continues to rise.[30]

(iv) "To all the kids out there, **who can't go on play dates** or on spring break vacation...I know this is a big change, but we have to do this for our grandparents and for the nurses and doctors in hospitals."[31]

(v) "So, to everyone, **stay at home,** and no matter what stay 2 meters apart, if you do have to go out. When it gets hard let's remember we are all in this together." (24:35) "…how important it is not just for ourselves, but for our loved ones and health care workers, for our seniors, **that we stay home,** that we stay 2 meters apart, as much as we can and that we continue to wash our hands regularly." (30:12)[32]

(vi) "I know it is tough to stay home, especially as the weather gets nicer. If you have kids, it is even tougher, but to get back outside and running around the playground and park as soon as possible, **you need to keep them inside for a little longer**. (10:22)[33]

(vii) "…but I can tell you that we know it is very difficult situation for Canadians. There are very challenging projections out there that will emphasize how important it is for all of us to do our part, **to stay home**, to keep ourselves safe, to keep our loved ones safe and get through this…"(42:26)[34]

(viii) More and more Canadians are avoiding public spaces. If your friends or family members are still going to parks and playgrounds, they are risking lives. Tell them to stop.[35]

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[29] Retrieved at: https://www.vice.com/en_ca/article/g5xng4/coronavirus-updates-canada-ottawa-and-justin-trudeau-may-jail-and-fine-people-to-keep-them-home

[30] Retrieved at: https://www.theguardian.com/world/2020/mar/23/justin-trudeau-canada-coronavirus-stay-home

[31] https://www.richmond-news.com/news/trudeau-dodges-covid-19-lockdown-appeals-1.24103564

[32] Retrieved at: https://www.youtube.com/watch?v=76iqxbZz4X8

[33] Retrieved at: \https://www.youtube.com/watch?v=A3GDk8uHv5A

[34] Retrieved at : https://www.youtube.com/watch?v=mfAa0vLltn8

[35] https://pbs.twimg.com/media/EVf0_maXkAE7qBg.jpg

(ix) On the topic of Asymptomatic viral shed contradiction puts to questions the merit of social distancing among healthy people: A reporter asks Mr. Trudeau, after his wife had been tested positive for coronavirus, what kind of advice he had received from medical doctors.

> "In terms of advice I have gotten from medical professionals, it was explained to me that **as long as I do not show any symptoms at all, there is no value in having me tested."** (15:30)A reporter asks about the possibility of transmission to other members of the cabinet,17:02 "According to Health Officials **the fact that I have expressed no symptoms means that anyone that I engaged with throughout this week has not been put at risk** (17:12)[36]

(b) While Trudeau made the above-noted comments and decrees, **without legal basis whatsoever,** and further contradicted actual Provincial laws, Trudeau, all the while breaks social distancing Provincial Laws by:

(i)On March 29, 2020 ; **Dr. Theresa Tam,** the **Chief Public Health Officer of Canada**:

> "Urban dwellers/Cottagers should RESIST THE URGE to head to the cottage and rural properties as these communities have less capacity to manage COVID19."

(ii) On April 1st, 2020 the government of Quebec introduced strict **travel restrictions** across the province, including police checkpoints to prevent unnecessary travel in and out of Quebec.

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[36] Retrieved at: https://www.youtube.com/watch?v=SjEgtT98jqk

(iii) Shortly after **calling on Canadians to "stay home"** and "Skype that big family dinner," Trudeau crossed the provincial border from Ottawa into Quebec on Easter Weekend to visit his wife and three children who had been living at their Harrington Lake cottage since **March 29** , 2020.[37]

(c) With respect to Premier Doug Ford of Ontario:

(i) Premier Ford tells business they can refuse customers that will not wear a mask.

> "Any business has the right to refuse anyone. That's their business," Ford said on a teleconference last week. Despite the fact that no mandatory masks order was in place, and contrary to the legal opinion of the Canadian Civil Liberties Association (CCLA);[38]

(ii) Ford tells people to stay away from their cottages but goes to visit his own cottage;[39]

(iii) Doug Ford has over his two daughters, and family, who each live in different households for a total of 6 – violating 5 person maximum orders.[40]

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[37] Retrieved at https://globalnews.ca/news/6815936/coronavirus-justin-trudeau-andrew-scheer-easter-travel/

[38] https://www.cambridgetimes.ca/news-story/9994798-doug-ford-says-businesses-can-refuse-anyone-not-wearing-a-mask-but-rights-watchdog-says-not-so-fast/?fBritish Columbialid=iwar2_ba_3eddfpm0shzqjpnht6fmhw0yjfualjugjrnxczcvi_70gfwodqla https://www.inbrampton.com/no-mask-no-service-businesses-have-the-right-to-require-masks-on-customers?fBritish Columbialid=IwAR2UMCjwOtyIXU898j_EwlnBr1nuqiM7TJxJDs6ECz5tACPAHFMipGiHB7c

[39] https://toronto.citynews.ca/2020/05/08/ford-cottage-coronavirus/

[40] https://www.cbc.ca/news/canada/toronto/ford-physical-distancing-daughters-1.5564756

(d) With respect to Toronto Mayor John Tory:

  (i) **On April 19, 2020:** numerous photos of social distancing violations during a parade to salute health care workers (pictured standing shoulder to shoulder down University Ave.)[41]

  (ii) May 23: Here is Tory violating social distancing rules and modeling counterproductive mask use at Trinity Bellwoods park, where **thousands** had gathered;[42]

(e) With respect to Bonnie Henry, by imposing lock-down measures but exempting wine-tasting at wineries, because Henry owns a winery which begs the question: if you can stand and wine taste at her winery, why can you not taste at a bar?

(f) With respect to Jagmeet Singh,

(g) With respect to Jason Kenney,

(h) With respect to Mike Farnworth,

(i) With respect to John Horgan,

153. The Plaintiffs state, and the fact is, that the various leaders are fast and loose with ignoring their own rules, contrary to law, and ignoring the actual rules implemented, because they know the measures are false and ineffective and that the virus is no more dangerous than a seasonal viral respiratory illness. This further holds true for Neil Ferguson who put out the false modeling early on, in

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[41] Retrieved from: https://www.cbc.ca/news/canada/toronto/toronto-salutes-health-care-workers-covid19-1.5537982

[42] retrieved at: https://www.cp24.com/video?clipId=1964623

March 2020, and who had to resign his post in the UK for breaching the Rules. Other examples of such reckless behaviour and statements include:

(a) British Columbia Premier John Horgan has made statements referring to British Columbia citizens as “selfish”, telling those who hold a masking exemption to “Buy a Boat”, as opposed to exercising their exemption to ride the BC Ferries. He has also used methods of guilt-tripping, and fear-mongering to encourage compliance above consent: “It does disappoint me that British Columbians are disregarding good advice,” even making further threats to treat citizens in a matter akin to cattle: “The challenge is personal behaviour,” he said, then added by way of warning: “We don’t want to use a stick.” And has also gaslighted women, “Pregnant **people** are now a priority population to get their vaccine. All Health Canada - approved vaccines are safe and effective, including for **people** who are pregnant.”, and young people, who have been proven to exhibit the lowest risks for contracting deadly cases of Covid-19, “the cohort from 20 -29 was not paying attention to the Covid broadcasts,” “Do not blow this for the rest of us”.

(b) Public Safety Minister Mike Farnworth has been quoted making bigoted, threatening, and condescending statements toward British Columbia citizens.

> "Shut up, grow up and mask up,"
>
> “These irresponsible idiots need to look in the mirror,”

> "They are the problem and the sooner we get this curve bent down, the sooner we get COVID under control, then they can go back to their narcissistic self-indulgent ways - but until that time, they don't have the right to endanger the health of the public."

154. The Plaintiff states, and fact is, that Horgan has no clue, and is wholly unqualified, and has not, assessed the "well accepted science" and "advice", and same holds for Farnworth and TRUDEAU, all of whom simply follow one singular dogma from the WHO, while refusing to disclose the "science", its substance or source, and what "advice" is being given by whom to them all-the-while ignore vast pool of experts who state that the measures are **NOT** warranted;

(c) Andrew Scheer and family, Elizabeth May, and Liberal Cabinet Minister ignore social distancing orders:

> "Parliamentarians packed onto a small nine-seat government jet last week — ignoring pandemic health guidelines to maintain a distance of two meters from others — in their haste to reach Ottawa for a vote on federal emergency economic legislation that passed on Saturday. Green Party Leader Elizabeth May, who lives in British Columbia, boarded the Challenger jet along with Liberal British Columbia cabinet minister Carla Qualtrough, Conservative Opposition Leader Andrew Scheer, his wife and their five children last Friday — filling all seats on the aircraft."[43]

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[43] Retrieved from: https://www.cbc.ca/news/politics/challenger-flight-may-scheer-qualtrough-1.5530542

(d) Dr. Bonnie Henry, British Columbia Provincial Health Officer allows gatherings of 50 and when challenged on conflicting figures from across Canada confirm "None of these are based on scientific evidence."[44]

(e) Dr. Yaffe: Ontario's Associate Chief Officer of Health Dr. Yaffe caught blatantly violating the social-distancing rules, just minutes after the premier said that based on public-health officials' advice we'll have to stay on lock-down for an indefinite period.[45] No such indefinite "lock-down" was mandated by any law.

(f) Dr. Bonnie Henry: Bonnie Henry was caught taking a helicopter trip, while unmasked over the 2021 Easter long weekend, in violation of her own mandates limiting intra-provincial travel over the holiday. Bonnie Henry also continued to allow wine tastings during the time period that provincial ministerial orders in British Columbia prohibited restaurants, bars, and pubs from allowing indoor dining. Bonnie Henry is a part-owner of the Clos du Soleil winery in Keremios, British Columbia.

155. The Plaintiffs state, and the fact is, that the illegal actions, and decrees issued by The Defendants and other public officials were done, in abuse and excess of their offices, knowingly to propagate a groundless and falsely-declared 'pandemic'', and generate fear and confusion on the ground, not only with citizens, but further, and moreover, with enforcement officials who are pursuing,

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[44] Retrieved at: https://www.1043thebreeze.ca/2020/04/01/British Columbia-not-budging-on-50-person-limit-restirction/

[45] https://twitter.com/RosemaryFreiTO/status/1254908247322083331

detaining, ticketing for perfectly legal conduct, because of the contradictory laws, and conduct of these public officials. All the while, their own personal conduct clearly manifests a knowledge that the ‘pandemic’’ is false, and the measures phony, designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs.

• C/ IGNORING AND FAILING TO ADDRESS MEDICAL EXPERTS’ EVIDENCE

•The Nature of Viral Respiratory Illness (or Disease) and COVID-19

156. From the on-set of the declared emergency, and shortly thereafter up to the summer of 2020, experts such as Dr. Denis RANCOURT, Ph.D., set out that the scientific preponderance of the evidence which contradicted and criticized the measures invoked, as set out below, and the fact is that, as is borne out by vast preponderance of medical and scientific study, that regardless of the novel viral specification (“strain”), viral strains which lead to Seasonal Viral Respiratory Illness (Diseases) annually follow the same pattern, namely:

(a) That classifying causes of death by “influenza” or “influenza-related”, or “pneumonia” is unhelpful and unreliable in the face of under-lying chronic diseases, particularly in the elderly (co-morbidity”);

(b) That what is of more and central relevance is simply the total number of excess deaths during a viral strain season;

(c) That the year-to-year winter-burden (excess) mortality in mid- latitude nations is robustly regular, with respect to Seasonal Viral Respiratory illness due to the following:

  (i) The absolute humidity which directly controls the impact of the transmission of airborne, pathogen-laden aerosol particle droplets;

  (ii) In mid-latitude countries, on either side of the Equator, "Flu-season" emerges in the late fall-winter months, owing to the dry, humidity-free, air which allows the pathogen-laden aerosol particles to travel freely and effectively to infect and be transmitted from person to person which phenomenon occurs on both sides of the Equator, at different times on the calendar year, given the reversal of the seasons on the opposite sides of the Equator;

  (iii) As the temperature rises, and humidity content in the air increases, the incident of transmission is reduced.[46] In tropical year-round hot climates this phenomenon is not generally in play. Nor is it at play in extreme cold climates towards both North and South Poles.

157. The Plaintiffs further state, and the fact is, as reflected in the scientific and medical literature that:

(a) The above means that all the viral respiratory diseases that seasonally plague temporal-climate populations every year are extremely contagious for two reasons: (1) they are transmitted by small aerosol particles that are part of the fluid air and fill virtually all enclosed air spaces occupied by humans, and (2) a single such aerosol particle carries the minimal infective dose (MID) sufficient to cause infection in a person, if breathed into the lungs, where the infection is initiated.

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[46] "All-Cause Mortality during COVID-19". Denis G. RANCOURT PhD., June 2nd, 2020, and all cited scientific and medical studies therein.

(b) This is why the pattern of all-cause mortality is so robustly stable and distributed globally, if we admit that the majority of the burden is induced by viral respiratory diseases, while being relatively insensitive to the particular seasonal viral ecology for this operational class of viruses. This also explains why the pattern is inverted between the Northern and Southern hemispheres, irrespective of tourist and business air travel and so on.

(c) The data shows that there is a persistent and regular pattern of winter-burden mortality that is independent of the details, and that has a well constrained distribution of year to year number of excess deaths (approximately 8% to 11% of the total yearly mortality, in the USA, 1972 through 1993). Despite all the talk of epidemics and pandemics and novel viruses, the pattern is robustly constant.

(d) An anomaly worthy of panic, and of harmful global socio-economic engineering, would need to consist of a naturally caused yearly winter-burden mortality that is statistically greater than the norm. That has not occurred since the unique flu pandemic of 1918 (the "Spanish Influenza").

Covid-19 is no exception and no more virulent than all others apart from the influenza pandemic of 1918.

(e) Scientific studies show that the three recent epidemics assigned as pandemics, the H2N2 pandemic of 1957, the H3N2 pandemic of 1968, and the H1N1 pandemic of 2009, were not more virulent (in terms of yearly winter-burden mortality) than the regular seasonal epidemics . In fact, scientific studies further show that the epidemic of 1951 was concluded to be more deadly, on the basis of P&I data, in England, Wales and Canada, than the pandemics of 1957 and 1968).[47]

- **Contrary Views of the Experts to WHO protocol**

158. The Plaintiffs further state that the COVID-19 measures have in fact accelerated, and caused more than would be normal deaths, and in the elderly population, which has accounted for 81% of the deaths with respect to COVID-19, mostly in Long-Term Care facilities.[48]

159. The Plaintiffs state and fact is that these Defendants, while purportedly relying on "advice" from their medical officers, are not transparent as to what the advice was, nor the scientific/ medical basis was, and in fact suppressing it. In fact, to date, they refuse to disclose where they are ultimately getting this 'advice'', and from whom, based on what medical evidence. The fact is that they are simply parroting the "advice" and dictates of the WHO without any scrutiny whatsoever,

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[47] "All-Cause Mortality during COVID-19". Denis G. RANCOURT PhD., June 2nd, 2020, and all cited scientific and medical studies therein.

[48] "All-Cause Mortality during COVID-19". Denis G. RANCOURT PhD., June 2nd, 2020, and all cited scientific and medical studies therein.

and without ever addressing nor recognizing Canadian and international experts who took, and continue to take, a contrary view and criticism of those directives from the WHO.

160. The Plaintiffs state that such experts include, early on, but are not restricted to:

(a) **Dr Sucharit Bhakdi**, a specialist in microbiology. He was a professor at the Johannes Gutenberg University in Mainz, Germany, and head of the Institute for Medical Microbiology and Hygiene and one of the most cited research scientists in German history.

(b) **Dr Wolfgang Wodarg**, a German physician specializing in Pulmonology, politician and former chairman of the Parliamentary Assembly of the Council of Europe. In 2009 he called for an inquiry into alleged conflicts of interest surrounding the EU response to the Swine Flu pandemic.

(c) **Dr Joel Kettner** , a professor of Community Health Sciences and Surgery at Manitoba University, former Chief Public Health Officer for Manitoba province and Medical Director of the International Centre for Infectious Diseases.

(d) **Dr John Ioannidis**, a Professor of Medicine, of Health Research and Policy and of Biomedical Data Science, at Stanford University School of Medicine and a Professor of Statistics at Stanford University School of Humanities and Sciences. He is director of the Stanford Prevention Research Center, and co-director of the Meta-Research Innovation Center at Stanford (METRICS).

(e) **Dr Yoram Lass**, an Israeli physician, politician and former Director General of the Health Ministry. He also worked as Associate Dean of the Tel Aviv University Medical School and during the 1980s presented the science-based television show Tatzpit.

(f) **Dr Pietro Vernazza** , a Swiss physician specializing in Infectious Diseases at the Cantonal Hospital St. Gallen and Professor of Health Policy.

(g) **Frank Ulrich Montgomery** ,a German radiologist, former President of the German Medical Association and Deputy Chairman of the World Medical Association.

(h) **Prof. Hendrik Streeck**, a German HIV researcher, epidemiologist and clinical trialist. He is professor of virology, and the director of the Institute of Virology and HIV Research, at Bonn University.

(i) **Dr Yanis Roussel** **et. al.** – A team of researchers from the Institut Hospitalo-universitaire Méditerranée Infection, Marseille and the Institut de Recherche pour le Développement, Assistance Publique-Hôpitaux de Marseille, conducting a peer-reviewed study on Coronavirus mortality for the government of France under the 'Investments for the Future' programme.

(j) **Dr. David Katz** , an American physician and founding director of the Yale University Prevention Research Center.

(k) **Michael T. Osterholm**, a regents professor and director of the Center for Infectious Disease Research and Policy at the University of Minnesota.

(l) **Dr Peter Goetzsche** , a Professor of Clinical Research Design and Analysis at the University of Copenhagen and founder of the Cochrane Medical Collaboration.[49]

And the Plaintiffs state, and fact is, that the above-noted experts are not alone in their contrary views and criticisms, but merely examples of a much bigger body of experts who take the same views, which contradict and criticize the WHO and current measures adopted by Canada and British Columbia.

161. These experts have expressed, early on, in summary, for example, the following opinions:

(a) By **Dr. Sucharit Bhakdi**:

> "**[that The government's anti-COVID19 measures] are grotesque, absurd and very dangerous […] The life expectancy of millions is being shortened.** The horrifying impact on the world economy threatens the existence of countless people. The consequences on medical care are profound. Already services to patients in need are reduced, operations cancelled, practices empty, hospital personnel dwindling. All this will impact profoundly on our whole society. All these measures are leading to self-destruction and collective suicide based on nothing but a spook."

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[49] https://www.fort-russ.com/2020/03/coronavirus-skepticism-these-12-leading-medical-experts-contradict-the-official-government-media-narrative/
https://off-guardian.org/2020/03/24/12-experts-questioning-the-coronavirus-panic/?__cf_chl_jschl_tk__=337111ad6d6d902b24b4e099f5281c65e3e4b9f4-1585388282-0-Af0o_edKyUgbHvh1VcWNkI9pmmKmNDpIe3t8p8AzOfNSL3KMq2f_1tyTqyj4i1RlgmD_uDh8P8ulAs_zAhps_nKe8fMclO8scdWTV4Jf5xpZtzHt3Hg5mrz4twiZSnTJ3tojWZUI6Vu4pAcnuDnaZ4WVv7Da0oCcEh38A0GuO5trR0zZOfPrwpXW5P7QIRjcNju5ST6yX4Ev7A09GNLFQRibRI8X1HgEpCzf5fPIQtOchyIX9wWUG-oM4wIgZqVvKDyUdHNQO1ZpMAXQFtOaEb9VeapKfqawhowADQDFU00X9yL8VLExpR33YwWjprrD7_zYCdPsI6xIOAZ06Js3baIu9t35M7s2F9IrPgzUR0W5&fBritish Columbialid=IwAR0ZWy2bg8_Hioqtuj-5xuOP8zKS-ds2-OqPxNL3MArzYJbwwEhrKImvnkA

(b) By **Dr Wolfgang Wodarg** that:

> "what is missing right now is a rational way of looking at things. We should be asking questions like "How did you find out this virus was dangerous?", "How was it before?", "Didn't we have the same thing last year?", "Is it even something new?" That's missing."

(c) By **Dr Joel Kettner** that:

> "I have never seen anything like this. I'm not talking about the pandemic, because I've seen 30 of them, one every year. It is called influenza. And other respiratory illness viruses, we don't always know what they are. But I've never seen this reaction, and I'm trying to understand why. . . I worry about the message to the public, about the fear of coming into contact with people, being in the same space as people, shaking their hands, having meetings with people. I worry about many, many consequences related to that. . . In Hubei, in the province of Hubei, where there has been the most cases and deaths by far, the actual number of cases reported is 1 per 1000 people and the actual rate of deaths reported is 1 per 20,000. So maybe that would help to put things into perspective."

(d) **By Dr John Ioannidis** that:

> "Patients who have been tested for SARS-CoV-2 are disproportionately those with severe symptoms and bad outcomes. As most health systems have limited testing capacity, selection bias may even worsen in the near future. . . The one situation where an entire, closed population was tested was the Diamond Princess cruise ship and its quarantine passengers. The **case fatality rate there was 1.0%,** but this was a largely elderly population, in which the death rate from Covid-19 is much higher. . . .Could the Covid-19 case fatality rate be that low? No, some say, pointing to the high rate in elderly people. However, even some so-called mild or common-cold-type coronaviruses that have been known for decades can have case fatality rates as high as 8% when they infect elderly people in nursing homes. If we had not known about a new virus out there, and had not checked individuals with PCR tests, the number of total deaths due to

> "influenza-like illness" would not seem unusual this year. At most, we might have casually noted that flu this season seems to be a bit worse than average. . . ."A fiasco in the making? As the coronavirus pandemic takes hold, we are making decisions without reliable data", *Stat News*, 17th March 2020."

(e) **By Dr Yoram Lass** that:

> "Italy is known for its enormous morbidity in respiratory problems, more than three times any other European country. In the US about 40,000 people die in a regular flu season. . . .In every country, more people die from regular flu compared with we all forget: the swine flu in 2009. That was a virus that reached the world from Mexico and until today there is no vaccination against it. But what? At that time there was no Facebook or there maybe was but it was still in its infancy. The coronavirus, in contrast, is a virus with public relations. . . .Whoever thinks that governments end viruses is wrong. – Interview in *Globes*, March 22nd 2020."

(f) **By Dr Pietro Vernazza** that:

> "We have reliable figures from Italy and a work by epidemiologists, which has been published in the renowned science journal ‹Science›, which examined the spread in China. This makes it clear that around 85 percent of all infections have occurred without anyone noticing the infection. 90 percent of the deceased patients are verifiably over 70 years old, 50 percent over 80 years. . . .In Italy, one in ten people diagnosed die, according to the findings of the *Science* publication, that is statistically one of every 1,000 people infected. Each individual case is tragic, but often – similar to the flu season – it affects people who are at the end of their lives. . . . **If we close the schools, we will prevent the children from quickly becoming immune. . . .We should better integrate the scientific facts into the political decisions.** – Interview in *St. Galler Tagblatt*, 22nd March 2020 ."

(g) **By Frank Ulrich Montgomery** that:

> "I'm not a fan of lockdown. Anyone who imposes something like this must also say when and how to pick it up again. Since we have

> to assume that the virus will be with us for a long time, I wonder when we will return to normal? You can't keep schools and daycare centers closed until the end of the year. Because it will take at least that long until we have a vaccine. Italy has imposed a lockdown and has the opposite effect. They quickly reached their capacity limits, but did not slow down the virus spread within the lockdown. – Interview in *General Anzeiger*, 18th March 2020."

(h) **By Prof. Hendrik Streeck** that:

> "The new pathogen is not that dangerous, it is even less dangerous than Sars-1. The special thing is that Sars-CoV-2 replicates in the upper throat area and is therefore much more infectious because the virus jumps from throat to throat, so to speak. But that is also an advantage: Because Sars-1 replicates in the deep lungs, it is not so infectious, but it definitely gets on the lungs, which makes it more dangerous. . . .You also have to take into account that the Sars-CoV-2 deaths in Germany were exclusively old people. In Heinsberg, for example, a 78-year-old man with previous illnesses died of heart failure, and that without Sars-2 lung involvement. Since he was infected, he naturally appears in the Covid 19 statistics. But the question is whether he would not have died anyway, even without Sars-2. – Interview in *Frankfurter Allgemeine*, 16th March 2020".

(i) **By Dr Yanis Roussel** et. al. that:

> "The problem of SARS-CoV-2 is probably overestimated, as 2.6 million people die of respiratory infections each year compared with less than 4000 deaths for SARS-CoV-2 at the time of writing. . . .This study compared the mortality rate of SARS-CoV-2 in OECD countries (1.3%) with the mortality rate of common coronaviruses identified in AP-HM patients (0.8%) from 1 January 2013 to 2 March 2020. Chi-squared test was performed, and the P-value was 0.11 (not significant)....it should be noted that systematic studies of other coronaviruses (but not yet for SARS-CoV-2) have found that the percentage of asymptomatic carriers is equal to or even higher than the percentage of symptomatic patients. The same data for SARS-CoV-2 may soon be available, which will further reduce the relative risk associated with this specific pathology. – "SARS-CoV-2: fear versus data", *International Journal of Antimicrobial Agents*, 19th March 2020."

(j) **By Dr. David Katz** that:

> "I am deeply concerned that the social, economic and public health consequences of this near-total meltdown of normal life — schools and businesses closed, gatherings banned — **will be long-lasting and calamitous, possibly graver than the direct toll of the virus itself**. The stock market will bounce back in time, but many businesses never will. The unemployment, impoverishment and despair likely to result will be public health scourges of the first order. – "Is Our Fight Against Coronavirus Worse Than the Disease?", *New York Times* 20th March 2020."

(k) **By Michael T. Osterholm** that:

> "Consider the effect of shutting down offices, schools, transportation systems, restaurants, hotels, stores, theaters, concert halls, sporting events and other venues indefinitely and leaving all of their workers unemployed and on the public dole. The likely result would be not just a depression but a complete economic breakdown, with countless permanently lost jobs, long before a vaccine is ready or natural immunity takes hold. . . [T]he best alternative will probably **entail letting those at low risk for serious disease continue to work, keep business and manufacturing operating**, and "run" society, while at the same time advising higher-risk individuals to protect themselves through physical distancing and ramping up our health-care capacity as aggressively as possible. With this battle plan, we could gradually build up immunity without destroying the financial structure on which our lives are based.
> – "Facing covid-19 reality: A national lockdown is no"
>
> cure", *Washington Post* 21st March 2020

(l) **By Dr Peter Goetzsche** that:

> "Our main problem is that no one will ever get in trouble for measures that are too draconian. They will only get in trouble if they do too little. So, our politicians and those working with public health do much more than they should do. . . .No such draconian measures were applied during the 2009 influenza pandemic, and they obviously cannot be applied every winter, which is all year

> round, as it is always winter somewhere. We cannot close down the whole world permanently. . . .Should it turn out that the epidemic wanes before long, there will be a queue of people wanting to take credit for this. And we can be damned sure draconian measures will be applied again next time. But remember the joke about tigers. "Why do you blow the horn?" "To keep the tigers away." "But there are no tigers here." "There you see!"[50] "Corona: an epidemic of mass panic", blog post on *Deadly Medicines* 21st March 2020

162. Expert criticism has also been levelled by Canadian experts, including:

(a) **By Dr Denis Rancourt, Ph.D.,** expert in public health and Researcher,

In stating that:

> "Federal and provincial Canadian government responses to and communications about COVID-19 have been irresponsible.""The approach being followed by governments is reckless.""Justification for the early panic-response is not corroborated.""Faith in epidemic-modelling of catastrophe-scenarios and mitigation strategies is not justified."[51]

(b) **Dr. Richard Schabas,** Ontario's former Chief Medical Officer who is of the opinion that:

- "We have **fundamentally over-reacted and misjudged the magnitude of the problem.**"
- "lockdown measures are unsustainable"
- "the virus isn't going anywhere"
- "In no country, including Italy, has the death toll come anywhere close to what we would expect in an average influenza year." (CBC News, March 22, 2020)[52]

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[50] Another 10 experts have been added to this link. Total is 22 experts.
https://www.europereloaded.com/twenty-two-experts-questioning-the-coronavirus-panic-videos-scientific-common-sense/

[51] http://ocla.ca/wp-content/uploads/2014/01/OCLA-Report-2020-1-Criticism-of-Government-Response-to-COVID19.pdf

[52] https://www.youtube.com/watch?v=sm9alyH8x
https://ca.news.yahoo.com/virus-isnt-going-anywhere-says-121720522.html

(c) Based on Dr. Richard Schabas' study of SARS and quarantine[53] Schabas states:

> "far more cases are out there than are being reported. This is because many cases have no symptoms and testing capacity has been limited. There have been about 100,000 cases reported to date, but, if we extrapolate from the number of reported deaths and **a presumed case-fatality rate of 0.5 per cent**, the real number is probably closer to two million – the vast majority mild or asymptomatic."
>
> " **the number of deaths was comparable to an average influenza season**. That's not nothing, but it's not catastrophic, either, and it isn't likely to overwhelm a competent health-care system. Not even close." "Quarantine belongs back in the Middle Ages. Save your masks for robbing banks. Stay calm and carry on. **Let's not make our attempted cures worse than the disease.**"[54]

(d) **Dr Joel Kettner** - former Chief Public Health Officer for Manitoba province; professor of Community Health Sciences and Surgery at Manitoba University; Medical Director of the International Centre for Infectious Diseases. In a phone interview on CBC Radio he stated:

> "in 30 years of public health medicine **I have never seen anything like this**, anything anywhere near like this. I'm not talking about the pandemic, because I've seen 30 of them, one every year. It is called influenza. . . . But I've never seen this reaction, and I'm trying to understand why.
>
> . . . **the data they are getting is incomplete to really make sense of the size of the threat**. We are getting very crude numbers of cases and deaths, very little information about testing rates, contagious analysis, severity rates, who is being hospitalised, who is in intensive care, who is dying, what are the definitions to decide

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[53] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2094974/

[54] https://www.theglobeandmail.com/opinion/article-strictly-by-the-numbers-the-coronavirus-does-not-register-as-a-dire/

> if someone died of the coronavirus or just died with the coronavirus. There is so much important data that is very hard to get to guide the decisions on how serious a threat this is.
>
> The other part is **we actually do not have that much good evidence for the social distancing** methods. It was just a couple of review in the CDC emerging infectious disease journal, which showed that although some of them might work, we really don't know to what degree and the evidence is pretty weak.
> The third part is the pressure that is being put on public health doctors and public health leaders. And that **pressure is coming from various places**. The first place it came from was the Director-General of the World Health Organization (WHO) when he said *"This is a grave threat and a public enemy number one"*, I have never heard a Director-General of WHO use terms like that."[55]

163. Other pointed criticism and opposite views, early on, included:

(a) **Stanford University Team**—to the effect that the Evidence of Covid 19 mortality rate is low;[56]

(b) **By Thomas Stavola**, Rutgers University Law School Relaxation of Lockdown via Quarantine of Symptomatics and Digital Contact Tracing, Experts Agree, indicating that:

> "The latest scientific data indicates that mild and asymptomatic prevalence is much higher than previously thought, thus, **the true fatality rate is closer to 0.4%**, or possibly even lower. While SARS-CoV-2 can be severe in very small subset, these values indicate that the population-based severity burden is much lower

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[55] https://off-guardian.org/2020/03/17/listen-cbc-radio-cuts-off-expert-when-he-questions-covid19-narrative/? cf chl jschl tk =d3faf8dfba5018289da87f791a612c2495a7f86d-1585163840-0-AcjXr346mVjSnluV8YDpGpd VknFDStnK llia4dphot9-E3ukKrgN7snq4BA4LggYPkDzLCQ8JXC7G-hqZtf0BZ0LIgFi5mB5Wv34UJsPHJy6UbROLM35V1nV98oiPR7t8pfCOhZ75WWrgS4NCn6vwzBMXALZw0UMU32u sijPnsW53IpHqSEyCnDdx9dfpJokTen28kaf0Is4UoNQMtfCxCbBpmxmdeFwYj6XWo-XQXWC4rA57a cbcLR54bfmC1imS1vPBIsHHqIjjCg5N2joQ9spQJUCbF80INdWsmat8SOzIb2pDrtNdA9dCUd62LRszCWgTBrVxRFu7zjPABr3Jj0hvjtLIkniXq3AnMs1ICU0rIhPAGzHmXAsEvsRUw

[56] https://www.greenmedinfo.com/blog/stanford-team-finds-evidence-covid-19-mortality-rate-low-2-17-times-lower-whos-esta?utm campaign=Daily%20Newsletter%3A%20Personal%20update%20%28VVNwqr%29&utm medium=email&utm source=Daily%20Newsletter& ke=eyJrbF9lbWFpBritish Columbial6ICJqb2huZnJvbW91dHdlc3RAZ21haWwuY29tIiwgImtsX2NvbXBhbnlfaWQiOiAiSzJ2WEF5In0%3D

> than initially considered months ago. Studies indicate that asymptomatic transmission is negligible[1]. Maria Van Kerkhove, who heads the World Health Organization's emerging diseases and zoonoses unit, stated that asymptomatic cases are definitely not a major driver of transmission."[57]

(c) **By Knut Wittkowski** - German epidemiologist. **Mass Isolation Preventing Herd Immunity** , and conluding that:

> "The lockdown prevents the normal progression of natural immunity that is key to protecting the wellbeing of the most vulnerable. The extended lockdown will increase the harm already done many fold including deaths.
>
> Dr. Wittkowski said we must protect and quarantine the frail, sick and very elderly 10% of our population, while allowing the other 90% to acquire the virus with mild to no symptoms, thereby gaining true NATURAL herd immunity. He estimated this to be a 4 week process.
>
> When people are allowed to go about their daily lives in a community setting, he argued, the elderly could eventually – sooner rather than later – come into contact with the rest of the population in "about four weeks" because the virus at this point would be "vanquished."
>
> ***"With all respiratory diseases, the only thing that stops the disease is 'herd immunity,'"*** [58]

(d) **By Martin Dubravec, MD -** Allergist/Clinical Immunologist Allergy and Asthma Specialists of Cadillac Cadillac, MI, conducting that:**The Answer is Herd Immunity**[59]**;**

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[57] https://medium.com/@tomstavola/latest-science-on-covid-19-and-digital-contract-tracing-f58ee55b3b9b

[58] https://www.aier.org/article/stand-up-for-your-rights-says-professor-knut-m-wittkowski/?fBritish Columbiaid=IwAR2ZuYv6Cbcsjiln2UJHXOk84KOjbSOWoxceTSiaNZdl_eZuhadppi25PnE
https://ratical.org/PerspectivesOnPandemic-II.html

[59] https://aapsonline.org/coronavirus-covid-19-public-health-apocalypse-or-anti-american/

(e) **By Dr. Dubravec's** whose advice on how to end this epidemic is:

> "What can be done to end this epidemic? **The answer is herd immunity**. Let those who will not die nor become seriously ill from the disease get infected and immune to the disease. Don't close schools – open them up! Don't close universities – reopen them! Let those under the age of 65 with no significant health problems go to work. Their risk of death is very close to zero. They become the wall that stops the virus.
>
> **Our current strategy of isolating these healthy people from the virus: a. is not working** – the virus is still spreading and b. for those who theoretically may be shielded from the virus, they will get exposed later. **Our current strategy is actually leading to a prolonged COVID-19 season!** Herd immunity works and despite our current efforts to mess it up**, herd immunity will be the ultimate reason the virus dies down.** We should promote the concept, not try to stop it. Unlike the influenza epidemics of the past, this virus is not attacking young people. We can use herd immunity to our collective advantage."
>
> **The bottom line is that herd immunity is what will stop the virus from spreading. Not containment. Not a vaccine. Not staying locked in our homes.** It's time we had an honest conversation on how to move beyond containment.

(f) By **Professor Peter C. Gøtzsche** that: "The Coronavirus mass panic is not justified."[60]

(g) By the Wall Street Journal in "Rethinking the Coronavirus Shutdown", that:

> No society can safeguard public health for long at the cost of its economic health.[61]

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[60] https://www.deadlymedicines.dk/wp-content/uploads/G%C3%B8tzsche-The-Coronavirus-mass-panic-is-not-justified.pdf

[61] https://www.wsj.com/articles/rethinking-the-coronavirus-shutdown-11584659154

(h) **By the Professor Yitzhak Ben Israel** of Tel Aviv University, who plotted the rates of new coronavirus infections of the U.S., U.K., Sweden, Italy, Israel, Switzerland, France, Germany, and Spain, concluding that:

> "The numbers told a shocking story: irrespective of whether the country quarantined like Israel, or went about business as usual like Sweden, **coronavirus peaked and subsided in the exact same way**. The professor believes this evidence - **actual evidence and data, not the projections of some model - indicate that there is no need for either quarantines or economic closures."**[62]

(i) **By Professor Stefano Montanari** that: "The Virus Vaccine is a Scam"[63];

(j) **By Virologist Hendrick Streeck** that: "There is no danger of infecting someone else while shopping"[64];

(k) **By:**

(i) **Sucharit Bakhdi:**[65]

(ii) **Jobn Ioannidis, Stanford:**[66]

(iii) **John Lee:**[67]

(iv) **Perspectives on the Pandemic | Professor Knut Wittkowski | Episode 2.**[68]

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[62] https://www.afa.net/the-stand/culture/2020/04/shutdowns-were-pointless-all-along/#.XpnwkkhQ ZA.facebook

[63] https://europeansworldwide.wordpress.com/2020/04/02/the-virus-vaccine-is-a-scam/

[64] https://www.zuercher-presse.com/virologe-hendrick-streeck-gibt-keine-gefahr-beim-einkaufen-jemand-anderen-zu-infizieren/?cn-reloaded=1

[65] https://www.youtube.com/watch?v=JBB9bA-gXL4&fBritish Columbialid=IwAR1XMZJdTEpe-9woCk7YIMd5WShxUms loYZYLKVBR8CQICkG-VjD63Z5SY

[66] https://www.youtube.com/watch?v=d6MZy-2fcBw&fBritish Columbialid=IwAR1LCsQoUVv3dmZzn 2Uwzl85XgFofld0tnn8iSMTMAODv5N9 Dwsi7f3K4

[67] https://www.spectator.co.uk/article/how-to-understand-and-report-figures-for-covid-19-deaths-/amp

[68] https://www.youtube.com/watch?v=IGC5sGdz4kg

(v) "Medical Doctor Blows C Vi Rus Scamdemic Wide Open"

Andrew Kaufman M D in (Nederlands ondertiteld);[69]

All indicating that the "pandemic" is **not** a pandemic and the modeling and measures unwarranted;

(l) **French researchers**: in COVID FEAR vs. DATA :

> "Under these [first world] conditions, there does not seem to be a significant difference between the mortality rate of SARS-CoV-2 in OECD countries and that of common coronaviruses " which are responsible for 10 to 20 percent of all respiratory infections, including colds, worldwide."[70]

(m) In: Coronavirus COVID-19: Public Health Apocalypse or Panic, Hoax, and Anti-American?[71];

(n) In: Stanford doctor says Fauci doesn't have the evidence to back up his claims;[72]

(o) In: Questioning Conventional Wisdom in the COVID-19 Crisis, with **Dr. Jay Bhattacharya**;[73]

(p) **By Dr M. I. Adil**, Corona Virus is a Hoax;[74]

(q) In Resp therapist blowing the whistle on covid -19.[75]

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[69] https://www.youtube.com/watch?v=S8JBg9H725E

[70] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102597/?fBritish Columbialid=IwAR29vpTe-Dk-xoVzVRbuAgVhil1k0DcZkGqyYsak6lC-OByjZcBRP6cyjc

[71] https://aapsonline.org/cornoavirus-covid-19-public-health-apocalypse-or-panic-hoax-and-anti-american/

[72] https://www.youtube.com/watch?v=-UO3Wd5urg0

[73] https://www.youtube.com/watch?v=J04YzligPyU

[74] https://www.youtube.com/watch?v=y9WeIOX1UuQ&feature=youtu.be

[75] https://www.youtube.com/watch?v=R0aDAM5LzWA

164. Since the summer of 2020, to the present, the avalanche of the world "scientific" evidence and community of scientists and doctors continues to scream, which falls upon the deaf ears of the Defendants, that:

(a) Masks do **not** work to prevent the transmission of aerosol, airborne virus, in that:

(i) masks do not slow or stop the spread of viruses;[76]

(ii) in fact, masks may help viruses spread;[77]

(iii) most robust studies have found little to no evidence for the effectiveness of cloth face masks in the general population;[78]

(iv) when masks (especially cloth masks) are worn improperly and over extended periods they can actually cause disease and other serious health issues;[79]

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[76] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7707213/
https://www.aier.org/article/masking-children-tragic-unscientific-and-damaging/
https://www.aier.org/article/masking-a-careful-review-of-the-evidence/
https://www.aier.org/article/the-year-of-disguises/
https://www.smh.com.au/national/farce-mask-its-safe-for-only-20-minutes-20030427-gdgnyo.html
https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7707213/pdf/aim-olf-M206817.pdf

[77] https://eurjmedres.biomedcentral.com/articles/10.1186/s40001-020-00430-5

[78] https://wwwnc.cdc.gov/eid/article/26/5/19-0994_article
https://www.cebm.net/covid-19/masking-lack-of-evidence-with-politics/
https://www.cidrap.umn.edu/news-perspective/2020/04/commentary-masks-all-covid-19-not-based-sound-data
https://www.nejm.org/doi/full/10.1056/NEJMp2006372
https://www.medrxiv.org/content/10.1101/2020.03.30.20047217v2
https://www.medrxiv.org/content/10.1101/2020.04.01.20049528v1
http://www.asahi.com/ajw/articles/13523664
https://bmjopen.bmj.com/content/5/4/e006577
https://www.nejm.org/doi/full/10.1056/NEJMp2006372

[79] https://www.technocracy.news/blaylock-face-masks-pose-serious-risks-to-the-healthy/

(v) breathing in the microscopic particles from synthetic masks can cause health problems including cancer similar to asbestos. Some masks have been recalled because they have been found to contain toxic materials dangerous to lungs;[80]

(vi) masks use leads to dry and irritated eyes, rashes, nosebleeds, pneumonia and other bacterial infections, damages to ear cartilages;[81]

(vii) Masks cause a rapid buildup of CO2 to levels, which are deemed unsafe by OSHA.[82]

(b) That "lock-downs" do not work, and in fact cause irreparable, devastating harm:

(i) a French study of 160 countries found no association between stringency of government lockdowns/restrictions and Covid-19 mortality;[83]

(ii) a peer-reviewed study, dated January 5, 2021 by eminent Stanford professors of medicine, infectious disease epidemiology and public health stated that the evidence:

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https://apps.who.int/iris/bitstream/handle/10665/332293/WHO-2019-nCov-IPC_Masks-2020.4-eng.pdf?sequence=1&isAllowed=y
https://bmjopen.bmj.com/content/5/4/e006577

[80] https://www.ecotextile.com/2021040127603/dyes-chemicals-news/exclusive-chemical-cocktail-found-in-face-masks.html
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7537728/
https://www.science.news/2021-01-15-long-term-mask-use-breeds-microbes-lung-cancer.html

[81] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7362770/
https://link.springer.com/article/10.1007/s00266-020-01833-9

[82] https://ohsonline.com/Articles/2016/04/01/Carbon-Dioxide-Detection-and-Indoor-Air-Quality-Control.aspx?Page=2

[83] https://www.frontiersin.org/articles/10.3389/fpubh.2020.604339/full

> "fails to find strong evidence supporting a role for more restrictive NPIs (Non-Pharmaceutical Interventions, such as lock downs) in control of Covid-19… We fail to find an additional benefit for stay-at-home orders and business closures";[84]

(iii) another medical research paper states:

> "This phenomenological study assesses the impacts of full lockdown strategies applied in Italy, France, Spain and United Kingdom, on the slowdown of the 2020 COVID-19 outbreak. Comparing the trajectory of the epidemic before and after the lockdown, **we find no evidence of any discontinuity in the growth rate, doubling time, and reproduction number trends"; [85]**

(iv) a New Zealand study found that government mandated lockdowns

did not reduce Covid-19 deaths; [86]

(v) another medical research paper states:

> "closure of education facilities, prohibiting mass gatherings and closure of some non-essential businesses were associated with reduced incidence **whereas stay at home orders and closure of all non-businesses was not associated with any independent additional impact.**"[87]

(vi) the Great Barrington Declaration signed thus far by 13,985 medical

& public health scientists, 42,531medical practitioners states:

> "As infectious disease epidemiologists and public health scientists we have grave concerns about the damaging physical and mental health impacts of the prevailing COVID-19 policies, and recommend an approach we call Focused Protection
>
> Coming from both the left and right, and around the world, we have devoted our careers to protecting people. **Current**

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[84] https://onlinelibrary.wiley.com/doi/10.1111/eci.13484

[85] https://www.medrxiv.org/content/10.1101/2020.04.24.20078717v1

[86] https://www.tandfonline.com/doi/full/10.1080/00779954.2020.1844786

[87] https://arxiv.org/pdf/2005.02090.pdf

lockdown policies are producing devastating effects on short and long-term public health. The results (to name a few) include lower childhood vaccination rates, worsening cardiovascular disease outcomes, fewer cancer screenings and deteriorating mental health – leading to greater excess mortality in years to come, with the working class and younger members of society carrying the heaviest burden. Keeping students out of school is a grave injustice.

Keeping these measures in place until a vaccine is available will cause irreparable damage, with the underprivileged disproportionately harmed.

Fortunately, our understanding of the virus is growing. We know that vulnerability to death from COVID-19 is more than a thousand-fold higher in the old and infirm than the young. Indeed, for children, COVID-19 is less dangerous than many other harms, including influenza.

As immunity builds in the population, the risk of infection to all – including the vulnerable – falls. We know that all populations will eventually reach herd immunity – i.e. the point at which the rate of new infections is stable – and that this can be assisted by (but is not dependent upon) a vaccine. Our goal should therefore be to minimize mortality and social harm until we reach herd immunity.

The most compassionate approach that balances the risks and benefits of reaching herd immunity, is to allow those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk. We call this Focused Protection.

Adopting measures to protect the vulnerable should be the central aim of public health responses to COVID-19. By way of example, nursing homes should use staff with acquired immunity and perform frequent PCR testing of other staff and all visitors. Staff rotation should be minimized. Retired people living at home should have groceries and other essentials delivered to their home. When possible, they should meet family members outside rather than inside. A comprehensive and detailed list of measures, including approaches to multi-generational

> households, can be implemented, and is well within the scope and capability of public health professionals.
>
> Those who are not vulnerable should immediately be allowed to resume life as normal. Simple hygiene measures, such as hand washing and staying home when sick should be practiced by everyone to reduce the herd immunity threshold. Schools and universities should be open for in-person teaching. Extracurricular activities, such as sports, should be resumed. Young low-risk adults should work normally, rather than from home. Restaurants and other businesses should open. Arts, music, sport and other cultural activities should resume. People who are more at risk may participate if they wish, while society as a whole enjoys the protection conferred upon the vulnerable by those who have built up herd immunity."

This Declaration was authored and signed in Great Barrington, United States, on October 4, 2020, by: **Dr. Martin Kulldorff,** professor of medicine at Harvard University, a biostatistician, and epidemiologist with expertise in detecting and monitoring infectious disease outbreaks and vaccine safety evaluations; **Dr. Sunetra Gupta**, professor at Oxford University, an epidemiologist with expertise in immunology, vaccine development, and mathematical modeling of infectious diseases; **Dr. Jay Bhattacharya,** professor at Stanford University Medical School, a physician, epidemiologist, health economist, and public health policy expert focusing on infectious diseases and vulnerable populations;[88]

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[88] https://gbdeclaration.org

(vii) neither the long-established pandemic preparedness reports for Canada nor the World Health Organization included lockdowns as an evidence-based non-pharmaceutical measure in response to a pandemic[89];

(viii) the research study, "Effect of school closures on mortality from coronavirus disease 2019: old and new predictions" concluded:

> "We confirm that adding school and university closures to case isolation, household quarantine, and social distancing of over 70s would lead to more deaths compared with the equivalent scenario without the closures of schools and universities;"[90]

(ix) the research paper: "A country level analysis measuring the impact of government actions, country preparedness and socioeconomic factors on COVID-19 mortality and related health outcomes" found:

> Rapid border closures, **full lockdowns**, and wide-spread testing **were not associated with COVID-19 mortality per million people;**"[91]

(x) a news article found that the COVID-linked hunger is tied to 10,000 excess child deaths each month;[92]

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[89] https://apps.who.int/iris/bitstream/handle/10665/329438/9789241516839-eng.pdf
https://www.longwoods.com/articles/images/Canada_Pandemic_Influenza.pdf

[90] https://www.bmj.com/content/371/bmj.m3588

[91] https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(20)30208-X/fulltext

[92] https://apnews.com/article/virus-outbreak-africa-ap-top-news-understanding-the-outbreak-hunger-5cbee9693c52728a3808f4e7b4965cbd

(xi) a research study found:

> "Substantial increases in the number of avoidable cancer deaths in England are to be expected as a result of diagnostic delays due to the COVID-19 pandemic in the UK;"[93]

(xii) as a result of COVID-19 measures there is significant collateral damage to the healthcare system with respect to issues such as delayed diagnosis[94], impacts on cancer patients,[95]impacts on disabled persons;[96] and further issues;

(xiii) COVID-19 lockdowns have imposed substantial economic costs on countries in Africa, and other countries around the world.[97]

(c) That the PCR testing, at over 35 cycles, is a fraudulent and useless manner to "test", calculate and count "cases" and "infections". A PCR test alone cannot indicate whether the virus in that person is either virulent or infectious. PCR tests require further culturing tests where the virus is injected into other cells and then monitored to see if it infects other cells. Peer-reviewed scientific journals from prestigious sources indicate that at 35 cycles, less than 3% of PCR confirmed "cases" of viral cultures are positive and therefore actually virulent and infectious.[98]

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[93] https://www.thelancet.com/journals/lanonc/article/PIIS1470-2045(20)30388-0/fulltext
[94] https://www.sciencedirect.com/science/article/pii/S0923753420398252
[95] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7534993/
[96] https://pesquisa.bvsalud.org/controlecancer/resource/pt/mdl-32383576?src=similardocs
[97] https://ideas.repec.org/h/fpr/ifpric/133835.html

[98] Peer-Reviewed Medical Paper: https://academic.oup.com/cid/advance article/doi/10.1093/cid/ciaa1491/5912603; and

165. That alternative, recognized early treatments like HCQ and Ivermectin, exist, but the Defendants banned their use:

(a) the use of a five-day course of Ivermectin is associated with lower mortality in hospitalized patients with coronavirus disease.[99] There are 89 studies, 48 of which are peer reviewed, to date, which review the efficacy of ivermectin.[100]

(b) Hydroxychloroquine (HCQ) is effective both as a pre-exposure prophylaxis and as early post-exposure treatment, when administered in appropriate doses, especially when started within the first five days of symptom onset.[101] There are 285 studies with respect to the efficacy of using HCQ as a treatment, including 213 which are peer-reviewed.[102]

(c) Vitamin D deficiency is associated with higher risk of COVID-19, and vitamin D may be used to help treat COVID-19.[103]

166. That the Defendants, Trudeau, Tam, Henry, and other Public Health Officers have publicly stated and represented that the Covid-19 "vaccines" will **not** result in immunity nor protect against transmission from and to the vaccinated, and

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Peer-reviewed paper: https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(20)30172-5/fulltext.

[99] https://www.sciencedirect.com/science/article/pii/S0012369220348984
https://www.sciencedirect.com/science/article/pii/S1201971220325066
https://www.sciencedirect.com/science/article/pii/S2589537020304648

[100] https://c19ivermectin.com

[101] https://www.sciencedirect.com/science/article/pii/S0924857920303423;
https://www.ejinme.com/article/S0953-6205(20)30335-6/fulltexthttps://www.medrxiv.org/content/10.1101/2020.08.20.20178772v1
https://www.amjmed.com/article/S0002-9343(20)30673-2/fulltext
https://c19study.com.

[102] https://c19study.com

[103] Database of all vitamin D COVID-19 studies. https://c19vitamind.com/

that, despite the fact that Trudeau has announced the procurement of "booster" Covid-19 vaccines up to and including, **2024,** the other measures will have to be maintained, all of which is irrational, unscientific, non-medical, and utterly illogical. The Plaintiffs state, and fact is, that such admissions by the Defendants render the proposal of a "Vaccine Passport", for any use, irrational, illogical, arbitrary, and contrary to ss.2,7 and 15 of the ***Charter***.

•COVID-Measures Worse than Virus

167. Early on, and into the summer of 2020, another thematic point of sound scientific and medical criticism is that the COVID - measures are worse than the virus as reflected in, **inter alia**, the following:

(a) One study suggests the ultimate changes in contact patterns triggered by social distancing measures **could end up having a negative effect on the population** and, in some cases, even worsen the outcome of the "epidemic".[104]

(b) **Cost of Coronavirus cure could be deadlier than the disease.**[105], by Carpay who is president of the Justice Centre for Constitutional Freedoms;

(c) **California ER Physicians:** Sheltering in Place Does More Harm than Good - Lowers Our Immune System.

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[104] J R Soc Interface. 2018 Aug; 15(145): 20180296.
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6127185/pdf/rsif20180296.pdf
https://www.greenmedinfo.com/blog/social-distancing-may-worsen-epidemic-outcomes

[105] https://www.jccf.ca/the-cost-of-the-coronavirus-cure-could-be-deadlier-than-the-disease/

(d) Doctors Dan Erickson and Artin Massihi of Accelerated Urgent Care in Kern County, California say the longer people stay inside, the more their immune system drops. The secondary effects, the child abuse, alcoholism, loss of revenue – all of these are, in our opinion, significantly more detrimental thing to society than a virus that has proven similar in nature to the seasonal flu that we have every year.[106]

(e) **Economic Consequences of Lockdown:**

> "Our leaders must reopen our country immediately. We will survive this virus. We will not survive this economic lockdown."[107]

168. With respect to treatment measures, the Defendants further ignored, and continue to ignore, the following expert criticism and opposition;

(a) **Ventilators are not working and may be increasing harm.** New evidence reveals there is no 'pneumonia' nor ARDS with CV 19. Ventilators are not only the wrong solution, but high pressure intubation can actually wind up causing more damage than without. Ventilators are not working and may be increasing harm. Over 80% of individuals put on ventilators are dying. [108]

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[106] https://vaccineimpact.com/2020/california-er-physicians-sheltering-in-place-does-more-harm-than-good-lowers-our-immune-system/
https://prepforthat.com/kern-county-california-doctors-coronavirus-end-shutdown/

[107] https://www.facebook.com/groups/221945012378955/

[108] https://web.archive.org/web/20200405061401/https://medium.com/@agaiziunas/covid-19-had-us-all-fooled-but-now-we-might-have-finally-found-its-secret-91182386efcb

(b) **Managing the Flow.** The truth for any new virus is that most people will be exposed to it. If one's goal is to NEVER get COVID-19, one would pretty much need to live on lockdown for the rest of his/her life. The ONLY reason for the lockdown is to manage the flow of people through our hospitals so that those who have acute symptoms will get the care they need to hopefully not die. Is the desire to manage the flow of people through our hospitals worth shutting down our economy? Given most hospitals are operating at 50% or less of capacity, have we not over managed the flow?

(c) **No Evidence Masks Work.** No RCT study with verified outcome shows a benefit for HCW or community members in households to wearing a mask or respirator. There is no such study. Likewise, no study exists that shows a benefit from a broad policy to wear masks in public. Furthermore, if there were any benefit to wearing a mask, because of the blocking power against droplets and aerosol particles, then there should be more benefit from wearing a respirator (N95) compared to a surgical mask, yet several large meta-analyses, and all the RCT, prove that there is no such relative benefit.

(d) **Ineffectiveness of Masks & Respirators** - D. G. Rancourt.[109]

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[109] https://www.researchgate.net/publication/340570735 Masks Don't Work A review of science relevant to COVID-19 social policy?fBritish Columbialid=IwAR3xOsnDOC2oRHau1k8F8 rA6CmfTvca6eZY1IS BH0GRc5uHhKYPoWEmfk

(e) **Conflicting Advice About Face Masks to Prevent CV 19.** There is currently no evidence that wearing a mask (whether medical or other types) by healthy persons in the wider community setting, including universal community masking, can prevent them from infection with respiratory viruses, including COVID-19.[110]

(f) **The surgeon general said not to wear a mask.[111]**

(g) **Over 3 times the risk of contracting influenza like illness if cloth mask is used versus no mask at all;[112]**

(h) "Penetration of cloth masks by particles was almost 97% compared to medicalmaskswith44%";[113]

(i) **Report on surgical mask induced deoxygenation during major surgery"[114];**

(j) **Co-Factors:** Not everyone is at equal risk of dying from COVID 19. CV 19 has spread unevenly around the world, clustered in several hot pockets, while leaving other areas with scant outbreaks. What other factors are contributing to the COVID 19 virus mortality?;

(k) **Link Between Air Pollution and CV 19;[115]**

(l) **Underlying Disease and COVID- 19.[116]**

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[110] https://thevaccinereaction.org/2020/04/face-masks-to-prevent-covid-19-conflicting-facts-advice/#_edn5

[111] https://www.businessinsider.com/who-no-need-for-healthy-people-to-wear-face-masks-2020-4

[112] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4420971/

[113] https://www.sciencedaily.com/releases/2015/04/150422121724.htm

[114] https://www.ncbi.nlm.nih.gov/pubmed/18500410

[115] https://thevaccinereaction.org/2020/04/study-shows-link-between-fine-particle-air-pollution-and-covid-19-mortality/

169. The Plaintiffs state, and the fact is, that the evidence is that far many, more people have died as result of the "pandemic" measures themselves, than purportedly from the "COVID- deaths", even if one takes the deaths "caused" by COVID as a given, through the following consequences of the measures:

(a) Spikes in suicide rates resulting in intense clinical depression from the measures;

(b) Spikes in drug over-dose attributable to measures;

(c) Spikes in domestic violence and murder as a direct result of the measures;

(d) Deaths resulting from the cancellation of over 170,000 medical surgeries;

(e) Deaths from persons afraid to leave their homes to obtain medical diagnosis and treatments; and

(f) Sub-space spikes in starvation, given the UN World- Food Bank warning that 130 Million additional people will be on the brink of starvation by end of 2020 due to disruption of supply chains due to COVID Measures.

170. It is to be noted that the above-noted criticism was early on in the outbreak which criticism has now intensified both in volume and accuracy, that the COVOD-measures are unwarranted, extreme, and not based on science and medicine.

171. Another pointed area of disagreement and criticism, which continues, along with the above-noted, which the Defendants refuse to acknowledge, ignore, and not

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[116] https://thevaccinereaction.org/2020/04/covid-19-hospitalized-patients-and-underlying-chronic-disease/

respond to, is the questioning of this as a "pandemic" rather than a typical seasonal viral respiratory illness, as reflected, inter alia, by the following:

(a) **California has a 0.0003% Chance of Death from Covid 19"**:

> "Initial models were woefully inadequate. They predicted millions of cases of death. Not of prevalence or incidence but deaths. This is not materializing. What is materializing in California is 12% positives... This equates to 4.7 million cases in California. This is the good news.... We have seen 1,227 deaths. California has 0.0003% chance of death from Covid-19. Is this enough to justify a lock-down?"
>
> **"COVID-19 Antibody Seroprevalence in Santa Clara County, California"**Conclusion: "The population prevalence of SARS-CoV-2 antibodies in Santa Clara County implies that the infection is much more widespread than indicated by the number of confirmed cases. Population prevalence estimates can now be used to calibrate epidemic and mortality projections." [117]

(b) The above research, in (a) above, is ground-breaking and provides foundational support for narratives such as :

(i) the initial models were incorrect;

(ii) conflicts of interest (Gates/Fauci/Democrats) contributed to an over-hyped response and failure to revisit despite availability of new data (confirmation bias);

(iii) we need to be rational here as the lock-down is hurting normal citizens - the 99% ;

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[117] https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v1

(iv) no evidence exists to justify forceful solutions like mandatory Covid-19 vaccinations, community immunity passwords, contact tracing, or increased domestic surveillance;

(v) we need to root out and remove all conflicts of interests in our public health institutions, both CDC and WHO; again

(vi) **Annual Influenza Deaths vs. CV 19 deaths.** It is claimed that 7 to 8,000+ Canadians die from season viral respiratory illness each year. The number of Canadians who have died from Covid-19 does not stray from annual season viral respiratory illness death total,[118] notwithstanding the inflated, false " covid-deaths";

(c) In 2009-2010, the world experienced the swine flu pandemic (H1N1). During that pandemic it is claimed that 203,000 people were killed world-wide by the virus. There was not a need to shut down our entire way of life in 2009. It is still unclear why this is the strategy being implemented today;

(d) The CDC has tracked the total number of Americans who die every week from pneumonia. For the last few weeks, that number has come in far lower than at the same moment in previous years. How could that be? **It seems that doctors are classifying conventional pneumonia deaths as COVID-19 deaths.** That would mean this epidemic is being credited for thousands of deaths that would have occurred if the virus never appeared here.

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[118] https://www.worldometers.info/coronavirus/?nsukey=8gR2B80EUvHglg1gz%2FFrRbGWu%2BhOoChcVMEV2tcidO%2FquhcnKlUPJ6Oevxq86h8W7SYtAC%2FYsoVycvKvhtVZgT%2FvREx1TON%2BBritish ColumbiaUTJ6uKZDsLJ4QDUYN0QG2n2ifAPsDuLBJZryuEWbYH8BsYmR4hwzToazvCLjqZsbV0YQAANZ46gHbo7Sf%2Beyzk1c3WND68j

(e) Number of influenza cases and deaths according to WHO every year.[119]

(f) Are the numbers of CV deaths accurate?[120]

(g) Montana physician **Dr. Annie Bukacek** discusses how COVID 19 death certificates are being manipulated;[121]

(h) **Italy: 99% who died from virus had other illness;**[122] The Key Points being that :

- The cases and deaths of this new disease COVID19 are being described as "flu-like symptoms with pneumonia" but **there is NO data that shows SARSCov2 is present in all of these cases/deaths.** Only coronavirus of which there are many strains.

- This is because **the PCR test is not reliable enough** to identify the new strain - laboratory testing is only identifying coronavirus. This is the flaw in the CDC/WHO theory of causality for this "new" disease "COVID19". They haven't provided any data about the presence of this new strain (SARSCov2) in COVID19 and it is known that many influenza viruses and bacteria cause "flu-like symptoms with pneumonia".

- Until you have evidence to prove the causality of COVID19 disease as being to SARsCov2 by showing that it is present in every case of the disease then there is no new disease. Koch's postulates need to be used to provide proof of causality.

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[119] http://www.euro.who.int/en/health-topics/communicable-diseases/influenza/seasonal-influenza/burden-of-influenza?fBritish Columbialid=IwAR0ZDNTwTXKGve_oJVmtZsGKFAl44JYSo6IAf4GkA47EYD8805b6FS-8Rkw

[120] https://www.ctvnews.ca/health/coronavirus/why-the-exact-death-toll-for-covid-19-may-never-be-known-1.4881619

[121] https://www.youtube.com/watch?v=CnmMNdiCz_s

[122] https://www.bloomberg.com/news/articles/2020-03-18/99-of-those-who-died-from-virus-had-other-illness-italy-says?utm_campaign=pol&utm_medium=bd&utm_source=applenews&fBritish Columbialid=IwAR0qN9k2HVrnAghrK-Wrl72J7oBoNY1vFAGY3dI-M7GWKirK6cfUeAI16yg

- **Mathematical Modeling Flawed**
  In March, UK epidemiologist Neil Ferguson from the Imperial College of London issued a mathematical "model" that predicted that as many as 500,000 in the UK would die from Covid-19. On March 24th Ferguson revised his modeling projections to read 20,000 deaths, and "likely far fewer." On April 2nd Ferguson revised it again to read 5,700 deaths. The problem was that many world leaders used Ferguson's original number to shut down most of the planet.[123]

(i) The Canadian government implemented the lockdown on the basis of Neil Ferguson's Imperial College mathematical modeling that was grossly flawed. Ferguson has drastically backtracked on his predictions which begs the question why is Canada now doubling down on the lockdown that will not be lifted until a vaccine is ready?

(j) **UK Decides CV 19 No Longer A 'High Consequence Infectious Disease'** As of March 19, 2020, COVID-19 is no longer considered to be a high consequence infectious diseases (HCID) in the UK.[124]

(k) High Consequence Infectious Disease Public Health England, have provided current information and regarding COVID-19 mortality rates as low. The Advisory Committee on Dangerous Pathogens (ACDP) in the UK and is also of the opinion that COVID-19 should no longer be classified as an HCID (High Consequence Infectious Disease).[125]

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[123] https://prepforthat.com/fear-mongering-covid-19-epidemiologist-says-he-was-wrong/

[124] https://prepforthat.com/uk-officials-covid-19-no-longer-high-consequence-infectious-disease/

(l) Our World in Data researchers announced this week that they had stopped relying on World Health Organization data for their models.[126]

(m) New Oxford study suggests millions have already built up coronavirus immunity.[127]

(n) Lack of Good Data. If you are going to do something as draconian as shut down an economy, you better be right, and you better have good data. The government has neither.[128]

(o) Dr Teresa Tam's incompetent virus response.[129]

(p) **British Columbia health officer Dr Bonnie Henry admits They did not use science to impose restrictions.**[130]

172. The measures have been also heavily criticized, on a legal basis, in Canada and abroad. Early on in the declaration, on March 26th, 2020 the UN Commissioner for Human Rights, Michelle Bachelet, took an opposite view to that of Dr. Teresa Tam, whose view is that it is appropriate to run rough-shod over these rights and worry about it later, where Bachelet early declared that:

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[125] https://www.gov.uk/topic/health-protection/infectious-diseases

[126] https://fee.org/articles/oxford-based-group-stops-using-who-data-for-coronavirus-reporting-citing-errors/?fBritish Columbialid=IwAR1okWvqn-qe7zvbHxoUY_U-4Nlqe6A8mOVwGqw4_N3qk9TXsfs_P6eEMJA

[127] https://news.yahoo.com/oxford-study-suggests-millions-people-221100162.html?soc_src=hl-viewer&soc_trk=fb

[128] https://www.foxnews.com/opinion/tucker-carlson-we-must-ask-the-experts-how-they-screwed-up-the-coronavirus-models-so-badly?fBritish Columbialid=IwAR0xrpFytibdv5JJLOR2fveTjvpj5b23tn7JFn2uemrXeu27GDFRpeuDLol

[129] https://www.spencerfernando.com/2020/03/29/devastating-timeline-reveals-total-incompetence-of-theresa-tams-virus-response/

[130] https://www.youtube.com/watch?v=SY8fclCOG4c&feature=youtu.be&fBritish Columbialid=IwAR0BmcUm4qk7BB3VuJRqvaJpyuB0VfyfkvmVM6HLmF-u0KiKJbD_cdKQIls&app=desktop

> "Lockdowns, quarantines and other such measures to contain and combat the spread of COVID-19 should always be carried out in strict accordance with human rights standards and in a way that is necessary and proportionate to the evaluated risk."

173. Former UK Supreme Court Justice Lord Sumpton was an early opponent to the lock-down measures. In a BBC interview of May18th, 2020, he re-iterated and stated, **inter alia**, as follows:

> JS: because they seem to me to have no real purpose in continuing the lockdown other than to spare themselves public criticism. now one does understand why politicians don't want to be criticized but it's the mark of a statesman that you're prepared to stand up for the national interest and not simply to run away before public opinion. especially when you have in a sense created that public opinion yourself by frightening the daylights out of people over the over the last eight weeks and trying to persuade them that this is a much more virulent epidemic than it actually is.
> ....
> LS: what i'm advocating now is that the lockdown should become entirely voluntary. it is up to us, not the state, to decide what risks we are going to take with our own bodies. now, the traditional answer that people give to that is: "well, but by going out or in the streets and in shops and things you are infecting other people". but you don't have to take that risk you can voluntarily self-isolate. you don't have to go into the streets. you don't have to go to the shops. people who feel vulnerable can self-isolate, and the rest of us can then get on with our lives.
>
> ....
>
> we have never lived in a risk-free world and we're never going to live in a risk-free world.
>
> ...
>
> we are entitled to take risks with our own lives especially when basically life is only worth living if you are prepared to engage in social activities. which inevitably involve risk. that is part of life.

174. The Plaintiffs state, and fact is, that the above-noted **scientific and medical expert opinions,** against and in severe criticism of the "pandemic" declaration, and its draconian and un-necessary measures, **are not exhaustive, but examples**. The Plaintiffs state, and fact is, that the Defendants have never acknowledged, addressed, spoken to, nor responded to these contrary expert views, and further state that the Defendants, including the mega-social media, such as YouTube, Facebook, Amazon, Google, Yahoo and like, as well as CBC, have intentionally suppressed, censored, belittled and removed the publication of any such contrary views, contrary to the principles and methodology of science and medicine, with the acquiescence and actual support of the Canadian Federal government, which government threatens to add criminal sanctions to assist these media for what they irrationally, arbitrarily and unscientifically deem "misinformation" , and further violate the Plaintiffs' rights to freedom of speech, expression, and the media, contrary to s.2 of the **Charter**, by the government's acts and omissions in making threats of criminalizing speech, and doing absolutely nothing, by omission, to regulate this type of "Stalinist censorship".

175. Since the summer of 2020, this factor of the measures being in force, and causing more devastation than the virus, has gone from severe to catastrophic as reflected by:

(a) There are more suicides because of the measures and purported deaths by Covid-19;

(b) There are more drug overdoses because of the measures and purported deaths by Covid-19;

(c) There is more starvation caused by the measures and purported deaths by Covid-19;

(d) There are far more deaths, from cancelled, necessary surgeries and fear to access medical treatment for fear of covid, than purportedly from Covid itself.

(e) There are devastating mental health disorders caused by the measures;

(f) Domestic violence, child, and sexual abuse have sky-rocketed;

(g) Small businesses and livelihoods, to the tune of millions, have been obliterated.

- **D/ THE SCIENCE & MEDICINE OF COVID-19**

- **Summary (Overview)**

176. The Plaintiffs state, and the fact is, that the World Health Organization, ("WHO"), our federal, provincial, and municipal governments, and the mainstream media, propagate that we are facing the biggest threat to humanity in our lifetime. This is false.

177. The fact is that, false and baseless predictions of wide-spread infection with high rates of mortality persuaded governments that unprecedented containment measures were necessary to save us from certain peril.

178. The fact is that, while there is more about the SARS-CoV-2("COVID-19") coronavirus that needs to be understood, the scientific and medical evidence

clearly demonstrates that the mathematical modeling used to justify extreme containment measures were invalid. Further, that the vast majority of the population is not at serious risk of complications or mortality as a result of exposure to COVID-19.

179. The fact is that, the mass and indiscriminate containment of citizens, the restriction of access to our economy, courts, parliament and livelihoods, medical and therapeutic care, and the imposition of physical distancing and other restrictions are measures that have never before been implemented nor tested, nor have a scientific or medical basis.

180. The fact is that, the impact of these measures on physical, emotional, psychological, and economic well-being is profoundly destructive, unwarranted, and clearly not sustainable.

181. The fact is that, these drastic isolation measures are not supported by scientific or medical evidence. There is considerable agreement in the scientific community that such drastic measures are not sustainable nor warranted or justified, and while these measures may delay viral spread, they are unlikely to impact overall morbidity.

182. The fact is that, this over-hyped COVID-19 pandemic narrative is creating unnecessary panic and being used to justify systemic governmental violations of the rights and freedoms that form the basis of our society, including our constitutional rights, sovereignty, privacy, rule of law, financial security, and even our very democracy.

183. The fact is that, it is clear that significant violations of the Plaintiffs' rights and freedoms are being perpetrated by the federal, provincial and municipal governments and health authorities.

184. The fact is that, as a result of all of the above, the Plaintiffs have suffered and continue to suffer, severe violations of their constitutional rights which are justified on any measurement, including s. 1 of the **Charter.**

- **The Covid-Measures Unscientific, Non-Medical, Ineffective, and Extreme**

185. From the on-set of the declared emergency to summer of 2020, the Plaintiffs state and the fact is, that the Measures implemented lack scientific and medical evidence to support containment measures in that:

   (a) Mass and indiscriminate lockdown of the general population has not been previously attempted in modern history, and has no scientific nor medical basis. In fact, Dr. Bonnie Henry, BRITISH COLUMBIA Chief Medical Officer, has flatly stated that the measures are not based on science or medicine.

   (b) A 2011 review of the literature to evaluate the effectiveness of social distancing measures such as school closures, travel restrictions, and restrictions on mass gatherings to address an influenza pandemic concluded that *"such drastic restrictions are not economically feasible and are predicted to delay viral spread but not impact overall morbidity."* [131]

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[131] Social Distancing as a Pandemic Influenza Prevention Measure https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

(c) There are no realistic and contextual studies of the negative social, family, psychological, and individual health consequences of extended general population lockdowns, nor the impact on the national economy.

(d) The long-term impact of the broadly applied infringements of civil rights and freedoms is not known, including any permanent structural erosion of democracy itself due to increased authoritarianism and heightened regulatory or penal consequences for violating government directives.

(e) The measures enacted by the federal, provincial and municipal governments are unprecedented.

(f) The government has acted in diametrical opposition to the precautionary principle: *"Government shall not act with insufficient scientific knowledge, if the action has any likelihood of causing more harm than good"*.

(g) Justification for the early panic response has not been corroborated. [132]

(h) Faith in epidemic-modeling and the resulting mitigation strategies are not justified.

(i) Physicians globally are expressing alarm over the exponentially growing negative health consequences of the national shutdown. [133] [134]

(j) Despite the importance given to physical distancing as a containment measure, there is a lack of scientific evidence on the effectiveness of such intervention on the long-term health of citizens. [135] [136]

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132 http://ocla.ca/wp-content/uploads/2014/01/OCLA-Report-2020-1-Criticism-of-Government-Response-to-COVID19.pdf

[133] https://www.scribd.com/document/462319362/A-Doctor-a-Day-Letter-Signed#from_embed

[134] https://www.forbes.com/sites/gracemarieturner/2020/05/22/600-physicians-say-lockdowns-are-a-mass-casualty-incident/#20248e5250fa

(k) There is no scientific evidence to substantiate the effectiveness of two meter 'physical distancing' as an intervention to reduce SARS-CoV-2 transmission and infection and to improve overall health. [137]

(l) Dr. Martin Dubravec, MD, a Clinical Immunologist states: *"The bottom line is that herd immunity is what will stop the virus from spreading. Not containment. Not a vaccine. Not staying locked in our homes. It's time we had an honest conversation on how to move beyond containment."* [138]

(m) A review of the scientific literature with regards to the use of masking concluded there is no scientific evidence to substantiate the effectiveness of masking of the general public to prevent viral infection and transmission. [139]

(n) Denis Rancourt, Ph.D. has identified the many unknowns regarding the potential harm from a broad public policy of masking. Rancourt concludes: "In an absence of knowledge, governments should not make policies that have a hypothetical potential to cause harm. The government has an onus barrier before it instigates a broad social-engineering intervention or allows corporations to exploit fear-based sentiments." [140]

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[135] Benjamin E Berkman Mitigating pandemic influenza: the ethics of implementing a school closure policy. Journal of Public Health Management and Practice: JPHMP, 14(4):372–378, August 2008. PMID: 18552649.

[136] https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

[137] https://www.zuercher-presse.com/virologe-hendrick-streeck-gibt-keine-gefahr-beim-einkaufen-jemand-anderen-zu-infizieren/?cn-reloaded=1

[138] https://aapsonline.org/coronavirus-covid-19-public-health-apocalypse-or-anti-american/

[139] https://www.researchgate.net/publication/340570735_Masks_Don't_Work_A_review_of_science_relevant_to_COVID-19_social_policy

[140] https://www.researchgate.net/publication/340570735_Masks_Don't_Work_A_review_of_science_relevant_to_COVID-19_social_policy

(o) A study of cloth masks cautions against the use of cloth masks. The study concludes: "As a precautionary measure, cloth masks should not be recommended." [141]

(p) According to Dr. Richard Schabas, former Chief Medical Officer for Ontario -*"Quarantine belongs back in the Middle Ages. Save your masks for robbing banks. Stay calm and carry on. Let's not make our attempted cures worse than the disease."* [142]

(q) On May 20, 2020, Dr. Teresa Tam, Canada's Chief Medical Officer, publicly advised the use of non-medical masks for the general public to provide an *"added layer of protection"* that could help prevent asymptomatic or pre-symptomatic Covid-19 patients from unknowingly infecting others. Dr. Tam's advice is not supported by scientific evidence. [143]

(r) It would appear that any advice/requirement to use masks is for a purpose/agenda other than the prevention of viral infection and transmission.

(s) A paper published on January 30, 2020 in *The New England Journal of Medicine* (*NEJM*) which appeared to confirm that individuals who are asymptomatic can transmit SARS-CoV-2 to others has subsequently proven to contain major flaws and errors.[144]

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[141] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4420971/

[142] https://www.theglobeandmail.com/opinion/article-strictly-by-the-numbers-the-coronavirus-does-not-register-as-a-dire/

[143] https://www.politico.com/news/2020/05/20/canada-non-medical-masks-provinces-reopen-271008

[144] https://www.sciencemag.org/news/2020/02/paper-non-symptomatic-patient-transmitting-coronavirus-wrong

(t) The imposition of mass and indiscriminate self-isolation measures prevents the development of natural immunity necessary to secure herd immunity and end the epidemic. [145]

(u) On April 6, 2020, German epidemiologist, Knut Wittkowski, released a statement warning that artificially suppressing the virus among low risk people like school children may *"increase the number of new infections"* as it keeps the virus circulating much longer than it normally would. [146]

(v) On March 24, 2020 global medical experts declared that efforts to contain the virus through self-isolation measures would negatively impact population immunity, maintain a high proportion of susceptible individuals in the population, prolong the outbreak putting more lives at risk, damage our economy and the mental stability and health of the more vulnerable. [147] [148]

(w) A review of recent literature pertaining to social distancing measures conducted by David Roth and Dr. Bonnie Henry of the British Columbia Centre for Disease Control concluded the following: a) widespread proactive school closures are likely not an effective prevention measure during an influenza pandemic; b) stringent travel restrictions and border control may briefly delay imminent pandemics, these approaches are neither economically nor socially feasible; and c) there is no recent evidence outlining the effectiveness of the prohibition of mass gatherings. [149]

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[145] https://www.aier.org/article/herd-immunity-is-misleading/

[146] Stand Up for Your Rights, says Bio-Statistician Knut M Wittkowski American Institute for Economic Research. April 6, 2020 https://www.aier.org/article/stand-up-for-your-rights-says-professor-knut-m-wittkowski/

[147] https://off-guardian.org/2020/03/24/12-experts-questioning-the-coronavirus-panic/

[148] https://www.europereloaded.com/twenty-two-experts-questioning-the-coronavirus-panic-videos-scientific-common-sense/

(x) According to a public statement issued by the British Columbia Ministry of Health: a) COVID-19 virus has a very low infection rate in children and youth; b) In British Columbia, less than 1% of children and youth tested have been COVID-19 positive; c) There is no conclusive evidence that children who are asymptomatic pose a risk to other children or to adults, and d) Schools and childcare facility closures have significant negative mental health and socioeconomic impacts on vulnerable children and youth. [150]

(y) According to a May 21, 2020 letter from Dr. Mark Lysyshyn, MD, Deputy Chief Medical Health Officer with Vancouver Coastal Health: *"Although children are often at increased risk for viral respiratory illnesses, that is not the case with COVID-19. Compared to adults, children are less likely to become infected with COVID-19, less likely to develop severe illness as a result of infection and less likely to transmit the infection to others."* Dr. Lysyshyn further states: *"Non-medical masks are not needed or recommended. Personal protective equipment such as medical masks and gloves are not recommended in the school environment."* [151]

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[149] https://nccid.ca/wp-content/uploads/sites/2/2015/04/H1N1_3_final.pdf

[150] https://www2.gov.British Columbia.ca/assets/gov/health/about-British Columbia-s-health-care-system/office-of-the-provincial-health-officer/covid-19/covid-19-pho-guidance-k-12-schools.pdf

[151] http://www.vch.ca/Documents/COVID-VCH-Schools-May-21-2020.pdf

(z) On May 21, 2020, British Columbia's Chief Health Officer, Dr. Bonnie Henry stated: *"We're encouraging people [to wear masks] as a mark of respect, as a mark of politeness, and paying attention to the welfare of others."* The recommendation to mask no longer is on the basis of effectiveness but instead is being promoted as a social grace. [152]

(aa) British Columbia's Chief Health Officer, Dr. Bonnie Henry, when addressing a question regarding the inconsistency among the provinces of Canada on COVID-19 restrictions placed on Canadians stated: *"None of this is based on science."* [153]

(bb) The reported number of deaths attributed to SARS-CoV-2 is demonstrably unreliable given the inclusion of "*presumptive*" deaths, and the failure of the medical establishment to differentiate between individuals dying *from* COVID 19 and those with co-morbidities dying *with* COVID 19. [154] [155]

(cc) The failure to differentiate between individuals dying *from* COVID 19 and those with co-morbidities dying *with* COVID 19 inflates the risk of mortality from SARS-CoV-2 and undermines confidence in any response strategy based on mortality statistics. [156]

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[152] https://www.straight.com/covid-19-pandemic/may-21-coronavirus-update-British Columbia-resistance-health-measures-regional-restrictions-gender-differences-second-wave

[153] https://www.youtube.com/watch?v=SY8fclCOG4c&feature=youtu.be&fBritish Columbialid=IwAR0BmcUm4qk7BB3VuJRqvaJpyuB0VfyfkvmVM6HLmF-u0KiKJbD_cdKQIls&app=desktop

[154] Why the exact death toll for COVID-19 may never be known. CTV News, April 3, 2020 https://www.ctvnews.ca/health/coronavirus/why-the-exact-death-toll-for-covid-19-may-never-be-known-1.4881619

[155] https://www.cpsBritish Columbia.ca/for-physicians/college-connector/2020-V08-02/04

[156] https://www.bloomberg.com/news/articles/2020-03-18/99-of-those-who-died-from-virus-had-other-illness-italy-says

(dd) Doctors globally are being pressured to issue death certificates that identify COVID 19 as the cause of death even when other co-morbidity issues are the more likely cause of death.

(ee) The presentation of mortality data, expressed as a percentage of deaths of *tested and confirmed cases*, is distorting the risk and creating undue panic. This data fails to include a significant percentage of the population who contracted the virus but were not tested nor confirmed and who recovered without medical intervention.

(ff) To date, the number of reported deaths attributed to SARS-CoV-2 is not out of "normal" range when compared to the annual mortality from influenza and pneumonia (seasonal viral respiratory illness) recorded through the last decade. [157] [158] [159]

(gg) According to Dr. Richard Schabas, former Chief Medical Officer of Ontario, strictly by the numbers, the coronavirus does not register as a dire global crisis.

(hh) No data has been provided by the Government of Canada nor British Columbia to indicate that the total mortality in Canada has increased substantially from previous years.

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[157] Strictly by the numbers, the coronavirus does not register as a dire global crisis. Richard Schabas. The Globe and Mail. March 9, 2020
https://www.theglobeandmail.com/opinion/article-strictly-by-the-numbers-the-coronavirus-does-not-register-as-a-dire/

[158] New Data Suggest the Coronavirus Isn't as Deadly as We Thought. WDJ/Opinion. April 17, 2020
https://www.greenmedinfo.com/blog/stanford-team-finds-evidence-covid-19-mortality-rate-low-2-17-times-lower-whos-esta
https://www.medrxiv.org/content/10.1101/2020.04.14.20062463v2

[159] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7102597/?fBritish Columbialid=IwAR29vpTe-Dk-_xoVzVRbuAgVhil1k0DcZkGgyYsak6IC-OByjZcBRP6cyjc

(ii) Mortality modeling by the World Health Organization, Imperial College of London, and the US Institute for Health Metrics and Evaluation have all been drastically "downgraded". Strategies and measures based on these original predictions are invalid.[160] [161]

(jj) As of March 19, 2020, the status of COVID-19 in the United Kingdom was downgraded. COVID-19 is no longer considered a high consequence infectious disease (HCID). The Advisory Committee on Dangerous Pathogens (ACDP) in the UK is also of the opinion that COVID-19 should no longer be classified as an HCID (High Consequence Infectious Disease). [162] [163]

(kk) **On March 26, 2020,** Dr. Anthony Fauci published an editorial in the *New England Journal of Medicine* stating that *"the overall clinical consequences of Covid-19 may ultimately be more akin to those of a severe seasonal influenza with a case fatality rate of perhaps 0.1%."* [164]

(ll) On April 9, 2020, Canadian public health officials stated: "In a best-case scenario, Canada's total COVID-19 deaths can range from 11,000 to 22,000." And "In the bad scenarios, deaths go well over 300,000." As of May 21, 2020, the total reported deaths from

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[160] How One Model Simulated 2.2 Million U.S. Deaths from COVID-19. Cato Institute. April 21, 2020 https://www.cato.org/blog/how-one-model-simulated-22-million-us-deaths-covid-19

[161] https://prepforthat.com/fear-mongering-covid-19-epidemiologist-says-he-was-wrong/

[162] https://www.gov.uk/topic/health-protection/infectious-diseases

[163] https://prepforthat.com/uk-officials-covid-19-no-longer-high-consequence-infectious-disease/

[164] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7121221/

COVID 19 in Canada was 6,145. As of July 2, 2020, the total deaths attributed to COVID 19 in Canada was 8,642. In 2018, the mortality rate of the 2018 influenza/pneumonia in Canada which was **23 per 100,000**. [165] In a population of 37.7 M, this equates to approximately 8,671 deaths. This is the mortality even though a vaccine exists for both influenza and pneumonia and there is a high uptake rate in the senior population.

(mm) The World Health Organization knew as early as February 28, 2020 that most people will have mild illness from SARS-CoV-2 infection and get better without needing any special care. [166]

(nn) The Canadian government has implemented a re-start strategy that continues to maintain the unsubstantiated narrative that the SARS-CoV-2 virus is extra-ordinarily dangerous and requires extra-ordinary social distancing measures never before implemented.

(oo) The re-start strategy recommended by the federal and various provincial governments is based on 'sector' rather than 'risk'. There is no evidence that a re-start based on sector has scientific merit.

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[165] https://www.statista.com/statistics/434445/death-rate-for-influenza-and-pneumonia-in-canada/

[166] WHO Director-General's opening remarks at the media briefing on COVID-19 - 28 February 2020 https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---28-february-2020

(pp) According to a number of infectious disease experts, hospital capacity, rather than the number of infections should be the metric of choice for relaxing restrictions. [167]

(qq) There is no evidence that harms caused by the mass and indiscriminate containment of citizens was calculated and considered in the modeling and strategic planning response to SARS-CoV-2. [168]

(rr) SARS (2003), Swine Flu/H1N1 (2009), and MERS (2012) were all considered pandemics by the World Health Organization. Each of these pandemics were effectively contained without lockdowns, economic ruin, violations of privacy, and the indefinite loss of the right to work and personal freedoms. SARS and MERS dissipated on their own naturally without any vaccine intervention. [169]

(ss) Academic studies of media coverage during the 2003 Canadian SARS outbreak concluded that the media coverage was excessive, sensationalist, and sometimes inaccurate. Government health agencies were criticized for lacking a unified message and communications strategy, resulting in confusion and panic about the disease. [170] These same criticisms hold even more true for media and government response to SARS-CoV-2.

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[167] https://nationalpost.com/opinion/opinion-we-are-infectious-disease-experts-its-time-to-lift-the-covid-19-lockdowns

[168] Rethinking the Coronavirus Shutdown. WSJ/Opinion. March 19, 2020 https://www.wsj.com/articles/rethinking-the-coronavirus-shutdown-11584659154

[169] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2094974/

(tt) The suspension of our civil liberties is not justified by the known risk posed by SARS-CoV-2.

(uu) In a statement released on March 24, 2020, professor Peter Gotzche states: *"The coronavirus mass panic is not justified."* The suspension of our right to liberty, to work, to travel, and to conduct commerce is not justified by the known risk posed by SARS-CoV-2. [171]

(vv) There is no independent human rights oversight committee to track human rights violations associated with SARS-CoV-2 response measures in Canada.

(ww) Communications about SARS-CoV-2 by the Government of Canada and mainstream media have been exaggerated, distorted, irresponsible, and appear to have been purposely designed to evoke fear and panic. The fear is out of proportion to the actual risk of mortality.

(xx) Governments and media have repeatedly failed to properly distinguish between the 'risk of infection' and 'the risk of mortality'. For the vast majority of the population the risk of mortality is extremely low.

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[170] https://www.thecanadianencyclopedia.ca/en/article/sars-severe-acute-respiratory-syndrome

[171] The Coronavirus mass panic is not justified. Professor Peter C. Gøtzsche24 March 2020 https://www.deadlymedicines.dk/wp-content/uploads/G%C3%B8tzsche-The-Coronavirus-mass-panic-is-not-justified.pdf

(yy) Prevalence of SARS-CoV-2 in the entire Canadian population is very low. Extreme social controls should never be used in low prevalence epidemics.

(zz) As presented by PHAC, the modelling techniques used to establish probabilities of the epidemic trends and thus "inform" policy decisions have no basis in evidence, are completely inflated, and essentially amount to statistical chicanery.

(aaa) Using total case numbers as though they represent the risk of being infected with SARS-CoV-2 is perception management. While these numbers may be of interest for epidemiological study, they have little bearing on the true risk facing citizens.

(bbb) Severity of SARS-CoV-2 is estimated by infection fatality rates. Infection fatality rates cannot be established until the total number of cases, both symptomatic and asymptomatic, in the entire population can be estimated.

(ccc) The Canadian government failed to perform a national random sample test to establish a SARS-CoV-2 baseline across the entire population to justify the restrictions and violations of rights and freedoms.

(ddd) Exaggerated claims and distorted messages have contributed to an atmosphere of fear and uncertainty that is destructive to the well-being of Canadians. It would appear that the real epidemic is an epidemic of fear.

(eee) The evoked fear and panic is so entrenched amongst a large proportion of Canadians that it is extremely difficult to reverse that message even when the scientific data does not support such panic.

(fff) As recent as May 22, 2020 Prime Minister Justin Trudeau told reporters that contact tracing needs to be ramped up across the county. Trudeau stated that he "strongly recommends" provinces use cell phone apps when they become available, and that this use would likely be mandated. Use of surveillance technologies to monitor citizens constitutes a clear violation of our right to privacy.

(ggg) As of May 24, 2020, the Prime Minister of Canada had not invoked the *Emergencies Act*, nor has he to date. Therefore, emergency measures announced by the Prime Minister and his public statements to Canadians to "just stay home" have no legal basis or authority, are an abuse of power, and is resulting in confusing, dangerous and unlawful messaging.

(hhh) The Prime Minister of Canada and British Columbia Premier John Horgan have repeatedly stated that *"life will not return to normal* *until a vaccine is found*". It is irresponsible to base a return to normal upon a vaccine when there is no guarantee that an effective and safe vaccine can be developed.

(iii) There are significant risks to both individuals and to confidence in the health care system by accelerating the development of a SARS-CoV-2 vaccine by relaxing normal and prudent safety testing measures.

(jjj) Health Canada approved human trials of a SARS-CoV-2, under an Interim Order, of a SARS-CoV-2 vaccine (May 19, 2020) without clear evidence that prior animal testing to identify the potential risk of pathogenic priming (immune enhancement) has been conducted. Pathogenic priming has prevented the development of an effective and safe coronavirus vaccine to date.

(kkk) Dr. Peter Hotez of Baylor College (who has previously tried to develop a SARS vaccine) told a US Congressional Committee on March 5, 2020 that coronavirus vaccines have always had a "unique potential safety problem" — a "kind of paradoxical immune enhancement phenomenon." [172]

(lll) To impose through influence, mandate, or coercion an inadequately tested SARS-CoV-2 vaccine product upon all

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[172] https://www.c-span.org/video/?470035-1/house-science-space-technology-committee-hearing-coronavirus&start=1380

Canadians when 99% of the population is not at risk of mortality is reckless, irresponsible and immoral.

(mmm) A SARS-CoV-2 vaccine ought to be targeted at the less than 1% of the population that is at risk of mortality, rather than the more than 99% that is not at risk.

(nnn) There is no moral, medical or ethical justification to ignore prudent safety protocols and to suggest that the use of this yet to be developed medical product is necessary for life to return to normal.

(ooo) Dr. Allan S. Cunningham, a retired pediatrician, has raised the possibility that a potential contributor to the current coronavirus outbreak is the seasonal influenza vaccine. A randomized placebo-controlled trial in children showed that the influenza vaccine increased fivefold the risk of acute respiratory infections caused by a group of non influenza viruses, including coronaviruses. [173] [174]

(ppp) A study of US military personnel confirms that those who received an influenza vaccine had an increased susceptibility to coronavirus infection. [175]

(qqq) EU numbers show correlation between influenza vaccine and coronavirus deaths. The countries with highest death rates (Belgium, Spain, Italy, UK, France, Netherlands, Sweden, Ireland

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[173] https://www.bmj.com/content/368/bmj.m810/rr-0

[174] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3404712/

[175] https://www.sciencedirect.com/science/article/pii/S0264410X19313647

and USA) had all vaccinated at least half of their elderly population against influenza.[176]

(rrr) Canada continues to be one of only two G20 Nations which fails to compensate citizens who are injured and killed by government approved and recommended vaccine products. The other is Russia.

(sss) The unwillingness of the Government of Canada to provide compensation for vaccine injury, while at the same time imposing vaccine products upon its citizens, is unconscionable.

(ttt) To rely on a vaccine as the required strategy to returning life to normal is reckless, irresponsible and unwarranted.

(uuu) Jonathan Kimmelman, director of McGill University's biomedical ethics unit stated: "Outbreaks and national emergencies often create pressure to suspend rights, standards and/or normal rules of ethical conduct. Often our decision to do so seems unwise in retrospect."

(vvv) On June 8th, 2020 the WHO publicly announced that the risk of symptomatic spreading of the virus was "**very rare**". This statement removed by Facebook as "fake News", given its very early, prior contrary assessment, the WHO, the next day partially retracted this June 8th, 2020 statement by qualifying without details or explanation that modeling suggested Asymptomatic transmission is possibly as high as 40%: NO evidence or study was provided, nor the basis of the previous day's release. On July 4th, 2020 the WHO re-re paddled back to its original June 8th, 2020 position.

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[176] https://www.thegatewaypundit.com/2020/05/niall-mccrae-david-kurten-eu-numbers-show-correlation-flu-vaccine-coronavirus-deaths/

186. A posted report announcing the June 8th, 2020 WHO release, on Facebook, with respect that Asymptomatic transmission was very rare, which was immediately removed by Facebook as "Fake News" for, contradicting earlier WHO releases.

187. From the summer of 2020, to the present, the alarm and clarity that the Defendants have **not** been following the science, or medicine, has intensified, world-wide, and in Canada, while the Respondents continue to refuse to disclose the source and substance of whose and what science they are following, based on what?

188. British Columbia doctors have written Bonnie Henry, publicly, requesting she disclose and explain her "scientific" basis for the measures. She has consistently refused. In fact, doctor(s) doing so, or criticizing Covid-measures such as Dr. Stephen Malthouse, and other, have been pursued by their Regulatory College for simply asking questions of Bonnie Henry and the Covid measures. Directors from the College of Surgery and Physicians of British Columbia have issued, on the pain of discipline and removal of medical license, that no criticism of the official Public Health opinions, dictates, and treatment will be tolerated by the College.

189. This is not restricted to British Columbia. On April 20th, 2021 Ontario doctors demanded, of Ontario Premier Doug Ford, an open and public discussion and debate of his measures as they do not add up to science or medicine, like the measures in British Columbia.

•E/ HYPER – INFLATED, DISTORDETED TOTAL NUMBER OF CV-19 "CASES" & "DEATHS"

190. Since the on-set of the "emergency", and into the summer of 2020, the Plaintiffs state that the total number of Covid-19 cases is the basis for almost all of the Covid-19 data including deaths in those cases, recovery from those cases, hospitalizations and ICU admissions of those cases and total active cases.[177] Total case numbers are also used for other epidemiological metrics (e.g., virulence and transmission rates of Covid-19).

191. Yet the total case numbers are inflated by both RT-PRC testing and WHO coding definitions.

192. The Plaintiffs state that the WHO coding of cases allows 'virus not identified', i.e., probable cases to be counted as Covid-19 cases.[178] WHO coding also inflates death data numbers by requiring **all cases** where Covid-19 is "probable or confirmed" to be certified as a death due to Covid-19 regardless of

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[177] Public Health Agency of Canada, https://www.canada.ca/en/public- health/services/diseases/2019-novel-coronavirus-infection/health-professionals/national-case-definition.html"Confirmed:A person with laboratory confirmation of infection with the virus that causes COVID-19 performed at a community, hospital or reference laboratory (NML or a provincial public health laboratory) running a validated assay. This consists of detection of at least one specific gene target by a NAAT assay (e.g. real-time PCR or nucleic acid sequencing).

[178] WHO ICD-10 Coding https://www.who.int/classifications/icd/COVID-19-coding-icd10.pdf?ua=1]

comorbidities. Admonishing physicians to "always apply these instructions, whether they can be considered medically correct or not."[179]

193. RT-PCR was never intended as a diagnostic tool[180] and is not an antigen test[181].

194. The Plaintiffs state that the PCR tests are based on an arbitrary cycling number (Ct) that is not consistent among testing laboratories.[182] "Cycling too much could result in false positives as background fluorescence builds up in the PCR reaction." Tests can show positive for minute amounts of RNA that are not causing illness and for non-infectious fragments of RNA.[183] RT-PCR tests cannot prove the pathogenic nature of the RNA.

195. RT-PCR tests have a specificity of 80-85%.[184] This means 15-20% of the time a positive test does not indicate the presence of RNA of SARS-CoV-2, but of some other RNA source. RT-PCR testing is not reliable for SARS-CoV-2 testing.[185]

196. RT-PCR tests are more likely to be false positive than false negative.[186] In low prevalence countries like Canada: "Such [false positive] rates would have large

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[179] WHO Cause of Death Guidelines https://www.who.int/classifications/icd/Guidelines_Cause_of_Death_COVID-19-20200420-EN.pdf?ua=1

[180] Dr. Judy Mikowitz https://articles.mercola.com/sites/articles/archive/2020/05/03/is-the-new-coronavirus-created-in-a-lab.aspx "Epidemiology is not done with PCR. In fact, Kary Mullis who invented PCR, Nobel Laureate, and others, said PCR was never intended for diagnostic testing."

[181] Not an Antigen Test: Prof Eleanor Riley, Professor of Immunology and Infectious Disease, University of Edinburgh and Dr Colin Butter, Associate Professor and Programme Leader in Bioveterinary Science, University of Lincoln https://www.sciencemediacentre.org/expert-comment-on-different-types-of-testing-for-covid-19/

[182] Issues with the RT-PCR Coronavirus Test, David Crowe and Dr. Stephen Bustin, April 23, 2020 https://theinfectiousmyth.com/coronavirus/RT-PCR_Test_Issues.php]

[183] https://www.independent.co.uk/news/world/asia/coronavirus-south-korea-patients-infected-twice-test-a9491986.html

[184] RT-PCR Test 80–85% specificity per Dr. James Gill, Warwick Medical School, England https://www.sciencemediacentre.org/expert-comment-on-different-types-of-testing-for-covid-19/]

[185] Stability Issues of RT-PCR Testing of SARS-CoV-2, March 10, 2020 Abstract: https://pubmed.ncbi.nlm.nih.gov/32219885/
Full text: https://onlinelibrary.wiley.com/doi/full/10.1002/jmv.25786
"In our study, we found a potentially high false negative rate of RT-PCR testing for SARS-CoV-2 in hospitalized patients in Wuhan clinically diagnosed with COVID-19. Furthermore, the RT-PCR results showed a fluctuating trend. These may be caused by insufficient viral material in the specimen, laboratory error during sampling, or restrictions on sample transportation."]

impacts on test data when prevalence is low. Inclusion of such rates significantly alters four published analyses of population prevalence and asymptomatic ratio. The high false discovery rate that results, when prevalence is low, from false positive rates typical of RT-PCR assays of RNA viruses raises questions about the usefulness of mass testing…”[10]

197. The Plaintiffs state that the implications of false positive tests include the following: “There are myriad clinical and case management implications. Failure to appreciate the potential frequency of false positives and the consequent unreliability of positive test results across a range of scenarios could unnecessarily remove critical workers from service, expose uninfected individuals to greater risk of infection, delay or impede appropriate medical treatment, lead to inappropriate treatment, degrade patient care, waste personal protective equipment, waste human resources in unnecessary contact tracing, hinder the development of clinical improvements, and weaken clinical trials.”[187]

198. A Chinese study[188] found, “In the close contacts of COVID-19 patients, nearly half or even more of the 'asymptomatic infected individuals' reported in the active nucleic acid test screening might be false positives.”[189]

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[186] . 10 False positives in reverse transcription PCR testing for SARS-CoV-2 https://www.medrxiv.org/content/10.1101/2020.04.26.20080911v1.full.pdf]

[187] https://www.medrxiv.org/content/10.1101/2020.04.26.20080911v2 <https://www.medrxiv.org/content/10.1101/2020.04.26.20080911v2>

[188] Potential false-positive rate among the 'asymptomatic infected individuals' in close contacts of COVID-19 patients, March 23, 2020
http://html.rhhz.net/zhlxbx/017.htm
Full translation: https://theinfectiousmyth.com/articles/ZhuangFalsePositives.pdf

199. The Public Health Agency of Canada reports more than 1.4 million people have had PCR tests.[190] Considering the false positive rate, especially for contact tracing, this is not a good use of our resources (both dollars and testing staff).

200. As of June 15th, 2020 the COVID "statistics" are as follows:

(a) Population of Canada 2020--- 37,742,154;

(b) Total number of confirmed or probable cases as of June 15th -- 99,147;

(c) Therefore, 0.0026% of Canadians are testing positive;

(d) 0.00021% of Canadians are dying ''with'' or ''of COVID'' (there is no current differentiation between death "with" or "from" COVID statistically speaking). As of June 15,2020 the national death count from covid stands at 8,175, a completely inflated and distorted number, due to levels of gross mismanagement of patient care in institutions where outbreaks are reported, and death certificate mislabelling of dying ''with'' covid, as opposed to dying ''from'' covid. Meanwhile, the statistics (2018) for other causes of death, according to statistics Canada, in Canada were as follows:

(i) Suicides--- 3,811;
(ii) influenza and pneumonia (seasonal viral respiratory illness) --- 8,511*;

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[189] https://www.reddit.com/r/COVID19/comments/fik54b/false_positives_among_asymptomatic/ <https://www.reddit.com/r/COVID19/comments/fik54b/false_positives_among_asymptomatic/>

[190] PHAC Daily Update, May 25: 1,454,966 total people tested https://www.canada.ca/content/dam/phac-aspc/documents/services/diseases/2019-novel-coronavirus-infection/surv-covid19-epi-update-eng.pdf

(iii) accidents (unintentional injuries) ---13,290;
(iv) medical error (including medications)--- 28,000;
(v) heart disease--- 53,134;
(vi) cancer--- 79,536.

201. The Plaintiffs state, and fact is that the US, UK, and Italy, through their public health officials have publicly admitted that a COVID death is tallied as such, simply where the COVID virus is found, **albeit** inactive, and regardless of whether the patient died from another **primary** cause of death, such as from cancer in palliative care. Thus a senior US Health official, on April 19th,2020, Dr. Ezike, Director of Public Health, put it this way:

> That means, that if you were in hospice and had already been given a few weeks to live, and then you also were found to have COVID, that would be counted as a COVID death.
>
> ''It means technically if you died of a clear alternate cause but you had COVID at the same time, its still listed as a COVID death.
>
> Everyone who is listed as a COVID death doesn't mean that was the cause of the death, but they had COVID at the time of death.

The Plaintiffs state, and the fact is, that Canada uses the same system, mandated by the WHO, because the WHO collapsed three different ways of certifying and classifying death into one, in order to grossly inflate the number of deaths "attributable" to covid-19.

202. This includes someone like George Floyd who was killed (murdered) by four (4) Minneapolis police officers, who have been charged with murder, in that the official autopsy report stipulated that he had tested positive for COVID months

earlier. (Why George would be tested for COVID, in the circumstances, is beyond baffling).

203. The Plaintiffs state, and the fact is, that in many jurisdictions, such as New York City, a hospital is paid much more to deal with a "COVID-death", than a non-COVID death.

204. The Plaintiff states, and the facts is, that the false and faulty manner and method of determining a ''COVID-death'', is wholly and exclusively dictated by WHO guidelines and parroted by Chief Medical Officers in Canada, in furtherance of the WHO's false ''pandemic'', to instill baseless fears, in the WHO's non-medical agenda, at the control and instigation of Billionaire, Corporate, and Organizational Oligarchs, who actually control the agenda of the WHO, to effect their plan to install a New World (Economic) Order by means of economic shut-down and mandatory vaccinations and surveillance of the planet's population.

205. From the summer of 2020 to the present, the fraud, and fraudulent misuse of the PCR testing, which accounts for the "case-counts", and in turn the panic and justification for **ALL** Covid-measures continues, without the explanation to the public that:

(a) The inventor of the PCR test, Nobel-Prize winner Kary Mullis, made it clear that the PCR test **cannot** and **does not** detect any virus that it can diagnose **any** virus but is merely a screening investigative test and that, in order to verify the existence of a virus you must:

(i) Do a culture test to isolate and identify the virus; and

(ii) A concurrent blood-test to check for anti-bodies to verify that the virus is still infectious;

(b) The PCR test, when used at a threshold cycle of 35 or over, in the "positive" cases, 96.5% are false positives, which has been judicially excepted by three (3) courts, and currently British Columbia tests at between 43-45 cycles and which means that every time British Columbia announces a positive case count it needs to be reduced by 96.5%;

(c) That the PCR test will give a positive for all coronaviruses of which there are seven(7);

(d) That the PCR test will register and count as positive dead, **non**-infectious virus fragments;

(e) That dead, non-infectious virus fragments remain in the body for up to 80 days from the time the virus **ceases** to be infectious;

(f) That the positive "case(s) count(s)" has no relationship to the **death count.**

(g) In November 2020, a Portuguese court ruled that PCR tests are unreliable.[191]On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positives.[192] On February 16th, 2021, BC Health

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[191] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/

[192] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem

Officer, Bonnie Henry, admitted PCR tests are unreliable.[193] On April 8th, 2021, the Austrian court ruled the PCR was unsuited for COVID testing.[194]On April 8th, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter".[195] 9 On May 8th, 2021, the Swedish Public Health Agency stopped PCR Testing for the same reason.[196] On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard testified under cross examination in a trial before the court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[197]

206. In fact, as of April 2021, the Canadian and British Columbia claim that approximately 23,000 Canadians have died "from" and "with" Covid which is a fraudulent and misrepresenting statistic in that this is over the equivalent of two (2) flu seasons which means that 11,500 purportedly died in 2019-2020 and another 11,500 purportedly died in the 2020-2021 flu season. Even accepting the questionable dying "with Covid", 11,500 is not significantly higher than the

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[193] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[194] https://greatgameindia.com/austria-court-pcr-test/
[195] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[196] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis
[197] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious

8,500-9,100 who died from complications of the annual influenza, every year, prior to Covid-19. Vis-à-vis the population, it still amounts to a mere ¼ of 1% (0.0027%) of the population. To call this a "pandemic" is to engage in fraud and fear-mongering. The Plaintiffs state, and the fact is that an extremely exponential more people have died as a direct result of the Covid measures themselves.

- **F/ GLOBAL POLITICAL, ECONOMIC AGENDA BEHIND UNWARRANTED MEASURES**

•The Non-Medical measures and Aims of The Declared Pandemic- The Global Agenda

207. The Plaintiffs state, and the fact is that the WHO is not, nor ever has been, an objective, independent **medical** body, but is riddled with over-reaching socio-economic and political dictates of its funders who, inexplicably over and above the nation-states who fund-it, is heavily funded, and directed, through its "WHO Foundation", and **GAVI,** by international Billionaire Oligarchs, and Oligarch organizations such as Bill Gates, GAVI, the World Economic Forum ("WEF"). The Plaintiff states, and the fact is, that WHO vaccination programs, funded by the Bill Gates and Melinda Foundation, have been accused, by the governments of various sub-Saharan African countries, as well as Nicaragua, India, Mexico and Pakistan, the Philippines, of conducting unsafe, damaging vaccine experiments on their children. In India, the Courts are investigating these vaccination experiments on children. The WHO has recently, in the context of the COVID-19, been expelled from various countries for lack of confidence,

corruption, and attempted bribery of their officials, up to, and including, head(s) of state. The Plaintiffs further state, and fact is:

(a) There is a declared agenda to impose global mandatory vaccination, ID chipping, testing and immunity certification on all citizens. This global agenda has been in the works for decades; [198]

(b) Bill Gates, through his Foundation and Organization(s), is the largest private funder to the World Health Organization, is a leading proponent of keeping the economy locked down until a vaccine is developed. Gates is also a major advocate behind the contact tracing initiative. [199] Gates is a major investor in developing a SARS-CoV-2(COVID-19) vaccine and in tracking technology. Gates has a clear financial conflict of interest in advocating for a vaccine and contact tracing;

(c) Bill Gates has no medical or scientific training or credentials and holds no elected office. He should not be determining the fate of mankind. [200]

(d) The Gates Foundation (along with other partners) helped launch the Global Alliance for Vaccines and Immunization (GAVI). The foundation has given $4.1 billion to GAVI over the past 20 years;[201]

(e) These self-propelling agenda personally benefit Gates and other Billionaires, Corporations, and Organizations, particularly vaccines and computer and wireless technology, in his pharmaceutical (vaccine) holdings and agenda, as well as IT and internet holdings and concerns in that, overnight , a vast majority of socio-economic activity has been dislocated to a "virtual", "new normal" whereby everything from commerce, schools, Parliament, Courts, are converting to "virtual'', not to mention the electronic surveillance through cellphone applications for contract tracing;

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[198] https://childrenshealthdefense.org/news/a-timeline-pandemic-and-erosion-of-freedoms-have-been-decades-in-the-making/

[199] https://www.lifesitenews.com/news/bill-gates-life-wont-go-back-to-normal-until-population-widely-vaccinated

[200] https://childrenshealthdefense.org/news/government-corruption/gates-globalist-vaccine-agenda-a-win-win-for-pharma-and-mandatory-vaccination/

[201] https://www.vox.com/future-perfect/2020/4/14/21215592/bill-gates-coronavirus-vaccines-treatments-billionaires

(f) The Gates Foundation project to develop at-home testing evolved from a two-year-old research project from the University of Washington that was intended to track the spread of diseases like influenza. All told, the Gates Foundation has poured about $20 Million into the effort. A project funded by the Gates Foundation announced it would begin issuing at-home specimen collection kits for the novel coronavirus, COVID-19, according to a report in the Seattle Times;[202]

(g) Dr. Joel Kettner, former Chief Medical Officer revealed that pressure is being put on public health doctors and public health leaders by the Director-General of the World Health Organization (WHO) when he said, *"This is a grave threat and a public enemy number one"*. Kettner states – "I have never heard a Director-General of WHO use terms like that." [203];

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[202] https://www.seattletimes.com/seattle-news/health/gates-funded-program-will-soon-offer-home-testing-kits-for-new-coronavirus/

[203] https://off-guardian.org/2020/03/17/listen-cbc-radio-cuts-off-expert-when-he-questions-covid19-narrative/

(h) While these initiatives are presented as measures to address health, they significantly increase control by governments over their citizens, violate privacy, and are part of an agenda to impose vaccination by mandates and other forms of coercion;

(i) Contact tracing applications are being installed in cell phone software upgrades without the express knowledge or permission of consumers;

(j) The Centre for Disease Control in the United States is actively lobbying for increased masking and physical distancing measures, without substantive evidence to justify these measures., while in Canada compulsory masking has also emerged;

(k) Alan Dershowitz, a Harvard Law school professor has declared: *"If a safe vaccine is to be developed for Covid-19, I hope it's mandated, and I will defend it, and we'll argue that in the Supreme Court of the United States."* [204];

(l) Social media platforms such as Facebook, Pinterest, Instagram, Twitter, YouTube and others, under the direction of governments, are actively censoring information that challenges the SARS-CoV-2(COVID-19) pandemic narrative. Public debate on this topic is not being permitted, where Canada is no exception, and even worse, with the Canadian government threatening to enact **Criminal Code** provisions for those who utter or publish ''misinformation'' on COVID-19, including expert opinion;

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[204] https://www.forbes.com/sites/christopherrim/2020/05/20/more-than-stimulus-checks-how-covid-19-relief-might-include-mandated-vaccines/?fBritish Columbialid=IwAR2nrvg0WDTdv_KwjL_wedTNWBe3pxbqQeQAvQIK4m8OfSctLGFhAU9rGYE#1d19b0d57992

(m) The voices of highly credentialed and respected scientists and medical doctors have been censored by the government and media, preventing them from providing critical information from their decades long experience in dealing with infectious diseases and epidemics. Even our own public health experts' experience and advice, gathered over many decades has been ignored. This includes Dr. Joel Kettner, former Chief Medical Officer of Manitoba and Dr. Richard Schabas, former Chief Medical Officer of Ontario;

(n) Scientists have been involved in "gain-of-function" (GOF) research since 2002 that seeks to generate viruses *"with properties that do not exist in nature"* and to *"alter a pathogen to make it more transmissible (to humans) or deadly."* [205] [206];

(o) Rather than instruct people on how to improve their overall health or boost their immunity with healthy foods, quality supplements, and physical activity, governments are telling citizens that the only way to survive the coronavirus crisis is to rush the development of a vaccine and then inject all seven billion humans on the planet;

(p) Many scientists and doctors have expressed confidence in high dose Vitamin C, Vitamin D supplementation, and other generic, inexpensive, and readily available medications and treatments to assist recovery. To state that there is no cure to SARS-CoV-2 (COVID-19) is dishonest;

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[205] https://www.ncbi.nlm.nih.gov/books/NBK285579/

[206] https://www.sciencemag.org/news/2014/10/us-halts-funding-new-risky-virus-studies-calls-voluntary-moratorium

(q) The "no cure" agenda devolves directly from the pharmaceutical industry, which is receiving billions of dollars from governments to develop expensive and, so far, unproven as safe and effective "cures". Yet safe, effective and inexpensive remedies that help with recovery from Covid-19 already exist;

(r) Research in 2005 demonstrated that Chloroquine is a potent inhibitor of SARS coronavirus infection and spread, thus negating the urgent need for a vaccine; [207]

(s) Some governments are actively restricting access to treatments that have been proven to alleviate the symptoms of SARS-CoV-2(COVID-19) including VITAMIN C and D, zinc, HCQ, GTH precursors, and oxygen treatments, including hyperbaric chambers;

(t) The decision by governments globally to institute social controls and severe containment measures will prolong the epidemic and guarantee successive waves of infection. As social controls are lifted, susceptible individuals previously cocooned from infection will become exposed. Successive waves of infection is a certainty as a result of severe containment measures that prevented the development of natural immunity;

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[207] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1232869/

(u) Prime Minister Trudeau and Premiers, including the Respondents, have stated that "life will not return to normal until we have a vaccine", parroting Bill Gates and Gates' mantra and agenda, and has failed to take "mandatory vaccination" off the table as a potential action of the government.[208] It would appear that the Prime Minister and Premier are not considering any alternative plan to ending this lockdown;

(v) The Government of Canada has not assumed legal and financial liability for any injury or death resulting from containment measures or the use of any vaccine;

(w) When a government uses its power to force ordinary citizens to give up their freedoms, that nation is in great danger of moral and economic collapse. [209]

208. The Plaintiffs state, and the fact is, that the non-medical aims and objectives to declare the "pandemic", for something it is not beyond one of many annual seasonal viral respiratory illnesses, was to, **inter alia,** effect the following non-medical agendas, by using the COVID- 19" as a cover and a pretext:

(a) To effect a massive bank and stock market bail-out needed because the banking system was poised to again collapse since the last collapse of 2008 in that the World debt had gone from $147 Trillion dollars in 2008 to $321 Trillion dollars in January, 2020 and that;

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[208] https://nationalpost.com/news/canada/coronavirus-live-updates-covid-19-covid19

[209] https://www.chp.ca/commentary/free-injections-or-mandatory-vaccinations

(i) With 10 days of the declared pandemic European and North American banks were given $2.3 Trillion dollars and further amounts to hold up stuck markets and corporations, for a total of approximately $5 Trillion dollars, largely going un-noticed in the face of the "pandemic", with this number progressively climbing ;

(ii) The shutting of virtually **all**, small independent businesses, with the bizarre, **but intended** consequence that a local, street-level clothing-store, or hardware store, or any store not selling food or medicine, is forced shut down but a Walmart or Costco could sell anything and everything in its stores because one section of the store sold food (an essential service);

(iii) Other stores unable to sell, had to close with the consequence that all small hardware shops, and the like, were closed but the large corporations such as Home Depot, and the like, were equipped to take on-line orders and have drive-by pick up;

(b) The fact is that the pandemic pretense is there to establish a "new normal", of a New (Economic) World Order, with a concurrent neutering of the Democratic and Judicial institutions and an increase and dominance of the police state;

(c) A massive and concentrated push for mandatory vaccines of every human on the planet earth with concurrent electronic surveillance by means of proposed:

    - (i) Vaccine "chips", bracelets", and "immunity passports";
    - (ii) Contract- tracing via cell-phones;
    - (iii) Surveillance with the increased 5G capacity;
- (d) The elimination of cash- currency and the installation of strictly digital currency to better-effect surveillance;
- (e) The near-complete revamping of the educational system through "virtual" learning and closure of schools, particularly at the University levels.

209. The Plaintiffs state, and the fact is, that the benefactors of these goals and agendas are the global oligarchs who control and profit from vaccines and the technical infrastructure of information and communication such as Bill Gates, and his companies and Organizations, who pursues global vaccination and profits from a global shift to "virtual economy" along with the other corporate oligarchs and their "on-line" sale and distribution infrastructure of globalization, and by-passing of effective national governance of nation-states under their own respective Constitutions, including Canada.

210. The Plaintiffs state, and the facts is, that this agenda is well on its way to "virtualizing", "corporatizing", and "isolating" even Parliament and the Courts to an embarrassing and debilitating degree as reflected, ***inter alia*** by:

- (a) Virtual Parliamentary Committees and sittings become the "new normal" because a declared "pandemic", is available every year, with projected "2nd and 3rd waves;

(b) The Supreme Court of Canada, on June 3rd,2020 announced virtual, "Zoom" hearing of its appeals with its first virtual appeal hearing on or about June 10th, 2020;

(c) The Chief Justice of the Ontario Superior Court, Justice Justice Geoffrey Morawetz, embarrassingly declared, on May 29th, 2020 that :

> "there is no real return to full-scale, what I will call normal operations, to pre-March operations, until such time that there's a vaccine available".

Whether the Chief Justice is aware, or not aware, that he was echoing a mantra originated by Bill Gates, and an agenda Gates has been pursuing for decades, which serves Bill Gates and his associates, is unknown.

211. The Plaintiffs further state, and the fact is, that this agenda executed under the pretext of the COVID-19 has been long in the planning and making, as reflected and borne out by, **inter alia** the following facts and documents:

(a) (i) "decade of vaccines" declared by Bill Gates, and its funding with the full support of the Canadian government, under a Memorandum of Understanding in 2020 up to including PM Trudeau, and further, on or about May 18th, 2020, gifting Bill Gates another $800 Million dollars of Canadian Taxpayer dollars in addition to prior millions already gifted;

(ii) The public statements made by Bill Gates and others for mandatory vaccination of the globe, with vaccine-chips, chip-bracelets, smart-phone tracing, covid-testing, and surveillance of everyone;

(iii) The criminal vaccine experiments causing horrific damage to innocent children in India, Pakistan, Africa and other developing countries;

(b) The Rockefeller Foundation Report, issued on May 2010, and leaked, in which report a hypothetical scenario and hypothetical is laid out with the effect of " how to obtain global governance during a pandemic", and which report, posits an unknown virus escaping Wuhan, China;

(c) **The 2010** Canadian Film Board documentary in which Dr. Theresa Tam, an ex-WHO committee member, is featured and quoted to have stated, with respect to a potential pandemic;

Transcript (of Film Documentary):

1:25 – 1:32 - "Large epidemics and pandemics occur on a regular basis through-out history, and it will occur again. It definitely will."

57:00 - 58:00 - "If there are people who are non-compliant, there are definitely laws and public health powers that can quarantine people in mandatory settings."

"It's potential you could track people, put bracelets on their arms, have Police and other set-ups to ensure quarantine is undertaken."

"It is better to be pre-emptive and pre-cautionary and take the heat of people thinking you might be overreacting, get ahead of the curve, and then think about whether you've over-reacted later. It's such a serious situation that I think decisive early action is the key."

Narrator Colm Feore states: "Police checkpoints are set up on all the bridges and everyone leaving the city is required to show proof of vaccination. Those who refuse to cooperate are taken away to temporary detention centers."

1:22 – "What is certain is an epidemic or pandemic is coming."[210]

(d) Gates, through the Bill and Melinda Gates Foundation, between 2003 and 2017,vaccine program killing thousands of children and severely injuring 486,000-plus in India, Pakistan, and Africa in administrating vaccines, as exposed by Robert Kennedy Junior and his Defense of Children Foundation, and others, and the fact that in India the Courts are investigating this conduct, and an unsuccessful motion brought in the Italian Parliament to have Gates indicted and extradited for crimes against humanity , and further that developing nation states declaring that they have been "guinea pigs", mostly children, in furtherance of global vaccination;

(e) A study by Dr. Peter Aaby in Africa, **DTP Vaccine Increases Mortality 5-Fold, In Study Without Healthy User Bias** concluded: "**DTP was associated with 5-fold higher mortality than being unvaccinated.** *No prospective study has shown beneficial survival effects of DTP.* **All currently available evidence suggests that DTP vaccine may kill more children from other causes than it saves from diphtheria, tetanus or**

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[210] NFB Website: http://onf-nfb.gc.ca/en/our-collection/?idfilm=55974
Toronto Sun article: https://torontosun.com/news/national/warmington-tam-talked-of-tracking-bracelets-in-2010-epidemic-film

pertussis."[211] DTP while discontinued North America is still administered in the developing World.

(f) All the facts pleaded, in the above statement of claim with respect to Bill Gates, the Gates Foundation, GAVI, the WEF, Gates'entrenchment in vaccinating, mandatorily the entire planet, and his vaccine-chip pursuits with smart-phone surveillance, covid-testing, acquisition of 5G companies for maximum contact tracing and surveillance, his relationship with the WHO and its funding;

(g) A UN report, commissioned and released, in September, 2019, prepared by the "Global Preparedness Ministry Board", in which an "Apotyliptic Pandemic" is predicted killing as many as 80 million people;

(h) "Event 201", an exercise, simulating a pandemic, prior to October 18th, 2019, organized by Gates, GAVI, which included the "World Economic Forum", on invitation only;

(i) The Government of Canada's, minutely detailed 67- page Report, entitled" Government of Canada Response Plan COVID-19", final version 3.1", with previous versions unavailable, which could not have been researched and written a mere couple of weeks prior to the declaration of lock-downs and emergency in Canada;

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[211] http://vaccinepapers.org/high-mortality-dtp-vaccine/

(j) The heavily censored UK "Sage Report" of late-May, 2020;

(k) The International Lobby, spear-headed by Bill Gates and others as set out in the within Statement of Claim;

(l) The Suppressed German government 93-page, May, 2020, report which was eventually and recently leaked, which clearly and conclusively determined that the "pandemic" and measures are unjustified. The salient summary of which reads:

cs. KM4 – 51000/29#2

KM4 Analysis of Crisis Management (Brief Version)

Remarks: It is the task and aim of crisis management groups and any crisis management to recognize **extraordinary threats** and to fight them until the **normal state** is re-established/regained.
A normal state cannot therefore be a crisis.

Summary of the results of this analysis

1. In the past the crisis management did not (unfortunately against better institutional knowledge) build up adequate instruments for danger analysis. The situational reports, in which all information relevant for decision-making should be summarized in the continuing/current crisis, today still only cover a small excerpt of the looming spectrum of danger. An assessment of danger is in principle not possible on the basis of incomplete and inappropriate information. Without a correctly carried out assessment of danger, no appropriate and effective planning of measures is possible. The deficient methodology has an effect on a higher plane with each transformation; politics so far has had a strongly reduced chance to make factually correct decisions.

2. The observable effects of COVID-19 do not provide sufficient evidence that there is – in relation to the health consequences of all of society – any more than a **false alarm. At no point in time, it is suspected, was there a danger as a result of this new virus for the population (comparison is the usual death rate in Germany).** Those who die of corona are essentially those who statistically die this year, because they have arrived at the end of their lives and their weakened bodies cannot any longer fight coincidental everyday challenges (including the approximately 150 circulating viruses). **The danger of COVID-19 was overestimated. (In a quarter of a year worldwide no more than 250,000 deaths with COVID-19, as opposed to 1.5 million deaths during the 2017/18 influenza season). The danger is obviously no larger than that of many other viruses. We are dealing with a global false alarm which has been unrecognized over a longer period of time. - This analysis was reviewed by KM4 for scientific plausibility and does not fundamentally oppose the data and risk assessments provided by the RKI [Robert Koch Institute].**

3. A fundamental reason for not discovering the suspected false alarm is that the existing policies for the actions of the crisis management group and the crisis management during a pandemic do not contain appropriate instruments for detection which would automatically triger an alarm and the immediate cancellation/abandonment of measures, as soon as either a pandemic proves to be a false alarm or it is foreseeable that the collateral damage – and among these especially the parts that destroy human lives – threatens to become larger than the health effects of and especially the deadly potential of the illness under consideration.

4. In the meantime, the collateral damage is higher than the recognizable benefit. The basis of this assessment is not a comparison of material damages with damage to persons (human lives). Alone a comparison of deaths so far due to the virus with deaths due to the measures decreed by the state (both without certain data). Attached below is an overview-type summary of collateral health damages (incl. Deaths), reviewed by scientists as to plausibility.

5. The (completely useless) collateral damage of the corona crisis is, in the meantime, gigantic. A large part of this damage

will only manifest in the nearer and more distant future. This cannot be avoided anymore, only minimized.

6. Critical infrastructures are the lifelines necessary for the survival of modern societies. As a result of the protective measures, the current security of supply is no longer a given as it usually is (so far gradual reduction of the basic security of supply, which could result in a fallout in future challenging situations). The resilience of the highly complex and strongly interdependent complete system of critical infrastructure has been reduced. Our society lives, from now on, with increased vulnerability and a higher risk of failure of infrastructures necessary for life. This can have fatal consequences, if on the in the meantime reduced level of resilience of KRITIS a truly dangerous pandemic or other danger should occur.

Four weeks ago, UN-general Secretary Antonio Guterres of a fundamental risk. Guterres said (according to a report in the Tagesschau on April 4, 2020): "The weaknesses and insufficient preparation which are becoming apparent through this pandemic give insight into how a bioterrorist attack could look – and these weaknesses possibly increase a risk thereof." According to our analysis, in Germany a grave deficiency is the lack of an adequate system for the analysis and assessment of danger.

7. the protective measures decreed by the state, as well as the manifold societal activities and initiatives which, as initial protective measures cause the collateral damage, but have in the meantime lost any purpose, are largely still in effect. It is urgently recommended to abolish these immediately, to avert damage to the population – especially unnecessary additional deaths -, and to stabilize the situation around critical infrastructure, which is possibly becoming precarious.

8. The deficits and failures in crisis management consequently lead to communication of information that was not well-founded. (A reproach could be: The state showed itself to be one of the biggest fake-news-producers in the corona crisis).

From these insights it follows:

a) The proportionality of interference with the rights of eg. Citizens is currently not given, since the state did not carry out

> **an appropriate consideration with the consequences. The German constitutional court demands an appropriate balancing of measures with negative consequences. (PSPP judgement of May 5, 2020).**
>
> **b) The situational reports of the crisis management group BMI-BMG and the communications from the state to the provinces regarding the situation must there fore henceforth**
> **-conduct an appropriate analysis and assessment of dangerous**
> **-contain an additional section with meaningful, sound data regarding collateral damage (see remarks in the long version)**
> **-be freed of irrelevant data and information which are not required for the assessment of danger, because they make it difficult to see what is going on**
> **-an index should be formed and added at the beginning**
>
> **c) An appropriate analysis and assessment of danger is to be performed immediately. Otherwise the state could be liable for damages that have arisen.**[212]

212. The Plaintiffs further state, and fact is, that in a study issued by Stefan Homburg, Christof Kuhbandner, at the Leibniz University Hannover, Germany, **post-June 8th, 2020,** these authors soundly concluded in their study that the lock-down measures as modelled and executed were Not effective, globally comparing countries following the WHO protocols and countries that did not.[213]

213. The Plaintiffs state, and the fact is, that this agenda includes the "World Economic Forum ("WEF")". The Plaintiffs state and fact is that the WEF;

    (a) Consistently promotes a "New Economic World Order" ,which is a vision in the process of being rolled out under the auspices of the

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[212] https://human-synthesis.ghost.io/2020/05/31/km4-analysis-of-crisis-management-short-ver/
-<https://human-synthesis.ghost.io/2020/05/31/km4-analysis-of-crisis-management-short-ver

[213] http://diskussionspapiere.wiwi.uni-hannover.de/pdf_bib/dp-671.pdf

World Economic Forum, of which one of the main sponsors is **The Bill & Melinda Gates Foundation.**

(b) The World Economic Forum is the International Organization for Public-Private Cooperation. **The Forum engages the foremost political, business, cultural and other leaders of society to shape** global, regional and industry agendas.

(c) The World Economic Forum is committed "to the launch of the Great Reset - a project to bring the world's best minds together to seek a better, fairer, greener, healthier planet as we rebuild from the pandemic." "The COVID-19 crisis has shown us that our old systems are not fit any more for the 21st century," said World Economic Forum Executive Chairman Klaus Schwab. "In short, we need a great reset."[214]

(d) Since its launch on March 11th, 2020, the Forum's COVID Action Platform has brought together 1,667 stakeholders from 1,106 businesses and organizations to mitigate the risk and impact of the unprecedented global health emergency that is COVID-19. The platform is created with the support of the **World Health Organization.**[215]

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[214] https://www.weforum.org/agenda/2020/06/the-great-reset-this-weeks-world-vs-virus-podcast/

[215] https://cepi.net/about/whoweare/

(e) **The WEF sponsors have big plans**:"…the world must act jointly and swiftly to revamp all aspects of our societies and economies, from education to social contracts and working conditions. Every country, from the United States to China, must participate, and every industry, from oil and gas to tech, must be transformed. In short, we need a **"Great Reset" of capitalism."** **"The World Economic Forum is launching a new Davos Manifesto**, which states that companies should pay their fair share not taxes, show zero tolerance for corruption, uphold human rights throughout their global supply chains, and advocate for a competitive, level playing field." Klaus Schwab, Founder and Executive Chairman, World Economic Forum.[216]

(f) In 2017 Germany, India, Japan, Norway, the Bill & Melinda Gates Foundation, the Welcome Trust and the World Economic Forum founded the Coalition for Epidemic Preparedness Innovations (CEPI) to facilitate **focused support for vaccine development to combat major health epidemic/pandemic threats.** As an organization, the Forum has a track record of supporting efforts to contain epidemics. In 2017, at the Annual Meeting, the Coalition for Epidemic Preparedness Innovations (CEPI) was launched – bringing together experts from government, business, health, academia and civil society to accelerate the development of vaccines. CEPI is currently supporting the race to develop a vaccine against this strand of the coronavirus.[217]

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[216] https://www.weforum.org/the-davos-manifesto

(g) Event 201, the pandemic exercise in October 2019, was co-sponsored by the World Economic Forum and the Gates Foundation. [218]

(h) As early as 2016, the president of the WEF, announced his and the WEF's intentions that, "within 10 years", humans would be microchipped, including in the brain, to integrate with technology;

(i) In the Fall of 2020, the WEF commissioned a study written by two (2) McGill University professors, entitled: Transhumanism : How to make the Human Body an effective Information Platform" with volunteer, body-microchipped study groups;

214. Further with respect to global vaccination, in the context of Covid, the WEF has stated:

(a) That:

> "The COVID-19 crisis is affecting every facet of people's lives in every corner of the world. But tragedy need not be its only legacy. On the contrary, the pandemic represents a rare but narrow window of opportunity to reflect, reimagine, and reset our world to create a healthier, more equitable, and more prosperous future. Interactive diagram."[219]

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[217] https://cepi net/about/whowcare/ https://apps.who int/gpmb/assets/annual_report/GPMB_annualreport_2019.pdf pg 19

[218] https://www centerforhealthsecurity org/event201/

[219] https://www weforum org/agenda/2020/06/now-is-the-time-for-a-great-reset

(b) And that:

> "The changes that are underway today are not isolated to a particular country, industry, or issue. They are universal, and thus require a global response. Failing to adopt a new cooperative approach would be a tragedy for humankind. **To draft a blueprint for a shared global-governance architecture,** we must avoid becoming mired in the current moment of crisis management.
>
> Specifically, this task will require two things of the international community: wider engagement and heightened imagination. The engagement of all stakeholders in sustained dialogue will be crucial, as will the imagination to think systemically, and **beyond one's own short-term institutional and national considerations."**[220]

215. In early July, 2020, Trudeau announced the massive expenditure of post-COVID-19 infrastructure spending to re-align the economy, in concert with the WEF agenda, in tandem with private sector partnership whereby the anticipated privatization of public assets is a given. In September 2020, Trudeau announced his support for the "Great [2030] Reset".

216. The Plaintiffs state, and the fact is, that:

(a) This agenda, is spear-headed by Bill Gates, and other Billionaire, Corporate, and Global Organizational Oligarchs, which include vaccine, Pharmaceutical, and Technology Oligarchs, through the WHO, GAVI, and the WEF, whom they fund and effectively direct and control;

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[220] https://intelligence.weforum.org/topics/a1G0X000006OLciUAG?tab=publications
https://www.weforum.org/agenda/2018/11/globalization-4-what-does-it-mean-how-it-will-benefit-everyone/

(b) National and Regional Leaders who are simply, knowingly and/ or unknowingly, as duped partners, partaking in this agenda by simply declaring a "pandemic", "emergency", and delegating decisions to their Chief medical officers who are simply following the dictates and guidelines without question nor concern for the world expert opinions against such measures, of the WHO;

(c) In effect there are less than a hand-full of people dictating the virtual fate of the planet whereby sovereign Parliaments, Courts, and Constitutions are by-passed;

(d) The "social media", such as Google, Facebook, YouTube, Amazon owned and operated by the likes of Bill Gates, Mark Zukerberg, and, in Canada, the CBC, funded and controlled by the Federal Government, are knowingly playing in concert with this over-arching conspiracy, and in fact over-lapping conspiracies.

208. The Plaintiffs further state that through their conduct, communication, agreement, and functions of their intertwined respective public and private offices, the Defendants, knowingly and unknowingly, intentionally and unintentionally, as outlined, ***inter alia***, by the Supreme Court of Canada in the test set out in ***Hunt v. Carey*** and jurisprudence cited therein, have and to continue to:

(a) engage in an agreement for the use of lawful and unlawful means, and conduct, the predominant purpose of which is to cause injury to the Plaintiffs, through the declaration of a false pandemic and implementation of coercive and damaging measures including the infliction of a violation of their constitutional rights as set out above in the within statement of claim; and/or

(b) to engage, in an agreement, to use unlawful means and conduct, whose predominant purpose and conduct directed at the Plaintiffs, is to cause injury to the Plaintiffs, through the declaration of a false pandemic and implementation of coercive and damaging measures including the infliction of a violation of their constitutional rights as set out above in the within statement of claim, that Defendants and officials and employees, should know, in the circumstances, that injury to the Plaintiffs , is likely to, and does result.

217. The Plaintiffs state, and the fact is, that Canada's , and Trudeau's, connection to Gates, Gates' foundation, and various companies , and the global vaccine industry, is **inter alia,** as follows:

(a) PM Trudeau has echoed Bill Gates' sentiments that mass mandatory vaccination of people is necessary for any sense of normalcy to return.

(b) Gates uses proxies to successfully lobby the Canadian Government.

(c) The Gates Foundation founded GAVI, the Global Vaccine Alliance in 1999 with $750 million and continues to run it and fund it. The Global Vaccine Alliance, is an organization devoted to pushing vaccinations on the public all across the world.

(d) GAVI hired a lobbying firm called Crestview Strategy, a public affairs agency. Their Mission Statement is: "We make, change, & mobilize opinion."

(e) Canada has gifted Bill Gates, and his related Foundation and companies well over $1 Billion dollars in pursuit of his agenda, $800 Million recently by Justin Trudeau;

(f) Crestview has lobbied the Canadian Government on at least 19 occasions since2018 on various "health" matters, all on behalf of GAVI.

•Bill Gates- Vaccines, Pharmaceuticals & Technology

218. The Plaintiffs state, and the fact is, as set out in the within Statement of Claim, that Bill Gates companies, and associates, manifest a clear agenda, for himself and his associates in the vaccine, pharmaceutical and technology, industries, through the **de facto** control of the WHO, influencing and dictating its agenda, to:

(a) Effect a mandatory, global, vaccine policy and laws, which would net an approximately $1.3 Trillion per year, in which vaccine industry he is major proponent and investor;

(b) To effect surveillance, through his vaccination agenda, as outlined in their public statement, and the MIT developed smart-phone application to embed nanocrystal beneath the skin which can be read by a smart-phone through smart-phones, and 5-G capacity, in which industries Gates is a major stake-holder and investor;

(c) Using the above to "virtualize" and globalize the World economy , in which virtual and global New World (Economic) Order in which Gates further sits in the centre, along with the other Billionaire and corporate oligarchs;

(d) All of which is being effected and accelerated through the false pronouncement of a COVID-19 'pandemic'', and implementation of baseless and false, draconian measures.

219. The Plaintiffs state, and the fact is, that Bill Gates' statements, and conduct, in the above-noted facts, has been documented, as reflected in the within Statement of Claim.

- **The WHO / Gates/ Trudeau/Dr. Teresa Tam/ and Dr. Bonnie Henry**

220. The Plaintiffs state and fact is, that the connection and common agreement between Gates-Trudeau-Tam, in addition to their statements and actions in furthermore of that agreement as outlined above in the within Statement of Claim, is further manifested by the following:

(a) On April 9, 2020 just before Easter, Trudeau announced that:

> *"We will not be coming back to our former normal situation; we can't do that until we have developed a vaccine and that could take 12 to 18 months.....*

> *[and]….This will be the new normal until a vaccine is developed."*[221]

(b) Trudeau's statement is a script lifted straight from Bill Gates' echoing almost word for word, the message Gates has been pushing since the coronavirus in North America earlier this winter. The April 9th **Highwire video clip at 2:07** captures Gates stating:

> "Things won't go back to truly normal until we have a vaccine that we've gotten out basically to the entire world."[222]

(c) Instead of following the recommendations of leading scientists, doctors and epidemiologists, Trudeau is foisting the Gates/WHO/ GAVI/ WEF globalist agenda which he knows or ought to know, will result in financial ruin for millions of Canadians including the Plaintiffs.

(d) Despite the prevailing global consensus on natural herd immunity, Bill Gates is determined however, to prevent natural immunity so he can mandate his new vaccine(s) for everyone. Noted scientist and journalist. Rosemary Frei, shows Bill Gates does not want people to acquire immunity to COVID-19. Rather, Bill Gates prefers that we suffer the 'economic pain' of lockdown in order to prevent us from acquiring natural immunity as Gates has stated:

> "We don't want to have a lot of recovered people […] To be clear, we're trying – through the shut-down in the United States – to not get to one percent of the population

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[221] https://nationalpost.com/news/canada/coronavirus-live-updates-covid-19covid19

[222] Blowing the Whistle on Covid-19, April 9, 2020: https://www.youtube.com/watch?v=5g4u1LJQ7_k

> infected. We're well below that today, but with exponentiation, you could get past that three million [people or approximately one percent of the U.S. population being infected with COVID-19 and the vast majority recovering]. I believe we will be able to avoid that with having this economic pain."[223]

(e) In her latest compelling article, **Covid-19 Meltdown and Pharmas' Big Money Win,** Barbara Loe Fisher delves into the many disturbing angles of this epic viral/political war unleashed on humanity, the havoc caused by the Gates & Fauci lockdown policy and the economic spinoffs spawned by the pandemic.[224]

(f) Covid-19 has sparked the hottest new market in town – vaccine development. A staggering number of coronavirus vaccines are under development right now with astronomical piles of money being thrown at it. Gates is in the thick of it along with Tony Fauci, director of the National Institute for Allergy and Infectious Diseases (NIAID). Both are on record stating they don't want people developing natural immunity, in stating:

> "Now, I hope we don't have so many people infected that we actually have that herd immunity, but I think it would have to be different than it is right now", says Fauci.[225]

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[223] Did Bill Gates Just Reveal the Reason for the Lockdowns: By Rosemary Frei, Off-Guardian, April 4, 2020 https://off-guardian org/2020/04/04/did-bill-gates-just-reveal-the-reason-behind-the-lockdowns/?__cf_chl_jschl_tk__=8a31c96b7b831b06c6631d2d800e39e274fdb4c5-1593827339-0AbbQnElw4gYMqoe14KfV-9sVWpJ8_IO6ZguVbep6dVylwrKGMbqfHkxidxl_3uCK08NImuk8B5fJzKB4cL3viT1qQYvV8722SeZLNTHOWUovzpclffZQcDifxvg3QQ6jPmp ZkNGtNlwGs874a0MhuRY9_t7yNj8TyeXmeBXidqKFHOtCmuLJEmS9ZGcLDsNGb5WKidfnHO7DSzIQ110eNBgHMLXerbjPrKsESdGlhwd3LjoY6FiHhJu4U1bTEJMbsKQFlq5XIIOtoLGY2e7fThzjnbUBrcjpv76AL5aOYmAQAllCC3ttqOt_k21mLMgHNFafl2gWSlla4a2SUAI8IzoKXLcbkuTr0IpvKrbjkF8B4ij3p8MdQOK0DZHcW

[224] Covid-19 Meltdown and Pharma's Big Money Win: https://thevaccinereaction org/2020/04/covid19-meltdown-and-pharmas-big-money-win/

[225] Covid-19 Meltdown and Pharma's Big Money Win: https://thevaccinereaction.org/2020/04/covid19-meltdown-and-pharmas-big-money-win/

(g) Natural immunity would disrupt Bill Gates expressed intension to "vaccinate everything that moves". In a video interview Gates says:

> "Eventually, what we'll have to have is
> certificates of who is a recovered person, who's a
> vaccinated person, because you don't want people moving
> around the world where you'll have some countries that
> won't have it under control…"[226]

(h) The Gates foundation has invested tens of $billions in vaccine development which includes a decades long vicious propaganda war against anyone questioning vaccine safety. Gates' *'decade of vaccines'* from 2010-20 captured the global media and social media giants that have demonized and ruthlessly censored the 'vaccine risk aware' movement comprised mostly of vaccine injured families trying to protect their children and the basic human right to informed consent and exemption rights. This has been documented by various publications, which explore the massive influence and control with which the Gates' empire manipulates global health and vaccine policies.[227]

(i) In one article Canadian medical journalist, Celeste McGovern investigates the upcoming vaccine and microchip technologies Gates is funding.[228]

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[226] 6 How we must respond to the coronavirus epidemic, Youtube video March 25, 2020:https://www.youtube.com/watch?v=Xe8fljxicoo#t=33m45s

[227] Bill Gates search-Covid -19 Global Pandemic, Vaccine Impact News: https://vaccineimpact.com/?find=bill+gates

[228] Bill Gates and Intellectual Ventures Funds Microchip Implant Technology, By Celeste McGovern, April 14, 2020: https://www greenmedinfo.com/blog/bill-gates-and-intellectual-ventures-funds-microchipimplant-vaccine technology1?utm_campaign=Daily%20Newsletter%3A%20Bill%20Gates%20and%20Intellectual%20Ventures%20Funds%20Microchip%20Implant%20Vaccine%20Technology%20%28TCCz3V%29&utm_medium=email&utm_source=Daily%20Newsletter&_ke=eyJrbF9lbWFpBritish ColumbiaI6ICJjLm1jZ292ZXJuQGhvdG1haWwuY29tIiwgImtsX2NvbXBhbnlfaWQiOiAiSzJ2WEF5In0%3D

(j) In another, Robert F. Kennedy Jr. exposes the Gates/WHO agenda listing their deadly vaccine experiments in the developing world. Kennedy explains:

> "In 2010, when Gates committed $10 billion to the WHO, he said "We must make this the decade of vaccines." A month later, Gates said in a TED Talk that new vaccines "could reduce population." And, four years later, in 2014, Kenya's Catholic Doctors Association accused the WHO of chemically sterilizing millions of unwilling Kenyan women with a "tetanus" vaccine campaign.[229]

(k) Another expose is that of Vera Sharav, a Holocaust survivor and founder of the Alliance for Human Research Protection. She examines how Gates' table top 'Event 201' pandemic exercise in October, 2019, set the stage for how the coronavirus pandemic would be handled. It predicted the pandemic would end ONLY after an effective vaccine had been brought to market. It is no coincidence that the coronavirus pandemic was unleashed just weeks after Gates' pandemic 'war games' rehearsal and is now playing out, as lockdown scenario threatens to continue until the new vaccine arrives?[230]

(l) Sharav also delves into Gates' vast business ventures related to enhancing pharmaceutical products and vaccines. His ID2020 is a digital ID program aimed at identifying 1 billion + people lacking identity documents. Also in development are several ID devices that people could be forced to have implanted into their body to identify their vaccine and birth-control status.[231]

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[229] Bill Gates' Globalist Agenda: A Win-Win for Pharma and Mandatory Vaccination by Robert F Kennedy Jr April 9, 2020, Children's Health Defense:https://childrenshealthdefense org/news/governmentcorruption/gates-globalist-vaccine-agenda-a-win-win-for-pharma-and-mandatory-vaccination/

[230] Bill Gates & Intellectual Ventures Funds Microchip Implant Vaccine Technology by Celetes McGovern, April 14, 2020: https://www greenmedinfo com/blog/bill-gates-and-intellectual-ventures-fundsmicrochip-implant-vaccinetechnology1?utm_campaign=Daily%20Newsletter%3A%20Bill%20Gates%20and%20Intellectual%20Ventures%20Funds%20Microchip%20Implant%20Vaccine%20Technology%20%28TCCz3V%29&utm_medium=email&utm_source=Daily%20Newsletter&_ke=eyJrbF9lbWFpBritish ColumbiaI6ICJjLm1jZ292ZXJuQGhvdG1haWwuY29tIiwgImtsX2NvbXBhbnlfaWQiOiAiSzJ2WEF5In0%3D

221. With respect to the Defendants Trudeau and Tam, the Plaintiffs state, and the fact is that:

(a) Theresa Tam, Canada's chief public health officer and longtime loyal servant of the WHO, serves on multiple international committees and related organizations that dictate global health policies. Her main job is to make sure that Trudeau follows the WHO/Gates lockdown policy until the new Covid-19 vaccine arrives in 18 months.

(b) Molly Chan, author of a **probing analysis** of Dr. Tam's career thinks it's evident from her background that:

> "Theresa Tam works with the world's most powerful globalist entities that have tremendous say in how the world deals with disease and immunization. This power enables them to have a grip on the entire planet, and to decide which measures are put into place to control the behaviour of people in any event they choose to cause a panic over. With COVID-19, we have a perfect example of how the decisions of this small group of people can lead to global hysteria and unprecedented societal changes."[232]

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[231] Coronavirus provides dictators and oligarchs with a dream come true, By Vera Sharav, Alliance for Human Research Protection, March 26, 2020: https://ahrp org/coronavirus-provides-oligarchs-with-adream-come-true/

[232] Dr. Theresa Tam, Queen of the Vaccine by Molly Chan, Civilian Intelligence Network, March 31, 2020: https://civilianintelligencenetwork.ca/2020/03/30/dr-teresa-tam-queen-of-the-vaccine/

(c) Molly Chan asks important questions on Tam's career and extensive influence:

> "Does this make Theresa Tam a puppet or master? How is it possible to not follow WHO recommendations, when you're the one making them? She is on powerful committees!"

(d) Considering the multiple numerous high-level positions Dr. Tam holds on the international stage, Tam's first loyalty is not to the wellbeing of Canadians , or the Plaintiffs, but to the globalist policies so generously funded by Gates and Big Pharma.

(e) Chan dubs Tam as the *'Queen of Vaccine'* and explains:

> "convened public health leaders and parents to collaborate on the effort to shut down any hint of anti-vaccine thought. Governments, including Canada and the U.S. are also working with social media companies to remove vaccine misinformation and promote scientific literacy. She wants to make sure that people are not allowed to publicly say anything against vaccinations, and establish them as just a normal part of life, no questions asked."[233]

(f) While flexing her expansive influences, it seems a 'no brainer' Theresa Tam has been instrumental in controlling the CBC's narrative about the need to snuff out *'vaccine hesitancy'* which includes the ruthless censorship of any voices that would question vaccine safety in mainstream media.

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[233] Dr. Theresa Tam, Queen of the Vaccine by Molly Chan, Civilian Intelligence Network, March 31, 2020: https://civilianintelligencenetwork ca/2020/03/30/dr-teresa-tam-queen-of-the-vaccine/

(g) Tam is accused of **"total incompetence"** in having botched the Canadian response to the COVID-19 pandemic:

> "Tam has failed miserably, putting political correctness, and virtue-signalling lecturing ahead of doing her job. She couldn't grasp the situation in time, and when she grasped the seriousness of it was far too late to stop it."[234]

(h) The Toronto Sun's **cutting review** of Theresa Tam's incompetence says:

> "Our country is now run by 'healthcrats'. Dr. Theresa Tam is the Healthcrat who runs the federal government. **Her record on being wrong is spotless.**"[235]

(i) In a **recent interview** in Chatelaine magazine, Tam bashes vaccine resistors and accuses them of causing measles outbreaks. Her cryptic statement, ***"I always think we do a really good job, when no one knows what we're doing"***, reveals the federal health agency's lack of transparency and inability to provide crucial epidemiological data during this crisis.

222. Since the summer of 2020, to the present, this agenda has been made the clear by, but not limited to, the following:

(a) Admission and boasting by the likes of Gates and the WEF of what their plan is, including admission and promotion of the "2030 re-set" by Trudeau, as well as by the WEF stating that: "by 2030 you will own nothing, but you will be happy";

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[234] Devastating timeline reveals complete incompetence of Theresa Tam's Virus Response https://spencerfernando.com/2020/03/29/devastating-timeline-reveals-total-incompetence-of-theresatams-virus-response/

[235] The healthcrats cure is proving worse than the disease, Toronto Sun, April 10, 2020: https://torontosun.com/opinion/columnists/snobelen-the-healthcrats-cure-is-proving-worse-than-thedisease

(b) By the censorship of social and mainstream media of anything, and everyone critical of the Covid-measures;

(c) By the banning of alternative medical treatment and prosecution and persecution of Doctors who advocate alternative medical treatment to the awaited vaccine such as British Columbia doctors Stephen Malthouse, David Code, Dr. Dorle Kneifel, and Ontario doctors Dr. Patrick Phillips, Dr. Kulvinder Gill, Dr. Caroline Turek;

(d) By the economic devastation of independent businesses to the corresponding increased and doubling of profits by the billionaire oligarchs and corporate oligarchs;

(e) By the "emergency" approval of vaccines, that did not comply with the necessary animal and human trials without which approval normally could not ensue and whereby approval of such experimental medical vaccines could not only see approval if no existing alternative medical treatment available could assist or alleviate with respect to the virus, which explains why such medicine as HCQ, Ivermectin, etc… was banned for use for treating Covid-19;

- **Dr. Bonnie HENRY – History and Conduct as British Columbia Chief Medical Officer – Ignoring the Science**

223. Dr. Henry worked internationally with the WHO/UNICEF polio eradication program in Pakistan and with the WHO to control the Ebola outbreak in Uganda.[236]

224. Dr. Henry helped to establish the Canada Pandemic Influenza Plan, which contains recommendations for health-related activities during the spread of a virus.[237] Canada Pandemic Influenza Preparedness Task Group (CPIPTG) members: B Henry (Chair), Canada's pandemic vaccine strategy Acknowledgements.[238]

225. In 2012, Health Canada demanded that nurses who refused to take a vaccine would be mandated to wear a mask throughout the 6-month flu season; it was known as VOM (Vaccinate or Mask). The Ontario Nurses Union filed a grievance against St. Michael's Hospital's VOM policy. The result was a precedent setting win for nurses across the country. The arbitrator in the case ruled that wearing masks "was not supported by science and was most likely an attempt to drive up vaccination rates among staff."

226. Dr. Henry was one of the expert witnesses who was instrumental in overturning the mask mandate and testified in the 2015 case saying, "there's very scant

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[236] https://www2.gov.bc.ca/gov/content/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/biographies

[237] https://en.wikipedia.org/wiki/Bonnie_Henry

[238] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5764724/

evidence about the value of masks in preventing the transmission of influenza." Dr. Henry goes on to say that there is no data to support wearing masks and, "When we look at individual strains circulating and what's happening, I think we need it to be consistent with the fact that there was nothing that gave us support that providing a mask to everybody all the time was going to give us any additional benefit over putting in place the other measures that we have for the policy."

227. In December 2019, Dr. Henry supported the arbitrator's 2015 decision on behalf of British Columbia Nurses.

228. In May 2020, Dr. Henry unequivocally states, "there is no evidence that if you're not ill wearing a mask, particularly wearing a mask outside or out in public, that provides much protection or any benefit at all." Dr. Henry further admits that asymptomatic people do not spread the virus, "we have not seen anybody not showing any symptoms passing it on to anyone else."[239] **Henry also admits there is "no real science behind the decisions she is making."**[240]

229. Throughout 2020, Dr. Henry is on record repeatedly saying that masks are not effective and yet in March of 2021, Dr. Henry once again lies to the public claiming she has never said that masks do not work.[241]

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[239] https://rumble.com/vbdsmb-bonnie-henry-admits-no-evidence-masks-work-for-those-not-sick.html

[240] https://canucklaw.ca/wp-content/uploads/2020/07/COVID-19_-B.C.-health-officer-explains-50-vehicle-limit-for-events.mp4

[241] https://action4canada.com/masks/

230. Henry is duty bound to make decisions based on science and facts, and yet it is very evident that she intentionally ignored the information available to her on masking, asymptomatic spread, social distancing and lockdowns, and instead implemented the draconian measures that destroyed people's livelihoods and put the public in harm's way on multiple levels.

231. On June 28, 2012, Dr. Henry worked for BCCDC Emergency - Management and Environmental Health and was a presenter at the Public Health Ethics and Pandemic Planning. Dr. Henry listed the goals of the CPIP (Canadian Pandemic Influenza Plan) and ensured that, were there a pandemic, the plan must account for minimizing serious and overall deaths and minimize societal disruption amongst Canadians. She also lists the risks to schoolchildren of closing schools, and the fact that children are at very low risk of contracting or transmitting viruses. However, Dr. Henry supports that government restrictions are acceptable, including forced quarantine and personal autonomy being effected by forced vaccinations. Dr. Henry, along with her fellow presenter, Dr. Unger, believe this is the right, moral and ethical thing to do.[242]

232. As a result of Dr. Henry's previous involvement with the CPIP, BCCDC, Dr Fauci, and the WHO, and as she currently holds the position of British Columbia's Chief Health Officer, there is reason to be concerned that Dr. Henry's actions are calculated and possibly pre-mediated based on the level of training

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[242] https://mediasite.phsa.ca/Mediasite/Showcase/bccdc/Presentation/e4823d251a8c40a38cdc80666f7d0fa71d

Dr. Henry has participated in. Of great concern is, Dr. Henry's willingness to openly and aggressively violate the public's "guaranteed" ***Charter*** Rights. Specifically, their right to bodily autonomy, security of the person, to be employed and provide for one's family, the freedom of mobility, the freedom of speech and to assemble, the freedom to access medical care and the right to live without being subjected to discrimination and hate.

233. To date, Dr. Bonnie Henry, along with the other British Columbia Defendants have engaged in illegal and unconstitutional actions as set out below:

234. To begin with, the emergency measures are based on the claim that we are experiencing a "public health emergency." There is no evidence to substantiate this claim. In fact, the evidence indicates that we are experiencing a rate of infection consistent with a normal influenza season.[243]

235. The purported increase in "cases" is a direct consequence of increased testing through the inappropriate use of the PCR instrument to diagnose so-called COVID-19. It has been well established that the PCR test was never designed or intended as a diagnostic tool and is not an acceptable instrument to measure viral infections. Its inventor, Kary Mullis, has clearly indicated that the PCR testing device was never created to test for coronavirus.[244] Mullis warns that, "the PCR Test can be used to find almost anything, in anybody. If you can amplify one

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[243] https://www.bitchute.com/video/nQgq0BxXfZ4f

[244] https://rumble.com/vhu4rz-kary-mullis-inventor-of-the-pcr-test.html

single molecule, then you can find it because that molecule is nearly in every single person."

236. In light of this warning, the current PCR test utilization, set at higher amplifications, as in British Columbia, for example is using it at cycles of 35+, is producing up to 97% false positives.[245] Therefore, any imposed emergency measures that are based on PCR testing are unwarranted, unscientific, and fraudulent. An international consortium of life-science scientists has detected 10 major scientific flaws at the molecular and methodological level in a 3-peer review of the RTPCR test to detect SARS-CoV-2.[246]

237. In November 2020, a Portuguese court ruled that PCR tests are unreliable, and when run at 35 threshold cycles are or, produce a 96.5% false positive rate. British Columbia runs them at 43-45 cycles.[247]

238. On December 14, 2020, the WHO admitted the PCR Test has a 'problem' at high amplifications as it detects dead cells from old viruses, giving a false positive.[248]

239. On February 16, 2021, **Dr. Henry herself admitted that PCR tests are unreliable, yet still continued to use them to identify cases.[249]**

240. On April 8, 2021, the Austrian court ruled the PCR test was unsuited for COVID testing.[250]

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[245] https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa1491/5912603
[246] https://cormandrostenreview.com/report/
[247] https://unitynewsnetwork.co.uk/portuguese-court-rules-pcr-tests-unreliable-quarantines-unlawful-media-blackout/
[248] https://principia-scientific.com/who-finally-admits-covid19-pcr-test-has-a-problem/
[249] https://rumble.com/vhww4d-bc-health-officer-admits-pcr-test-is-unreliable.html
[250] https://greatgameindia.com/austria-court-pcr-test/

241. On April 8, 2021, a German Court ruled against PCR testing stating, "the test cannot provide any information on whether a person is infected with an active pathogen or not, because the test cannot distinguish between "dead" matter and living matter."[251]

242. On May 8, 2021, the Swedish Public Health Agency stopped PCR testing for the same reason.[252]

243. On May 10th, 2021, Manitoba's Chief Microbiologist and Laboratory Specialist, Dr. Jared Bullard, testified under cross-examination in a trial before the Court of Queen's Bench in Manitoba, that PCR test results do not verify infectiousness and were never intended to be used to diagnose respiratory illnesses.[253]

244. On July 21, 2021 - Innova Medical Group Recalled Unauthorized SARS-CoV-2 Antigen Rapid Qualitative Test with Risk of False Test Results. The FDA has identified this as a Class I recall, the most serious type of recall. Use of these devices may cause serious injuries or death.[254]

245. On July 21, 2021 the CDC sent out a "Lab Alert revoking the emergency use authorization to RT-PCR for COVDI-19 testing and encourages laboratories to adopt a multiplexed method that can facilitate detection and differentiation of SARS-CoV-2 and influenza viruses". The CDC is admitting that the RT-PCR test

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[251] https://2020news.de/sensationsurteil-aus-weimar-keine-masken-kein-abstand-keine-tests-mehr-fuer-schueler/
[252] https://tapnewswire.com/2021/05/sweden-stops-pcr-tests-as-covid19-diagnosis/
[253] https://www.jccf.ca/Manitoba-chief-microbiologist-and-laboratory-specialist-56-of-positive-cases-are-not-infectious/
[254] https://www.fda.gov/medical-devices/medical-device-recalls/innova-medical-group-recalls-unauthorized-sars-cov-2-antigen rapid-qualitative-test-risk-false-test

'cannot' differentiate between SARS, influenza or the common flu. This is confirmation of what was stated in Section 7 and reported since the onset of the so-called pandemic.[255]

246. On July 21, 2021 an FDA document admits the "COVID" PCR test was developed without isolation Covid samples for test calibrations, effectively admitting it's testing something else. In the FDA document, it is clearly stated that ordinary seasonal flu genetic material was used as the testing marker in the PCR test kits. The authorities would have known that many people would test "positive" for it, thus allowing them to use these results to create the "covid" narrative.[256]

247. Prior to COVID-19, the definition of a case (in a medical sense) has been a patient with significant symptoms. With the implementation of the PCR test, cases are now being defined as someone who tests positive regardless of whether they have any symptoms or not.

248. Dr. Henry has been knowingly conflating positive PCR test result with the actual disease, thereby deliberately misleading the public into believing the infection is far more serious and widespread than it actually is. At no time in history have we ever encouraged asymptomatic people to get tested, yet Dr. Henry allowed this to happen to keep the case numbers high.

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[255] https://www.cdc.gov/csels/dls/locs/2021/07-21-2021-lab-alert-Changes_CDC_RT-PCR_SARS-CoV-2_Testing_1.html

[256] https://www.naturalnews.com/2021-08-01-fda-covid-pcr-test-fraud.html

249. The British Columbia government is reportedly decreasing the amplifications of the PCR test in order to lower the number of COVID-19 cases to deceive the public into believing that the decline in cases is a result of people being "vaccinated." The government is now testing the vaccinates at much lower threshold rates, but the **unvaccinated** at 43-45.

250. Dr. Henry has been instrumental in disseminating information to the public that is knowingly false, deceptive and/or misleading. To knowingly disseminate false information is a violation of the *Health Professions Act.*

251. It is evident that the government, with the recommendations and support of Dr. Henry, have imposed the emergency measures based on the fraudulent, unwarranted and unscientific use of the PCR test.

252. Based on this compelling and factual information, the emergency measures, as well as the use of the COVID-19 experimental injection ("vaccine"), were not, and are not required or recommended. In fact, warnings around the world are calling for the immediate halt of the experimental 'vaccines' due to the volume of extreme adverse reactions, including death.

253. Furthermore:

a) The Nuremberg Code,[257] to which Canada is a signatory, states that it is essential before performing medical experiments on human beings, there is voluntary informed consent. It also confirms, a person involved should have legal capacity to give consent, without the intervention of any element of force, fraud, deceit, duress, overreaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him/her to make an understanding and enlightened decision. This requires, before the acceptance of an affirmative decision by the experimental subject, that there should be made known to him/her the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonable to be expected; and the effects upon his/her health or person which may possibly come from participation in the experiment.

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[257] https://media.tghn.org/medialibrary/2011/04/BMJ_No_7070_Volume_313_The_Nuremberg_Code.pdf

b) All the treatments being marketed as COVID-19 "vaccines", are still in Phase III clinical trials until 2023,[258] and hence, qualify as a medical experiment. People taking these treatments are enrolled as test-subjects and are further unaware that the injections are not actual vaccines as they do not contain a virus but instead an experimental gene therapy.

c) None of these treatments have been fully approved; only granted emergency use authorization by the Food and Drug Administration (FDA), which Health Canada[259] [260] [261] is using as the basis for approval under the interim order, therefore, fully informed consent is not possible.

d) Most vaccines are trialed for at least 5-10 years,[262] and COVID-19 treatments have been in trials for less than a year.

e) No other coronavirus vaccine (i.e., MERS, SARS-1) has been approved for market, due to antibody-dependent enhancement, resulting in severe illness and death in animal models.[263]

f) Numerous doctors, scientists, and medical experts are issuing dire warnings about the short and long-term effects of COVID-19 injections, including, but not limited to, death, blood clots, infertility, miscarriages, Bell's Palsy, cancer, inflammatory conditions, autoimmune disease, early-onset dementia, convulsions, anaphylaxis, inflammation of the heart,[264]

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[258] https://clinicaltrials.gov/ct2/show/NCT04368728?term=NCT04368728&draw=2&rank=1

[259] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

[260] https://www.canada.ca/en/health-canada/services/drugs-health-products/covid19-industry/drugs-vaccines-treatments/authorization/applications.html

[261] https://www.pfizer.com/news/hot-topics/the_facts_about_pfizer_and_biontech_s_covid_19_vaccine

[262] https://hillnotes.ca/2020/06/23/covid-19-vaccine-research-and-development/

[263] https://www.tandfonline.com/doi/full/10.1080/21645515.2016.1177688

[264] https://www.nbcconnecticut.com/news/coronavirus/connecticut-confirms-at-least-18-cases-of-apparent-heart-problems-in-young-people-after-covid-19- vaccination/2494534/

> and antibody dependent enhancement leading to death. This includes children ages 12-17 years old.[265]

Dr. Byram Bridle, a pro-vaccine Associate Professor on Viral Immunology at the University of Guelph, gives a terrifying warning of the harms of the experimental treatments in a peer reviewed scientifically published research study[266] on COVID-19 shots. The added Spike Protein to the "vaccine" gets into the blood, circulates through the blood in individuals over several days post-vaccination, it accumulates in the tissues such as the spleen, bone marrow, the liver, the adrenal glands, testes, and of great concern, it accumulates high concentrations into the ovaries. Dr. Bridle notes that they "have known for a long time that the Spike Protein is a pathogenic protein, it is a toxin, and can cause damage if it gets into blood circulation." The study confirms the combination is causing clotting, neurological damage, bleeding, heart problems, etc. There is a high concentration of the Spike Protein getting into breast milk and reports of suckling infants developing bleeding disorders in the gastrointestinal tract. There are further warnings that this injection will render children infertile, and that people who have been vaccinated should NOT donate blood.

254. Minors are at nearly zero percent risk of contracting or transmitting this respiratory illness and are, instead, buffers which help others build their immune

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[265] https://childrenshealthdefense.org/defender/vaers-data-reports-injuries-12-to-17-year-olds-more-than-triple/

[266] https://omny.fm/shows/on-point-with-alex-pierson/new-peer-reviewed-study-on-covid-19-vaccines-sugge

system. The overall survival rate of minors who have been infected with the SARS-CoV-2 virus is 99.997%.[267] **In spite of these facts, the British Columbia government and Dr. Henry are pushing the experimental treatment , to be applied to minors, without parental consent, with the tragic outcome of a high incidence of injury and death.**

255. According to Health Canada's Summary Basis of Decision,[268] updated May 20, 2021, the trials have not proven that the COVID-19 treatments prevent infection or transmission. **The Summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in pediatric (age 0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real- world use", "safety and immunogenicity in subjects with immune-suppression", and concomitant administration of non-COVID vaccines." Furthermore:**

a) Under the Risk Management plan section of the Summary Basis of Decision, it includes a statement based on clinical and non-clinical studies that "one important potential risk was identified being vaccine-associated enhanced disease, including VAERD (vaccine-associated enhanced respiratory disease)." **In other words, the shot increases the risk of disease and side-effects, and weakens immunity toward future SARS related illness.**

b) The report specifically states, "**The possibility of vaccine-induced disease enhancement after vaccination against SARS-CoV-2, has been**

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[267] https://online.anyflip.com/inblw/ufbs/mobile/index.html?s=08

[268] https://action4canada.com/wp-content/uploads/Summary-Basis-of-Decision-COVID-19-Vaccine-Moderna-Health-Canada.pdf

> **flagged as a potential safety concern that requires particular attention by the scientific community**, including the WHO, the Coalition for Epidemic Preparedness Innovations (CEPI) and the International Coalition of Medicines Regulatory Authorities (ICMRA)."[269]

In spite of this information, Dr. Henry, with the support of John Horgan, Adrian Dix and Mike Farnworth, has intentionally and consistently mislead the public by insisting the COVID injection is safe, and goes further to highly recommend the "vaccine" as safe for pregnant women, nursing infants and children.

256. As reported in the United States to the Vaccine Adverse Events Reporting System (VAERS), there have been more deaths from the COVID-19 injections in five months (Dec. 2020 – May 2021) than deaths recorded in the last 23 years from all vaccines combined.[270] Furthermore:

a) It is further reported that only one percent of vaccine injuries are reported to VAERS,[271] compounded by several months delay in uploading the adverse events to the VAERS database.[272]

b) On July 2, 2021, VAERS data release showed 438,441 reports of adverse events following COVID-19 injections, including 9,048 deaths and 41,015 serious injuries, between December 14, 2020, and July 2, 2021, and that adverse injury reports among 12-17-year old's more than tripled in one week.[273]

c) Dr. McCullough, a highly cited COVID-19 medical specialist, came to the stunning conclusion that the government was "...scrubbing unprecedented

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[269] https://www.tandfonline.com/doi/full/10.1080/14760584.2020.1800463

[270] https://vaccineimpact.com/2021/CDC-death-toll-following-experimental-covid-injections-now-at-4863-more-than-23-previous-years-of-recorded-vaccine-deaths-according-to-vaers/

[271] https://www.lewrockwell.com/2019/10/no_author/harvard-medical-school-professors-uncover-a-hard-to-swallow-truth-about-vaccines/

[272] https://vaxoutcomes.com/thelatestreport/

[273] https://childrenshealthdefense.org/defender/cdc-vaers-deaths-reported-covid-vaccines/

> numbers of injection-related-deaths." He further added, "...a typical new drug at about five deaths, unexplained deaths, we get a black-box warning, your listeners would see it on TV, saying it may cause death. And then at about 50 deaths, it's pulled off the market."[274]

257. Canada's Adverse Events Following Immunization (AEFI) is a passive reporting system and is not widely promoted to the public, hence, many adverse events are going unreported. Historically, in Canada, only about 1% of adverse effects are actually reported.

258. Dr. Joss Reimer, medical lead for Manitoba's Vaccine Implementation Task Force, says that new vaccine recommendations from the National Advisory Committee on Immunization on mixing mRNA vaccines will be a form of trial and error. Reimer stated, "Well in some ways, during a pandemic everything we do is a big human experiment."[275] However, according to Health Canada's Summary Basis of Decision Pfizer and Moderna warn that the interchangeability of the injections is unknown and recommend first and second dose of the same shot. The World Health Organization also warns that mixing the vaccines is dangerous.

259. Safe and effective treatments, Hydroxychloroquine and Ivermectin, and preventive measures, Vitamin D and Zinc, exist for COVID-19, apart from the

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[274] https://johnbwellsnews.com/highly-cited-covid-doctor-comes-to-stunning-conclusion-govt-scrubbing-unprecedented-numbers-of-injection-related-deaths-by-leo-hohmann/

[275] https://www.ctvnews.ca/politics/manitoba-vaccine-lead-says-mixing-vaccines-is-part-of-pandemic-s-big-human-experiment-1.5457570?fbclid=IwAR0sYVZiRZgkhAjPn_9q3IRuFdBfTvWIi_noINrhe69Aefzf8NxIKR_iXsI

experimental shots, yet the British Columbia government and Dr. Henry are prohibiting their use.[276] [277]

260. Messaging from the British Columbia government and Dr. Henry has placed pressure on the public to receive "vaccines" in exchange for the loosening of implemented lockdowns, restrictions, and infringements of various freedoms. This includes an inability to make income or see family members as a result of these restrictions, which adversely affects people's ability to meet basic needs and care for themselves and their families.

261. The British Columbia government and Dr. Henry have incentivised the receiving of injections, measuring the public's compliance against the degree, prevalence and severity of lockdowns and restrictions. This is a form of coercion, **and in fact criminal extortion**, as it makes clear specific consequences of non-compliance, which includes continued difficulty to make income, to maintain businesses, to maintain living standards and meet personal/familial responsibilities due to the continuation of these lockdowns and restrictions. This has also impacted the medical and homecare system wherein family members are not permitted to visit their family members. This is likely to continue due to the unconscionable mandate to vaccinate healthy people. This, all in the face of the

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[276] https://www.washingtonexaminer.com/news/study-finds-84-fewer-hospitalizations-for-patients-treated-with-controversial-drug-hydroxychloroquine

[277] https://www.ctvnews.ca/politics/manitoba-vaccine-lead-says-mixing-vaccines-is-part-of-pandemic-s-big-human-experiment-1.5457570?fbclid=IwAR0sYVZiRZgkhAjPn_9q3IRuFdBfTvWIi_noINrhe69Aefzf8NxlKR_iXsI

fact that the Supreme Court of Canada has established that it is a s.7 ***Charter*** right to refuse **any** medical treatment without informed, **voluntary**, consent.

262. The elderly have been treated cruelly and inhumanely by forcing the harmful experimental injection on them and also withholding loved ones from being "permitted" to visit them. Many elderly people died alone with no one by their side in their final hours to comfort and console them. The isolation of the elderly has been comparable to convicted criminals in solitary confinement. The elderly have been isolated for up to a month at a time, and now going on 16 months. Criminals subjected to this kind of isolation were compelled to choose a lethal injection over being subjected to the intense feelings of separation from human contact. Therefore, it sadly comes as no surprise that the elderly are choosing euthanasia over further lockdowns.[278]

263. Over 80% of all deaths occurred in care-homes and were people over the age of 80. The majority had multiple existing comorbidities.

264 As for children, they have been exposed to unprecedented amounts of fear, instability, shaming, psychological trauma, bullying, and segregation through the COVID-19 measures[279] and, are therefore, even more susceptible to being influenced by those in authority than their developmental stage would usually entail. Children have experienced extreme depression and anxiety due to the COVID-19 measures and are at the highest scale of suicide ideation of all age

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[278] https://www.ctvnews.ca/health/facing-another-retirement-home-lockdown-90-year-old-chooses-medically-assisted-death-1.5197140

[279] https://action4canada.com/student-mask-covid-exemptions/

groups. The "pandemic" has taken a heavy toll on children's mental health.[280] [281] The "extra" suicides and drug over-doses undisputedly tied to Covid-measures constitutes criminal negligence causing death.

265. The curriculum, and indeed all government narratives, exclude full disclosure of the growing risks (adverse reactions and death) of the experimental treatments, and the emerging evidence that the shots do not provide protection, as claimed. Informed consent with FULL disclosure is mandatory and yet, due to lack of research data, "full" disclosure cannot be provided.

266. As a result of the British Columbia government and Dr. Henry's push to vaccinate the masses, 'medically unqualified' people such as politicians, teachers, and business owners, have also placed pressure on the public to receive an injection that might (according to medical specialists) jeopardize their health by harming or even killing them.

267. Recommendations/mandates from the British Columbia government and Dr. Henry, that people take COVID-19 injections, are being made in complete contradiction to statements, recommendations, and findings of qualified medical practitioners and world-renowned scientist and virologist, including the inventor of the mRNA technology, Dr. Robert Malone, who is calling for "an immediate

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[280] https://www.thestar.com/news/gta/2021/07/08/very-very-concerning-pandemic-taking-heavy-toll-on-childrens-mental-health-sick-kids-study-shows.html

[281] https://toronto.ctvnews.ca/most-ontario-youth-experienced-depression-during-pandemic-early-data-suggests-1.5501275

halt of the COVID-19 "vaccines" due to the severe adverse reactions; in particular, the extreme danger it poses to young people."[282]

268. Researchers in Britain have also called on the government to halt their use of the coronavirus "vaccine" immediately after discovering potentially "toxic" side-effects.[283]

269. Dr. Vladimir Zev Zelenko, MD, called child vaccine mandates "coercive human experimentation," calling for those responsible for such policies to be tried for "crimes against humanity."

270. "According to the CDC, healthy kids 18 or younger have a 99.998% rate of recovery from COVID-19 WITHOUT any treatment," Zelenko told America's Frontline Doctors (AFLDS). "There is NO medical necessity for any vaccines. Especially, an experimental and unapproved mRNA injection that has shown to have many dangerous side effects."

271. He continued: "Any government or individual that forces or mandates children to get this experimental injection is in direct violation of the Geneva convention's prohibition against coercive human experimentation. These are criminals of the highest order and must be brought to justice for crimes against humanity."[284]

272. On June 25, 2021, Spanish researchers are conducting studies of the mRNA vaccines and the preliminary analysis of vaccination vials confirms the presence

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[282] https://gospelnewsnetwork.org/2021/06/29/mrna-inventor-says-to-stop-covid-vaccines-now/

[283] https://www.oann.com/chinese-virus-vaccine-produces-toxic-effects-british-researchers-call-on-govt-to-halt-use-immediately/#

[284] https://americasfrontlinedoctors.org/frontlinenews/dr-zelenko-calls-child-vaccine-mandate-coercive-human-experimentation-crimes-against-humanity/

of graphene nanoparticles. Graphene oxide is a highly toxic substance. The discovery made here by La Quinta Columna is being referred to as a full-fledged attack of State bioterrorism, or at least with the complicity of governments to the entire world population, now constituting crimes against humanity.[285]

273. On July 3, 2021, CTV News is spewing propaganda to support the governments' objective to force the experimental injection on the healthy Canadians who choose to reject the injection. The propaganda further incites discrimination, unreasonable fear and intolerance (hate) towards the unvaccinated.[286]

274. The injections being heavily promoted by Dr Henry have not been through the strict protocol normally assigned to new drugs or treatments. They were only approved by the FDA to be used under emergency authorization. This FDA approval was the basis for the "interim" approval by Health Canada. One of the main criteria for that authorization was that there are no alternative treatments available. This is the reason why Dr. Henry has withheld crucial information regarding other proven treatments for COVID-19, such as Hydroxychloroquine and Ivermectin. If she admitted that there were other treatments, then that criterion would no longer be met and the injections would have to be pulled and subjected to more in-depth study to be able to justify their use.

275. Dr. Henry is using her position to promote this experimental genetic technology of unknown efficacy and safety. With the knowledge of Premier Horgan,

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[285] https://www.orwell.city/2021/06/covid-19-is-caused-by-graphene-oxide.html

[286] https://www.ctvnews.ca/health/coronavirus/unvaccinated-people-are-variant-factories-infectious-diseases-expert-says-1.5495359

Minister of Safety Mike Farnworth, and Minister of Health Adrian Dix, she is deliberately misleading the public causing further harm and death. Everyone who takes these injections has the right to informed consent regarding the nature of the authorization, and to know that by taking it they are themselves becoming the test subjects in the Phase III trials. She is abusing the trust and duty that people naturally have towards someone who presents themselves as a physician.

276. She is even going so far as to tell minors that they do not need parental consent when she is fully aware there is even less safety data to warrant risking the lives of children who are at extremely low risk from COVID-19.

277. Dr. Henry is on record recommending the "vaccine" for pregnant women. She is therefore responsible and duty bound to know the harms and alert people to them. She is using her trusted position to manipulate women into taking a harmful shot.

278. On April 26, 2021, Dr. Henry made a public announcement and claimed that when the vaccine was originally tested and introduced, there were some concerns about whether women who were pregnant should receive it, but then states, "now there is more substantial data supporting it is safe and effective in pregnancy" ... and adds, "A new study released last week showed protected antibodies are transmitted through breast milk to the infant as well."[287] [288] Dr. Bridle's report

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[287] https://globalnews.ca/news/7813885/b-c-encourages-pregnant-women-to-get-vaccinated-but-wont-move-them-up-the-list/

[288] https://healthycanadians.gc.ca/recall-alert-rappel-avis/hc-sc/2021/75959a-eng.php

warned of infants with gastrointestinal bleeding. There are further reports of infant deaths associated with nursing mothers who had taken the shot.

279. Dr. Henry is once again outright lying because according to Health Canada's Summary Basis of Decision, **updated May 20, 2021**, it maintained what it had since the onset: that both the Moderna and Pfizer manufacturers identified that there are six areas of missing (limited/no clinical data) information. Listed as follows: **"use in paediatric (age 0-18)", "use in pregnant and breastfeeding women"**, "long-term safety", "long-term efficacy" including "real world use", "safety and immunogenicity in subjects with immune-suppression", and "concomitant administration of non-COVID vaccines."

280. **This is on Health Canada's website and was part of the Health Canada approval process, to which Dr. Henry has full access.**

281. In mid-June, the *New England Journal of Medicine* published a study called "Preliminary Findings of mRNA Covid-19 Vaccine Safety in Pregnant Persons" by Tom T. Shimabukuro and others from the Center of Disease Control's "v-safe COVID-10 Pregnancy Registry Team." The team wrote that there were "no obvious safety signals among pregnant [women] who received Covid-19 vaccines" even though it published a table which showed that **82% of women in the study who were injected with either the Pfizer or the Moderna vaccine during early pregnancy, lost their babies (miscarried).** [289]

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[289] https://www.breakingchristiannews.com/articles/display_art.html?ID=33214

282. On April 19, 2021, Dr. Henry uses the single death of an infant as more fodder to manipulate compliance of the masses. Dr. Henry says that the infant's tragic death "reminds us of the vicious nature of this virus." The reality was that this infant was already a patient at the British Columbia Children's Hospital for a pre-existing condition.[290]

283. The same article goes on to say that this was the very first death under the age of 30 in the entire province of British Columbia (population 5 million). More than a year (and two "waves") into the pandemic. That in itself highlights just how NOT dangerous this virus is to young people under the age 30.

284. In a news report on May 14, 2021, after numerous reports of adverse effects from the AstraZeneca injection, Dr. Henry continued to manipulate and coerce the public into taking the jab by only reporting on cases, **not deaths**, by PCR based cases. She further claims in her public announcement that youth are now at great risk for contracting COVID-19. Dr. Henry makes this claim with no evidence to substantiate it. Dr. Henry blatantly lies about youth getting COVID-19 saying, "especially young people are having severe disease with Covid-19." The facts are that young people are at nearly zero percent risk of contracting or transmitting this virus and if they do get it, they have mild symptoms.

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[290] https://web.archive.org/web/20210420021347/https://vancouversun.com/news/local-news/infant-dies-from-covid-19-at-b-c-childrens-hospital

285. Dr. Henry's May 14, 2021, news update included a Langley man, Mr. Mulldoon,[291] who was hospitalized and had to undergo surgery to remove six feet of his small intestines due to a severe reaction to the AstraZeneca shot. Dr. Henry sidestepped the issue and minimized the fact that this man's life has been permanently impacted by referring to his blood clot as "very rare." Statistics prove otherwise.

286. The fact is, there can be no "informed" consent since this experimental "vaccine" is still in the trial phase. All the potential side-effects are unknown. Anyone involved in this experiment is equivalent to a lab rat, at this point.

287. When countries around the world, including several provinces in Canada, were banning AstraZeneca due to the serious adverse reactions including death, Dr. Henry is on record continuing to not only make it available to the public but promote it and claiming it is "perfectly safe."

288. The duty of disclosure for informed consent is rooted in an individual's right to bodily integrity and respect for patient autonomy. A patient has the right to understand the consequences of medical treatment regardless of whether those consequences are deemed improbable, and have determined that, although medical opinion can be divided as to the level of disclosure required, the standard is simple, "A Reasonable Person Would Want to Know the Serious Risks, Even

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[291] https://www.msn.com/en-ca/news/canada/covid-19-bc-man-hospitalized-with-astrazeneca-vaccine-induced-blood-clot/ar-BB1gHW5y

if Remote." ***Hopp v Lepp, supra; Bryan v Hicks, 1995 CanLII 172 (BCCA); British Columbia Women's Hospital Center, 2013 SCC 30.***[292]

289. Vaccination is voluntary in Canada, yet, some federal, provincial, municipal officials have incentivised the taking of COVID-19 injections, even suggesting that lockdowns and lockdown measures will not end until enough of the population has received these injections. This is despite the negative impacts lockdowns have had on the health and well-being of the citizenry. Canadian law has long recognized that individuals have the right to control what happens to their bodies; law which is being directly infringed upon by these officials.

290. Dr. Henry has been instrumental in disseminating information to the public that is knowingly false, deceptive and/or misleading, resulting in egregious crimes against humanity, the division of families and society, abuse and mistreatment of our elderly and children, the destruction of our economy, employment and businesses, prohibiting medical care, and all of these things contributing to increased drug overdoses, suicide, depression, excess deaths and an overall breakdown of society.

291. Dr. Henry persists, in the face of mounting evidence, to misrepresent COVID-19 as a deadly condition when this condition produces only mild or no symptoms for the greatest percentage of the population (99.997%).

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[292] https://www.canlii.org/en/ca/scc/doc/2013/2013scc30/2013scc30.html?resultIndex=1

- **Dr. Bonnie HENRY – Vaccines and the WHO**

292. As per her Biography, Bonnie Henry has worked with the WHO and UNICEF Polio eradication program, as well as with the WHO to manage Uganda's Ebola outbreak[293].

293. Bonnie Henry was in Pakistan working with the WHO to purportedly eradicate polio in 2000. This through a vaccination program, without informed consent of the recipients, and this notwithstanding the fact that, according to the WHO, every Polio case since 1979 has been a result of the Polio vaccine itself and not naturally occurring. [294]

294. The Bill and Melinda Gates Foundation is a member, and funding organization of the WHO, specifically when it comes to the topic of developing vaccines, and delivering them to the "developing world"[295]

295. The Bill and Melinda Gates Foundation developed a highly comprehensive campaign to dispel "misinformation", and coerce Pakistani families to vaccinate their infants by implying that all infants should receive the vaccine unless there was a reason not to.[296]

296. The World Bank released a project appraisal document naming all of the sponsors on the project for a polio eradication project in Pakistan, that named the

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[293] Biographies - Province of British Columbia (gov.British Columbia.ca)

[294] Bonnie Henry – National Collaborating Centre for Infectious Diseases (nccid.ca)

[295] WHO | Bill & Melinda Gates Foundation

[296] Polio: Questions and Answers (immunize.org)

Bill and Melinda Gates Foundation as a sponsor, and the WHO as one of the major planning organizations on the project.[297]

297. As recently as May 2018, children have been not only experiencing injury, but also death at the hands of the Polio vaccine that has seen mass campaigns across even the most remote parts of their nation, including invasive door-to-door vaccination campaigns, since 1998, yet these deaths are often brushed aside. These massive injuries and deaths have been documented in South Asia (India and Pakistan) as well as Africa.[298]

298. Also per her biography, Bonnie Henry has been heavily involved, in the past, in the management of "mass gatherings" in Canada and abroad[299]. This included the Vancouver 2010 Olympic, and Paralympic Winter Games. Incidentally, Todd Dennett, former employee at the Bill and Melinda Gates foundation was appointed to be responsible for overseeing the medal ceremonies[300]. Todd Dennett was the manager of scheduling and trip operations at the Bill and Melinda Gates Foundation from March 2005-April 2008[301]. Todd Dennett is now the CEO and founder of Tiller Global, a company that boasts of a portfolio including having worked with: Bill and Melinda Gates Foundation, Microsoft, HIV Vaccine Trials Network[302].

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[297] World Bank Document

[298] Deaths of children after getting polio vaccine panic people - Pakistan - DAWN.COM

[299] Biographies - Province of British Columbia (gov.British Columbia.ca)

[300] Making the Olympic medal moment perfect: it's all in the details | The Seattle Times

[301] Todd Dennett | LinkedIn

[302] Portfolio – Tiller Global

299. The Plaintiffs state, and fact is, that administrating medical treatment without informed consent constitutes experimental medical treatment and contrary to the ***Nuremberg Code*** and ***Helsinki Declaration*** of 1960, still in vigor, and further and thus constitutes a crime against humanity under the ***Criminal Code*** of Canada.

300. On May 21st, 2021, Dr. Bonnie Henry, and her department announced the availability of the Covid vaccines for twelve (12) to seventeen (17) year olds, without the need for their parents consent, notwithstanding:

(a) That the Vaccines have **NOT** undergone required trial and safety protocols but were all made under an "emergency" basis;

(b) That there has **NOT** been a recorded death or life-threatening case of any twelve (12) to seventeen (17) year old in Canada;

(c) That twelve (12) to seventeen (17) year olds are not at risk of Covid-19;

(d) That, in the absence of informed consent, it constitutes medical experimentation and thus constituted a "crime against humanity" emanating from the Nuremberg trials, and principles following the medical experimentations by the Nazi regime and codified in Canada, as a Criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act;***

(e) And that on June 5th, 2021 Dr. Joss Reimer, Medical Lead for the Manitoba Vaccine Implementation Task Force, in asserting that the various vaccines can be mixed, publicly declared that the Covid-19 vaccinations are a "big human experiment";

(f) That many twelve (12) to seventeen (17) year olds do not possess the intellectual capacity to give informed consent;

(g) And by doing so Dr. Bonnie Henry, and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

- ## G/ CONSEQUENCES OF MEASURES TO THE PLAINTIFFS AND OTHER CITIZENS, AND VIOLATION OF CONSTITUTIONAL RIGHTS

301. The Plaintiffs state, and the facts is, that the impact of containment measures to Plaintiffs is, **inter alia** that:

(a) Mass containment measures negatively impacts the development of herd immunity, artificially prolongs the epidemic, extends the period of confinement, and contributes to maintaining a high proportion of susceptible individuals in the population.

(b) California emergency room physicians stated that *"sheltering in place does more harm than good and lowers our immune system."* [303]

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[303] https://vaccineimpact.com/2020/california-er-physicians-sheltering-in-place-does-more-harm-than-good-lowers-our-immune-system/

(c) The measures employed to achieve the objective of *"flattening the curve"* so as not to overwhelm the health care system were disproportionate to the objective. Our health care system has consistently operated at 40 – 50% **below** capacity since the introduction of these measures.

(d) The suspensions of rights to participate in community and in commerce has caused substantial and irreparable harm to the economy, livelihoods, communities, families, and the physical and psychological well-being of Canadians and the Plaintiffs. These include:

   (i) A dramatic increase in reports of domestic violence (30%).

   (ii) Over six million Canadians have applied for unemployment benefits and 7.8 million Canadians required emergency income support from the Federal government (as of May 2020). [304]

   (iii) The deepest and most rapid loss of jobs, savings and income in the history of Canada. [305]

   (iv) Numerous citizens have been forced into unemployment and poverty, the loss of their business, and bankruptcy.

   (v) Estimates of the Federal deficit resulting from their response to SARS-CoV-2 ranges up to $400 billion (May 2020). [306]

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[304] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[305] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

[306] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

(vi) Leading Economic Indicators show the Canadian economy is now in "*freefall*". [307]

(vii) Illnesses and conditions not related to SARS-CoV-2 have gone untreated and undiagnosed.

(viii) Dramatic increase in number of individuals dying at home due to lack of medical care and for fear of visiting emergency wards despite the fact that most hospitals have capacity.

(ix) Denial of access to health care professionals including doctors, dentists, chiropractors, physiotherapists, naturopaths, homeopaths, physiotherapists, massage therapists, optometrist, and osteopaths.

(x) Denial of access to health care services including cancer treatments, elective surgeries, testing, diagnosing, and treatment.

(xi) Regulated health care practitioners, including chiropractors, Naturopaths, and Homeopaths have been directed to refrain from providing health care knowledge to individuals concerned about SARS-CoV-2. This is an unwarranted infringement on the right to therapeutic choice.

(xii) Dramatic Increase in mental health challenges including suicide.

(xiii) The significant potential for the traumatizing children due to the disproportionate fear of contracting a virus for which the risk of death is virtually zero.

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[307] https://www.macdonaldlaurier.ca/beyond-lockdown-canadians-can-have-both-health-and-prosperity-an-open-letter-to-the-prime-minister/

(xiv) Significant increase in alcohol consumption and drug use.

(xv) Denial of access to healthy recreation including parks, beaches, camping, cottages, and activities as golf, tennis, swimming, etc.

(xvi) Denial of a public education for children.

(xvii) Denial of access to consumer goods and services.

(xviii) Individuals dying alone in hospital and extended care facilities without the support of family and friends. [308]

(xix) Fathers denied access to be present for the birth of their child.

(xx) Elderly parents in supportive care are denied access to the support of their family and friends.

(xxi) The effective closure of Courts of Law is unprecedented, illegal, unconstitutional, undemocratic, unnecessary, and impedes the ability of Canadians to hold our governments accountable.

(xxii) The effective closure of Parliaments is unprecedented, illegal, unconstitutional, undemocratic, unnecessary, and impedes the ability of Canadians, including the Plaintiffs, to hold governments accountable.

302. The Plaintiffs further state, and fact is, that:

(a) To combat COVID-19, "Canada's federal government initially committed to measures totaling around $400 billion, of which about two-fifths constitutes direct spending." Currently, the deficit for

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[308] https://globalnews.ca/news/6866586/British Columbia-woman-disability-dies-covid-19/

2019-2020 is expected to be well over $1.2 Trillion. This is seven times larger than the previous year's deficit. [309]

(b) There is no evidence that the impact of these negative consequences were calculated, much less fully considered in the government's response to SARS-CoV-2.

(c) John Carpay, president of the Justice Centre for Constitutional Freedoms in Canada has stated there is reason to conclude that the government's response to the virus is deadlier than the disease itself. [310]

(d) The cost of combatting SARS-CoV-2 is placed disproportionately on the young and blue collar and service workers who cannot work from home, as opposed to white collar workers who often can.

(e) The results from Sweden, and other countries that did not engage in mass and indiscriminate lockdowns, demonstrates that other more limited measures were equally effective in preventing the overwhelming of the health care system, and much more effective in avoiding severe economic and individual health consequences.

(f) The Ontario government took the "extraordinary step" to release a database to police with a list of everyone who has tested positive for COVID-19 in the province.[311]

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[309] https://www.huffingtonpost.ca/entry/canada-budget-deficit-covid19_ca_5e85f6British Columbiac5b60bbd735085f4

[310] https://www.jccf.ca/the-cost-of-the-coronavirus-cure-could-be-deadlier-than-the-disease/

[311] https://toronto.ctvnews.ca/mobile/ontario-takes-extraordinary-step-to-give-police-list-of-all-covid-19-patients-1.4910950?fBritish Columbialid=IwAR10jfu_5OYq5BPZJKMyyqiN2P47dK_wbZzFMqC8WEpFxilhEFt81cGnfqc

303. Furthermore, while upon the declaration of the pandemic, based on a totally erroneous modeling, postulated that, as opposed to regular 650, 000 deaths every year form seasonal viral respiratory illness , world-wide, that 3.5 Million may or would die, the erroneous COVID implemented measures have proven to be more devastating than the "pandemic" at its posited worse in that:

(a) In Canada, as elsewhere, 170,000+ medical, surgical, operations are canceled, with the numbers climbing, as well as closure of other medical services at hospital, which have caused deaths;

(b) With the fear of lock-downs and self-isolation, patients have not accessed their doctor for diagnosis of medical problems;

(c) Documented spikes of domestic violence and suicides have been recorded;

(d) Inordinate spike in alcoholism, drug use; and clinical depression;

(e) Moreover, and most-shocking, the UN through an official of the World Food Bank, on April 22nd,2020, had published a document stating that, because of COVID-19 (measures)and the disruption of supply chain, it estimates that 130 **Million "additional people"** "on the planet could be on the brink of **starvation by end of year 2020** which, begs the question: why is it justifiable to add 130 Million deaths to purportedly save 3.5 Million?

304. The Plaintiffs state, and the facts is, that the purported, and false, goals of the WHO measures and its purveyors, such as the Defendants, are a perpetual moving target, and purposely shift to an unattainable goals, in that:

(a) The initial rationale for the mass lockdown of Canadian society was to "flatten the curve" to avoid overwhelming health care services. It was never about preventing the coronavirus from spreading altogether, but rather to render its spread manageable.

(b) It appears now that the goal has changed. Government appears to have shifted the goal to preventing the virus from infecting any and all Canadians. If so, this ought to be made clear, as should the justification for the change. [312]

(c) Yoram Lass, the former director-general of Israel's Ministry of Health is of the opinion that "lockdown cannot change the final number of infected people. It can only change the *rate* of infection." [313]

(d) There are warnings of an imminent "second wave." But if the "first wave" has been flattened, planked or buried to the extent that in vast areas of the country very few people have been exposed to the virus at all, then the "second wave" is not really a second wave at all, but a delayed first wave.

(e) Minimizing the total spread of the coronavirus until a vaccine is available will be the most expensive goal in the history of human governance.

(f) There is no scientific evidence to substantiate that the elimination of the virus through self-isolation and physical distancing is achievable or medically indicated.

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[312] https://nationalpost.com/opinion/raymond-j-de-souza-on-covid-19-a-lockdown-without-a-clear-goal

[313] https://www.spiked-online.com/2020/05/22/nothing-can-justify-this-destruction-of-peoples-lives/#.XsgqiN6D0uQ.facebook

(g) According to four Canadian infectious disease experts, Neil Rau, Susan Richardson, Martha Fulford and Dominik Mertz - *"The virus is unlikely to disappear from Canada or the world any time soon"* and *"It is unlikely that zero infections can be achieved for COVID-19."* [314]

(h) There is no compelling reason to conclude that the general-population lockdown measures (first requested by the Trudeau government on 17 March) had a detectable effect in Canada. The lockdown measures may have been implemented after "peak prevalence" of actual infections, which renders mitigation measures entirely without effect.

(i) The Government of Canada has been slow to endorse the re-opening of the economy even as hospitals remain well below capacity – the metric that was initially used to justify the restrictions.

305. Since the summer of 2020, the above-noted consequences have exponentially multiplied, magnified, and chronically festered to the large point of deprivation and deaths, caused by the measures.

- **H/ THE COVID-19 VACCINE- "WE DO NOT GET BACK TO NORMAL UNTIL WE HAVE A VACCINE"**

306. From the on-set of the declared "emergency", the Plaintiffs state, and the fact was, that the narrative and mantra created and propagated by Bill Gates that "we do not get back to normal until we have a vaccine" has been accelerated by a

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[314] https://nationalpost.com/opinion/opinion-we-are-infectious-disease-experts-its-time-to-lift-the-covid-19-lockdowns

falsely declared "pandemic" to what has been a persistent push for **mandatory** vaccination of every human being on the planet, along with "global governance" as propagated by Bill Gates, Henry Kissinger, the Rockefeller Foundation, GAVI, the WEF, and their likes.

307. With respect to (mandatory) vaccines and the COVID-19, the Defendants, in addition to pushing the ultimate aim of mandatory vaccines, spear-headed by Bill Gates, and others, have also ignored and refuse to address the issues in the context of COVID-19, let alone vaccines at large, as reflected in, inter alia, the following:

(a) **Intention to Create Vaccine Dependency:** Is it ethical to deny children, young people and most of the population who are at low risk of mortality the opportunity to develop natural immunity when we know natural immunity is lifelong in most cases? Are we going to create another condition where we become 'vaccine dependent' or will we recognize the value of natural herd immunity? Advocates of the natural herd immunity model are of the opinion that rather than the mass isolation of billions of people, only the most at-risk people and their close associates should be isolated. The forced mass quarantine of an entire, mostly low-risk population is disproportionate and unnecessary. This is the position being utilized by Sweden.[315]

(b) **Will A COVID 19 Vaccine Be Safe?**

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[315] https://vaccinechoicecanada.com/in-the-news/will-a-covid-19-vaccine-save-us/

(i) **Dr. Anthony Fauci** – is the director of the National Institute of Allergy and Infectious Diseases in the United States. Fauci has stated: *"We need at least around a year and a half to make sure any new vaccine is safe and effective."* [1]

(ii) **Dr. Paul Offit** - Offit warns, *"Right now you could probably get everyone in this country to get this (CV) vaccine because they are so scared of this virus. I think we should keep remembering that most people who would be getting this vaccine are very unlikely to be killed by this virus."*

(iii) **Dr. Peter Hotez** - dean of the National School of Tropical Medicine at Baylor College of Medicine, told Reuters, *"I understand the importance of accelerating timelines for vaccines in general, but from everything I know, this is not the vaccine to be doing it with."*

(iv) **Pathogenic Priming**[316];

(c) **Jonathan Kimmelman**, a biomedical ethics professor at McGill University in Montreal, is watching how both scientific and ethical standards are maintained while the pandemic vaccine trials progress at breakneck speed.

> "My concern is that, in the fear and in the haste to develop a vaccine, we may be tempted to tolerate less than optimal

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[316] https://www.sciencedirect.com/science/article/pii/S2589909020300186?via%3Dihub=&amp=1

> science," Kimmelman said. "That to me seems unacceptable. The stakes are just as high right now in a pandemic as they are in non-pandemic settings. "To show how long the process can take, Kimmelman points to the example of the ongoing search for an effective HIV vaccine that began in the 1990s. Before healthy people worldwide receive a vaccine against SARS-CoV-2, the risk/benefit balance needs to tip in favor of the vaccine's efficacy in offering protection over the potential risks, he said. The balance still exists even in the face of a virus wreaking an incalculable toll on human health and society." [317]

(d) CBC News March 24, 2020 reported by Amina Zafar;[318]

(e) Moderna's vaccine uses genetic material from the virus in the form of **nucleic acid.** That tells the human body how to make proteins that mimic viral proteins and this should provoke an immune response. Denis Leclerc, an infectious diseases researcher at Laval University in Quebec City, said the advantage of nucleic acid vaccines like Moderna's is that they're much faster to produce than other types. While relatively safe, **nucleic acid vaccines are generally not the preferred strategy**, Leclerc said, because they **don't have the same safety record** as the traditional approach.

(f) **Will a COVID 19 vaccine be effective? Ian Frazer** - Immunologist Ian Frazer has downplayed the role of a vaccine in overcoming the coronavirus pandemic, saying it may "not stop the spread of the virus in the community". That's if a vaccine can be developed at all. Frazer, a

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[317] https://www.cbc.ca/news/canada/coronavirus-covid19-april16-canada-world-1.5534020

[318] https://www.cbc.ca/news/health/covid-19-vaccine-research-1.5497697

University of Queensland scientist who was recognized as Australian of the Year in 2006 for his contribution to developing HPV vaccines, said a COVID-19 vaccine may not be the end-all to the current crisis. [319]

(g) **Role of Influenza Vaccination to Current Outbreak - Allan S. Cunningham**, Retired pediatrician The possibility that **seasonal flu shots are potential contributors** to the current outbreak. A randomized placebo-controlled trial in children showed that flu shots increased fivefold the risk of acute respiratory infections caused by a group of non influenza viruses, including coronaviruses.[320]

(h) **Mandatory Vaccination**

(i) **Diane Doucet** – Message to New Brunswick Committee on Law Amendments"Mandatory vaccination may soon be imposed on the entire population. Eventually, every person will have to decide between attending school, keeping their job, their home and their ability to participate in society and their so-called freedom to choose. People will also be at risk of losing their jobs if they speak out against mandatory vaccinations.

We are not talking about quarantining individuals infected by a disease. We are talking about the segregation of healthy children and adults from participating in society. Their crime is that they do not consent to handing over their bodies to the tyrannical will of a vaccine cartel which is accountable to no one.

The policy makers look down upon the citizenry with arrogance. We live in a system that views the common people as being too ignorant to decide what's best for themselves and their children. When corporations, health agencies and government institutions treat people like chattel and punish those who do not submit, you

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[319] https://7news.com.au/lifestyle/health-wellbeing/coronavirus-australia-immunologist-ian-frazer-expresses-doubt-around-role-of-vaccine-in-pandemic-c-983647

[320] https://www.bmj.com/content/368/bmj.m810/rr-0

> have slavery. If an institution can take it upon itself and do what it wants to people's bodies against their will, then you live in a slave system. We find ourselves here today, wondering how we managed to slip this low."

- **Microchipping /Immunity Passports/ Social Contact Vaccine Surveillance & 5G**

308. The Plaintiffs state that, and fact is, this global vaccination scheme which is being propelled and pushed by the Defendants, is with the concurrent aim of total and absolute surveillance of the Plaintiffs and all citizens.

309. In addition to the facts, pleaded with respect to Gates' vaccine-chip, nannocrystal "app" already developed, in late June, 2020, cell-phone companies, at the request of Justin Trudeau that the 30-Million eligible Canadians "voluntarily" load up "contract-tracing apps" now available from the phone-tech giants. These companies began dumping the apps on to customers without **informed** consent.

310. On June 30th, 2020, Canada announced that it was participating, to be included, as one of an initial fifteen (15) countries, to require "immunity passport", a cell-phone application disclosing medical vaccination history.[321] Canada is one of an initial fifteen (15) countries to enter into a contract to deploy "immunity passport" technology. The technology would utilize a cell-phone application to disclose medical vaccination history. [322]

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[321] https://www.mintpressnews.com/mass-tracking-covi-pass-immunity-passports-slated-roll-15-countries/269006/

[322] https://www.mintpressnews com/mass-tracking-covi-pass-immunity-passports-slated-roll-15-countries/269006/

311. The Plaintiffs further state, and the fact is, that above and beyond what is set out above in the within Statement of Claim, mandatory vaccination, for any disease, let alone a **virus**, is a flagrant violation of the Plaintiffs' **Charter** , and written constitutional rights, under s. 2 and 7 of the **Charter,** to freedom of belief, conscience, religion, and life liberty and security of the person as a violation of physical and psychological integrity, where informed medical consent is absent in a mandatory scheme.

312. Furthermore, and more importantly, the Plaintiffs state that public officials, including the relevant Defendants, Trudeau, Tam, and Henry have warned that, despite the anticipated five (5) years of the Covid-19 "vaccines", the vaccines will **not** result in immunity: do not prevent transmission of the virus to and from the recipient: and that the other measures, lockdoans, maskins and useless PCR tests must be maintained indefinitely. This all begs the question: why then roll out an experimental "vaccine" by-passing the safety protocols?

Version April 29/21

- **Authorized COVID "Vaccines"**

313. Since the Summer of 2020, with respect to the Covid "vaccines", the events have unfolded as set out below.

314. There are four COVID-19 vaccines which have received emergency use authorization in Canada: [323]

(a) The **Pfizer-BioNTech** COVID-19 vaccine was authorized for use in Canada on December 9, 2020.

(b) The **Moderna** COVID-19 vaccine was authorized for use in Canada on December 23, 2020.

(c) The **AstraZeneca** COVID-19 vaccine was authorized for use in Canada on February 26, 2021.

(d) The **Janssen** COVID-19 vaccine was authorized for use in Canada on March 5, 2021.

(e) Merck, a major pharmaceutical company, which was developing two (2) potential vaccines, abandoned their development and publicly announced, that it is **more** effective for people to simply contract the virus and let the natural immune system deal with it.

Note: Health Canada authorized two manufacturers to produce this vaccine developed by AstraZeneca and Oxford University: AstraZeneca and Serum Institute of India (SII). NACI has not specifically reviewed evidence for the SII vaccine, but Health Canada has deemed SII and AstraZeneca vaccines to be comparable. Authorization of the SII COVID-19 vaccine (COVISHIELD) was based on its comparability to the AstraZeneca COVID-19 vaccine as determined by evaluation and direct comparison of manufacturing processes and controls and the quality characteristics of the two products. The results of this comparison by Health Canada determined that the two products were sufficiently similar and that the efficacy, immunogenicity and safety of COVISHIELD could be inferred from the non-clinical and clinical studies from the AstraZeneca COVID-19 vaccine.

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[323] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

315. These "vaccines" constitute experimental Medical Devices in that:

(a) Canadians have been led to believe that the COVID 19 vaccines have undergone robust clinical trials and have proven these products to be both safe and effective. That belief is simply untrue. In fact it is a bald and intentional lie.

(b) Those partaking in the COVID 19 vaccines are test subjects in ongoing clinical trials. [324]

(c) The COVID-19 vaccines have not received full Health Canada approval. They have only been granted 'interim use'; i.e. 'emergency use authorization'. This means that these medical products are considered 'experimental'. Those partaking in these products are subjects in human clinical trials. In order to obtain emergency use, it must be established that no other recognized and approved medical treatment or drugs are available to mitigate, assist, or avert the disease which explains the banning and use of such drugs as HCQ, Ivermectin, Vitamin D, Zinc, and Magnesium in combination, treatments that have been proven effective.

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[324] https://off-guardian.org/2021/01/03/what-vaccine-trials

(d) These "vaccine" products are unlike any previous vaccine. The most significant difference with the Pfizer and Moderna vaccines is the introduction of 'messenger RNA/DNA technology'. This technology has never before been injected into humans on a mass scale to function as a vaccine.

(e) The AstraZeneca and Janssen vaccines use a genetically modified virus to carry genes that encode SARS-CoV-2 spike proteins into the host cells. Once inside the cell, the spike protein genes are transcribed into mRNA in the nucleus and translated into proteins in the cytosol of the cell.

(f) The long-term consequences of injecting genetic technology into humans on a mass scale is, quite simply, unknown.

316. Safety Trials have not been completed with these vaccines and furthermore:

(a) None of the vaccines authorized for COVID-19 have completed Phase III clinical trials. Clinical trials are still ongoing.

(b) Phase III safety results will not be concluded until 2022 - 2024 depending upon the manufacturer.

(c) Long-term safety data does not exist for these products. [325]

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[325] https://www.fda.gov/media/144416/download

(d) The normal development timeline to determine the safety of a vaccine is 5 - 10 years. It is impossible to know the safety and efficacy of a new medical product in the few months these products have existed.

(e) It is also important that Canadians know that these 'vaccines' are unlike any previous vaccine.

(f) There are significant concerns related to the fast tracking of a COVID 19 vaccine, with safety being first and foremost.

(g) Vaccine manufacturers have been working on a coronavirus vaccine for more than fifty (50) years with no success.

(h) A coronavirus vaccine carries the risk of what is known as 'pathogenic priming' or 'disease enhancement', whereby instead of protecting against infection, the vaccine makes the disease worse in vaccinated individuals. [326]

(i) The mechanism that causes disease enhancement is not fully understood and has prevented the successful development of a coronavirus vaccine to date.

(j) Disease enhancement occurred with the dengue fever vaccine. Vaccines developed for other coronaviruses, SARS-1 and MERS, resulted in a high rate of death in test animals.

(k) Normal protocols to test the safety of vaccines include testing in animals prior to testing in human subjects.

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[326] https://www.reuters.com/article/us-health-coronavirus-vaccines-insight-idUSKBN20Y1GZ

(l) Animal testing prior to human trials is even more necessary for a coronavirus vaccine as all previous efforts to develop a coronavirus vaccine have failed because the vaccine caused an exaggerated immune response upon re-exposure to the virus. [327] Vaccinated animals suffered hyper-immune responses including inflammation throughout their bodies, especially in their lungs. Consequently, those vaccines were never approved.

(m)In the rush to develop a COVID vaccine, Health Canada has permitted vaccine makers to either bypass animal testing entirely or conduct animal testing concurrently with testing in humans.

(n) Dr. Peter Hotez, dean of the National School of Tropical Medicine, was involved in previous efforts to develop a SARS vaccine. On March 5, 2020, Hotez told a US Congressional Committee that coronavirus vaccines have always had a "unique safety problem" — a "kind of paradoxical immune enhancement phenomenon." [328]

(o) Hotez has stated, "I understand the importance of accelerating timelines for vaccines in general, but from everything I know, this is not the vaccine to be doing it with."

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[327] childrenshealthdefense.org/defender/pfizer-COVID-vaccine-trial-pathogenic-priming/

[328] https://www.c-span.org/video/?470035-1/house-science-space-technology-committee-hearing-coronavirus&start=1380

(p) Vaccine manufacturers have yet to provide data that defines the vaccine's interaction with other vaccines or prescription medications. [329]

(q) COVID-19 vaccines have not been tested for their ability to cause cancer, induce organ damage, change genetic information, impact the fetus of a pregnant woman or to impair fertility.

(r) The product monograph for the AstraZeneca vaccine authorized for use in Canada states: [330] "It is unknown whether AstraZeneca COVID-19 Vaccine may impact fertility. No data are available." "The safety and efficacy of AstraZeneca COVID-19 Vaccine in pregnant women have not yet been established." "It is unknown if AstraZeneca COVID-19 Vaccine is excreted in human milk. A risk to the newborns/ infants cannot be excluded." "The safety and efficacy of AstraZeneca COVID-19 Vaccine in children and adolescents (under 18 years of age) have not yet been established. No data are available." "Currently, there is limited information from clinical trials on the efficacy of AstraZeneca COVID-19 Vaccine in individuals ≥65 years of age."

(s) William Haseltine, a former Harvard Medical School professor states that, "These protocols seem designed to get a drug on the market on a timeline arguably based more on politics than public health." [331]

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[329] COVIO-vaccine.canada.ca/info/pdf/pfizer-biontech-COVID-19-vaccine-authorisation.pdf?fbclid=IwAR0vCv09_332PjR41OUBJOy1k1ESQg--_CbAgcGpk1ZWY71xBztuLDE05oE

[330] https://covid-vaccine.canada.ca/info/pdf/astrazeneca-covid-19-vaccine-pm-en.pdf

[331] https://www.washingtonpost.com/opinions/2020/09/22/beware-covid-19-vaccine-trials-designed-succeed-start/

317. The Plaintiffs further state, and the fact is, that these Vaccines include never before used mRNA genetic technology in that:

(a) The Pfizer and Moderna vaccines includes ingredients never before used in licenced vaccines, and function unlike any previous vaccine to date.

(b) These treatments are more accurately a medical device and includes synthetic genetic technology based on a computer generated *"spike glycoprotein antigen encoded by RNA and formulated in lipid nanoparticles"*. [332]

(c) According to the Canadian National Advisory Committee on Immunization (NACI) – Recommendations on the Use of COVID-19 Vaccines: [333] "mRNA vaccines *that use messenger RNA (mRNA) platforms contain modified nucleotides that code for the SARS-CoV-2 spike protein. A lipid nanoparticle formulation delivers the mRNA into the recipient's cells. Once inside the cytoplasm of a cell, the mRNA provides instructions to the cell's protein production machinery to produce the trans-membrane spike protein antigen that becomes anchored on the cell's external surface."*

(d) The NACI claims – *"The mRNA does not enter the nucleus of the cell and does not interact with, or alter, human DNA." and "The mRNA, lipid nanoparticle, and spike protein are degraded or excreted within days to*

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[332] https://www.fda.gov/media/144416/download

[333] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

weeks from time of immunization." (page 17) Evidence to substantiate these claims have not been provided.

(e) The same document states: *"COVID-19 vaccines based on viral vector platforms use a modified virus to carry genes that encode SARS-CoV-2 spike proteins into the host cells. The vector virus is a type of adenovirus that has been modified to carry COVID-19 genes and to prevent replication. These modifications are intended to prevent the viral vector from causing disease (i.e., they are non-replicating). Once inside the cell, the SARS-CoV-2 spike protein genes are transcribed into mRNA in the nucleus and translated into proteins in the cytosol of the cell. The AstraZeneca vaccine uses a modified chimpanzee adenovirus vector (ChAd).* " (page 17) Again, evidence to substantiate these claims have not been provided.

(f) This technology has never before been injected into humans on a mass scale.

(g) The long-term consequences of injecting genetic technology into a human body is unknown.

(h) A white paper produced by Moderna states: "DNA vaccines have a risk of permanently changing a person's DNA." [334]

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[334] https://www.modernatx.com/sites/default/files/RNA_Vaccines_White_Paper_Moderna_050317_v8_4.pdf

(i) The Moderna White Paper also states: "As with all new vaccines, time is needed to establish the level and duration of immunogenicity and the safety profile of mRNA vaccines in larger, more diverse populations."

(j) The potential exists for significant consequences, not only for the person receiving the vaccine, but for future generations as it is highly possible that the mRNA/DNA in the vaccine will combine with the recipient's own DNA and be transmitted to their offspring.

(k) The mRNA vaccine uses the cell's own machinery to create a protein that is identical to the spike protein on the coronavirus. This protein is also found in the placenta and in sperm. If a constant immune response is initiated by the vaccine against this protein, it will likely attack these human tissues as well and prevent placentas and sperm from forming properly. This autoimmune cross-reactivity could cause infertility, miscarriages and birth defects.

(l) The mRNA in the Pfizer vaccine was sequenced from the 3rd iteration of the original WUHAN published Genome SARS-CoV-2 (MN908947.3). The WHO protocols Pfizer used to produce the mRNA do not appear to identify any nucleotide sequences that are unique to the SARS-CoV-2 virus. When questioned Pfizer confirmed: "The DNA template does not come directly from an isolated virus from an infected person." [335]

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[335] https://off-guardian.org/2021/01/03/what-vaccine-trials

318. The Plaintiffs state, and the fact is, that: Vaccines manufacturers have been given total immunity from liability, in that:

(a) COVID-19 vaccine manufacturers have been granted total immunity from liability for any harm or injury caused by their products.

(b) Federal procurement minister Anita Anand justified the indemnity in the following statement - *"All countries, generally speaking, are faced with the issue of indemnification of companies, especially in cases of novel technologies like this."* [336]

(c) Ordinarily, a 'novel technology' would demand a higher level of oversight and accountability, not less.

(d) Without legal accountability, there is no financial incentive for manufacturers to make the safest vaccines possible, nor is there incentive to remove injurious vaccines from the marketplace.

(e) Legal and financial indemnity does not exist with any other product licensed for use in Canada.

(f) Experience in other countries reveals that eliminating or severely restricting manufacturer liability for injury or death result in an ever-expanding market of poorly tested vaccine products.

(g) A 2017 study investigated the consequences in the United States of removing litigation risk related to vaccines. The researchers concluded that vaccines that were licensed after legislation that pre-empted most product liability lawsuits are associated with a significantly higher incidence of adverse events than were vaccines that were licensed under a previous regime that permitted consumers to sue. [337]

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[336] https://globalnews.ca/news/7521148/coronavirus-vaccine-safety-liability-government-anand-pfizer/

319. The Plaintiffs further state, and the fact is, that there is **No Evidence** the Vaccine Prevents Infection or Transmission, and the Public Health officers warn of this very fact and further that:

(a) These medical devices have been declared 'effective' even though manufacturers have not demonstrated that their product prevents infection or transmission, nor whether the device will result in a reduction in severe illness, hospitalization, or death. [338] [339] [340]

(b) According to a report in the British Medical Journal, *"Hospital admissions and deaths from COVID-19 are simply too uncommon in the population being studied for an effective vaccine to demonstrate statistically significant differences in a trial of 30,000 people. The same is true of its ability to save lives or prevent transmission: the trials are not designed to find out."* [341]

(c) Given these vaccines have not been proven to prevent infection or transmission, there is no evidence that they contribute to community protection/herd immunity.

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[337] https://link.springer.com/article/10.1007/s11151-017-9579-7

[338] https://blogs.bmj.com/bmj/2020/11/26/peter-doshi-pfizer-and-modernas-95-effective-vaccines-lets-be-cautious-and-first-see-the-full-data/

[339] https://www.nytimes.com/2020/09/22/opinion/covid-vaccine-coronavirus.html

[340] https://stopmedicaldiscrimination.org/home#af86c044-aed2-496d-92bb-e1d76dca284e

[341] www.bmj.com/content/371/bmj.m4037

(d) What is being reported by vaccine manufacturers is relative risk reduction, not absolute risk reduction The absolute risk reduction appears to be less than 1%.[342]

(e) On the Public Health Agency of Canada website, the National Advisory Committee on Immunization (NACI) "recommends that all individuals should continue to practice recommended public health measures for prevention and control of SARS-CoV-2 infection and transmission (wear a face covering, maintain physical distance, and avoid crowds) **regardless of vaccination with COVID-19 vaccines.**" (pg. 41) [343]

(f) According to the 'Recommendations on the use of COVID-19 vaccines' on the Government of Canada website - *"There is currently insufficient evidence on the duration of protection and on the efficacy of these vaccines in preventing death, hospitalization, asymptomatic infection and reducing transmission of SARS-CoV-2."* [344]

(g) According to the National Advisory Committee on Immunization – Recommendations on the Use of COVID-19 Vaccines: [345] *"Due to the availability of only short-term clinical trial data, the duration of*

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[342] https://blogs.bmj.com/bmj/2020/11/26/peter-doshi-pfizer-and-modernas-95-effective-vaccines-lets-be-cautious-and-first-see-the-full-data/

[343] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

[344] https://www.canada.ca/en/public-health/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines.html#a2

[345] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

protection provided by COVID-19 vaccination is currently unknown." (page 18) and *"Efficacy against hospitalization was not assessed in the clinical trials of the mRNA vaccines, but evidence from the clinical trials involving the AstraZeneca vaccine is* *suggestive* *of a protective effect against hospitalization."* (page 20)

(h) The data from Phase 1, 2, and 3 clinical trials presented to the High Consequence Infectious Disease Working Group and NACI are unpublished and have not been made available for independent third party review and verification.

320. The Plaintiffs further state, and fact is, that the British Columbia Health Information is not Congruent with Vaccine Manufacturer Information in that:

(a) Information disseminated by BC Health and the BC Centre for Disease Control is not congruent with information taken directly from the Pfizer Emergency Use Authority request to the US FDA.

(b) The Pfizer Emergency Use Authorization request states the following: [346]

- **Under section 6.2 - Unknown Benefits/Data Gaps:**
- **Duration of protection**

It is not possible to assess sustained efficacy over a period longer than 2 months.

- **Effectiveness in certain populations at high-risk of severe COVID-19**

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[346] https://www.fda.gov/media/144416/download

The subset of certain groups such as immunocompromised individuals is too small to evaluate efficacy outcomes.

- **Effectiveness in individuals previously infected with SARS-CoV-2**

Available data are insufficient to make conclusions about benefit in individuals with prior SARS-CoV-2 infection.

- **Effectiveness in pediatric populations**

The representation of pediatric participants in the study population is too limited to adequately evaluate efficacy in pediatric age groups younger than 16 years.

- **Future vaccine effectiveness as influenced by characteristics of the pandemic, changes in the virus, and/or potential effects of co-infections**

The evolution of the pandemic characteristics . . . as well as potential changes in the virus infectivity, antigenically significant mutations to the S protein, and/or the effect of co-infections may potentially limit the generalizability of the efficacy conclusions over time.

- **Vaccine effectiveness against asymptomatic infection**

Data are limited to assess the effect of the vaccine against asymptomatic infection.

- **Vaccine effectiveness against long-term effects of COVID-19 disease**

At present it is not possible to assess whether the vaccine will have an impact on specific long-term sequelae of COVID-19 disease in individuals who are infected despite vaccination.

- **Vaccine effectiveness against mortality**

A larger number of individuals at high risk of COVID-19 and higher attack rates would be needed to confirm efficacy of the vaccine against mortality.

- **Vaccine effectiveness against transmission of SARS-CoV-2**

Data are limited to assess the effect of the vaccine against transmission of SARS-CoV-2 from individuals who are infected despite vaccination.

- **Under Section 6. 3 - Known Risks**:

The vaccine has been shown to elicit increased local and systemic adverse reactions as compared to those in the placebo arm.

Severe adverse reactions occurred in 0.0 - 4.6% of participants.

- **Under Section 6.4 - Unknown Risks/Data Gaps**:
- **Safety in certain subpopulations**

There are currently insufficient data to make conclusions about the safety of the vaccine in subpopulations such as children less than 16 years of age, pregnant and lactating individuals, and immunocompromised individuals.

- **Adverse reactions that are very uncommon or that require longer follow-up to be detected**

Use in large numbers of individuals may reveal additional, potentially less frequent and/or more serious adverse events not detected in the trial safety population.

- **Vaccine-enhanced disease**

Risk of vaccine-enhanced disease . . . remains unknown and needs to be evaluated further.

- **Under Section 7.0 - VRBPAC Meeting Summary:**
- **The Vaccines and Related Biological Products Advisory Committee** convened on December 10, 2020 to discuss potential implications of authorization of the Pfizer vaccine. The committee members acknowledged the following:
    - The importance of long-term safety data for the Pfizer-BioNTech COVID-19 Vaccine as it is made using a technology not used in previously licensed vaccines.
    - The lack of data on how the vaccine impacts asymptomatic infection and viral shedding.
    - FDA noted that the vaccine should not be administered to individuals with known history of a severe allergic reaction to any component of the vaccine.
    - Appropriate medical treatment used to manage immediate allergic reactions must be immediately available in the event an acute anaphylactic

- FDA explained that there are insufficient data to inform vaccine-associated risks in pregnancy.
- Committee members raised concerns about the limited conclusions about the prevention of severe disease based on the study endpoints.
- Potential benefits that could be further evaluated but are not necessary to support an EUA include: prevention of COVID-19 in individuals with previous SARS-CoV-2 infection, prevention of mortality and long-term complications of COVID-19, reduction in asymptomatic SARS-CoV-2 infection and reduction of SARS-CoV-2 transmission.
- Known risks include: common local and systemic adverse reactions, (notably injection site reactions, headache, fever, chills, myalgia, and fatigue), all of which are usually mild to moderate and lasting a few days, with higher frequency in younger vaccine recipients.
- Potential risks that should be further evaluated include: uncommon to rare clinically significant adverse reactions that may become apparent with more widespread use of the vaccine.
- Since the roll-out of the vaccine, the following immediate, and identifiable reactions have included: death, blood clots, heart attacks, and strokes, as well as various less drastic side effects,

while the long-term adverse reactions will be revealed with the passage of time and completion of the human trials expected to be completed 2023.

(c) On the Public Health Agency of Canada website, the National Advisory Committee on Immunization (NACI) states: [347]

(i) "Currently, there is **insufficient evidence on the duration of protection of COVID-19 vaccines** and the effectiveness of COVID-19 vaccines in reducing transmission of SARS-CoV-2." (pg. 41)

(ii) "The immune response to SARS-CoV-2, including duration of immunity, is not yet well understood. Reinfections with SARS-CoV-2 have been reported." (p. 41)

(iii) "Currently, there is a lack of evidence on potential differences in vaccine efficacy or safety between those with and without prior evidence of SARS-CoV-2 infection." (p. 41)

(iv) "Currently, there are no data on COVID-19 vaccination in individuals who are immunosuppressed."

(v) "NACI recommends that a complete COVID-19 vaccine series may be offered to individuals who are immunosuppressed . . . if informed consent includes discussion about the limited evidence on the use of COVID-19 vaccines in this population." (p. 42)

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[347] https://www.canada.ca/content/dam/phac-aspc/documents/services/immunization/national-advisory-committee-on-immunization-naci/recommendations-use-covid-19-vaccines/recommendations-use-covid-19-vaccines-en.pdf

(vi) "It is currently unknown whether immunocompromised individuals will be able to mount an immune response to the authorized COVID-19 vaccines." (p.43)

(vii) "Currently, there are no data on the safety and efficacy of COVID-19 vaccines in pregnancy or during breastfeeding. Pregnant or breastfeeding individuals were excluded from the mRNA and viral vector COVID-19 vaccine clinical trials." (p. 45)

(viii) "Currently, there are no data to inform outcomes of inadvertent administration of COVID- 19 vaccine to pregnant individuals or their developing fetus in clinical trials." (p. 45)

(ix) "There is currently no evidence to guide the time interval between the completion of the COVID-19 vaccine series and conception. In the face of scientific uncertainty, it may be prudent to delay pregnancy by 28 days or more after the administration of the complete two-dose vaccine series of a COVID-19 vaccine." (p. 45)

(x) "NACI recommends that a complete vaccine series with a COVID-19 vaccine may be offered to individuals in the authorized age group who are breastfeeding . . . if informed consent includes discussion about the limited evidence on the use of COVID-19 vaccines in this population. " (p. 45)

(xi) "As no immunological correlate of protection has been determined for SARS-CoV-2, these cellular responses cannot be interpreted as corresponding with vaccine protection." (p.50)

(xii) "There is limited data on the efficacy or effectiveness of mRNA vaccines against P.1 (variant of concern) and P.2 (variant of interest)." (p. 50)

(d) Information on the Health BC website states: "Vaccines are very safe. It is much safer to get the vaccine than to get COVID-19. Serious side effects due to the vaccines were not seen in the clinical trials." [348]

(e) The BC Center for Disease Control website states: "The vaccine will help reduce the spread of COVID-19 in B.C. Vaccines save lives by preventing disease, especially for people most likely to have severe illness or die. If enough people get vaccinated, it makes it difficult for the disease to spread." [349] This information is not consistent with manufacturer statements.

(f) These statements above in (d) and (e), are **not supported** by the data, the information provided by Pfizer and the Vaccines and Related Biological Products Advisory Committee, nor the National Advisory Committee on Immunization (NACI).

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[348] https://www.healthlinkbc.ca/healthlinkbc-files/covid-19-vaccines

[349] http://www.bccdc.ca/health-info/diseases-conditions/covid-19/covid-19-vaccine/vaccines-for-covid-19

(g) This distortion of the facts raises serious concerns of the integrity of Canadian regulatory agencies.

321. Furthermore, and more importantly, the Plaintiffs state that public officials, including the relevant Defendants, Trudeau, Tam, and Henry have warned that, despite the anticipated five (5) years of the Covid-19 "vaccines", the vaccines will not result in immunity: do not prevent transmission of the virus to and from the recipient: and that the other measures, lockdowns, masking, and useless PCR tests must be maintained indefinitely. This all begs the question: why then roll out an experimental "vaccine" by-passing the safety protocols?

322. The Plaintiffs state, and the fact is that under the circumstances "emergency" improperly and negligently deficient, untested "Vaccines" are Not Warranted for the following reasons:

(a) Many individuals who intend to be at the front of the line for a COVID-19 vaccine will do so because they believe COVID-19 is an illness with a high rate of mortality. This fear creates a sense of panic that compels people to accept a medical product with an unknown safety and efficacy profile.

(b) Our federal and provincial governments and the mainstream media persist in describing COVID-19 as a "deadly" condition. This is not true for the vast majority of the population.

(c) The risk of mortality is primarily to those over 80 years of age in poor health, residing in extended care facilities. LTC residents accounted for 81% of all reported COVID-19 deaths in Canada in 2020. [350]

(d) For the greatest percentage of the population under 70 years in good health, COVID-19 poses a very low risk and the use of an experimental product is not warranted.

(e) According to the CDC, the case survival rate of COVID-19 in patients ages 0 – 17 is 99.998%, 99.95% in patients 18 – 49 years, and 99.4% in patients 50 – 64 years. (as of March 19, 2021) [351]

(f) There is no evidence that the benefits of vaccination for COVID-19 outweigh the risks.

(g) What is also rarely acknowledged by our government, public health officers, and the corporate media is that safe and effective drugs and vitamin and mineral supplementation for the prevention and treatment of COVID-19 have been identified. [352] [353] [354] [355] [356] [357]

(h) Such treatments make illegal the use of an experimental product.

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[350] https://www.cihi.ca/sites/default/files/document/covid-19-rapid-response-long-term-care-snapshot-en.pdf?emktg_lang=en&emktg_order=1

[351] https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html

[352] https://www.americasfrontlinedoctors.org/covid-19/treatments

[353] www.youtube.com/watch?v=BLWQtT7dHGE

[354] https://anthraxvaccine.blogspot.com/2021/01/first-country-bans-ivermectin-lifesaver.html

[355] https://www.hsgac.senate.gov/imo/media/doc/Testimony-Kory-2020-12-08.pdf

[356] https://www.evms.edu/media/evms_public/departments/internal_medicine/Marik-Covid-Protocol-Summary.pdf

[357] https://covexit.com

(i) Canadians do not have access to treatments that have demonstrated effectiveness in treating COVID-19 including HCQ and Ivermectin.[358] [359] [360]

(j) The only Health Canada recommended treatment for COVID-19 is oxygen therapy and ventilation. [361]

(k) The province of British Columbia updated its COVID treatment guidelines on April 18, 2021 to include inhaled budesonide and colchicine for ambulatory outpatient and long-term care. [362]

323. The Plaintiffs state, and the fact is, that there has been No Individualized Risk-Benefit Analysis has been conducted by the Defendants, and further that:

(a) The arguments used to legalize and implement COVID-19 vaccination are political and ideological rather than evidence-based.

(b) In the rush to approve a COVID-19 vaccine a robust analysis of the risks vs benefits has not been conducted. Indeed, how does one conduct a risk-benefit analysis when both the risks and the benefits are unknown?

(c) Some researchers have described the use of a COVID-19 vaccine in the general population as *"the most reckless and brazen experiment in the history of humanity."*

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[358] https://www.americasfrontlinedoctors.org/covid-19/treatments

[359] https://covexit.com/first-ambulatory-treatment-recommended-for-covid-19-in-canada/

[360] https://covexit.com/wp-content/uploads/2021/04/Antimicrobial-Immunomodulatory-Therapy-adults.pdf

[361] https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/clinical-management-covid-19.html.

[362] https://covexit.com/first-ambulatory-treatment-recommended-for-covid-19-in-canada/

(d) Implementing an 'everyone should be vaccinated' policy assumes the risk-benefit is the same for everyone. This is simply not true and fails to take into consideration the established fact that the risk of COVID-19 varies greatly depending upon several known variables, most especially age and pre-existing conditions. These variables must be considered when assessing the risk and benefit of utilizing these medical devices.

(e) Deaths in the frail and elderly following COVID-19 vaccination have prompted health officials to recognize the need to assess individuals for their 'fitness to be vaccinated'. [363]

(f) As of April 16, 2021, Canada has reported 3,738 vaccine related adverse reactions including 19 deaths which are under investigation. [364] As of April 16, 2021, VAERS reports 86,080 adverse events following COVID-19 vaccination, including 3,186 deaths. What is to be remembered is that, historically, VAERS reports about a small portion of all adverse effects and deaths actually reported. A mere 1% are reported.[365] [366]

(g) We ought to have robust evidence that the benefits of vaccination clearly outweigh the risks. This has not been demonstrated.

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[363] https://www.bmj.com/content/372/bmj.n167/rapid-responses

[364] https://health-infobase.canada.ca/covid-19/vaccine-safety/

[365] https://www.medalerts.org/vaersdb/findfield.php?TABLE=ON&GROUP1=CAT&EVENTS=ON&VAX=COVID19

[366] https://www.medalerts.org/vaersdb/findfield.php?TABLE=ON&GROUP1=AGE&EVENTS=ON&VAX=COVID19&DIED=Yes

(h) The reporting of vaccine injury is subjective, voluntary, and there are no consequences for failing to report vaccine injury.

(i) Physicians receive little to no training on how to recognize and diagnose vaccine injury, and open themselves up to criticism and reprimand if they do fill out the vaccine injury reports.

(j) A Harvard Pilgrim Health Care study found that less than 1% of vaccine adverse reactions were reported. [367]

(k) The real number of children and adults who experience vaccine injury is unknown. The Defendant government(s) are not tracking documents, nor reporting hospitalizations and deaths due to the Covid vaccines.

324. The Plaintiffs further state, and fact is, that with respect to the constitutionally established right to informed consent that:

(a) It is not possible to give informed consent when the results of the clinical trials are unknown.

(b) Informed consent is the most fundamental aspect of an ethical medical system and a free society.

(c) It is imperative that any individual contemplating getting a COVID-19 vaccine be fully aware that these vaccines have not completed the most basic testing to demonstrate either safety or efficacy and that they are participating in a medical trial.

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[367] https://healthit.ahrq.gov/sites/default/files/docs/publication/r18hs017045-lazarus-final-report-2011.pdf

(d) In a letter dated October 3, 2020, Dr. Michael Yeadon, a former Vice President of Pfizer stated – *"All vaccines against the SARS-CoV-2 virus are by definition novel. If any such vaccine is approved for use under any circumstances that are not EXPLICITLY experimental, I believe that recipients are being misled to a criminal extent."* [368]

(e) In a paper published in **The National Center for Biotechnology Information** entitled 'Informed consent disclosure to vaccine trial subjects of risk of COVID-19 vaccines worsening clinical disease', the authors state – *"COVID-19 vaccines designed to elicit neutralizing antibodies may sensitize vaccine recipients to more severe disease than if they were not vaccinated. The specific and significant COVID-19 risk of anti-body dependent enhancement (ADE) should have been and should be prominently and independently disclosed to research subjects currently in vaccine trials, as well as those being recruited for the trials and future patients after vaccine approval, in order to meet the medical ethics standard of patient comprehension for informed consent."* [369] [370]

325. The Plaintiffs further state, and the fact is that Health Canada Oversight has been and continues to be Insufficient in that:

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[368] https://coronaversation.wordpress.com/2020/11/11/dr-mike-yeadons-open-letter-regarding-sars-cov-2-vaccine/

[369] https://pubmed.ncbi.nlm.nih.gov/33113270/

[370] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7645850/pdf/IJCP-9999-e13795.pdf?fbclid=IwAR1U-vdWXpOG0SJb0VGR1KkmkqsioWKY8Ux-iOeWpyt0xxa7C5HwlhFBZnU

(a) Many Canadians assume Health Canada provides rigorous oversight and would not permit a vaccine to be introduced to the Canadian public without robust testing to ensure both safety and effectiveness. The fact is that Health Canada does not conduct its own clinical trials to determine the safety and efficacy of a vaccine. Instead, Health Canada relies on the data provided by the vaccine manufacturers.

(b) Vaccine manufacturers are not required to maintain a blinded, neutral placebo-control group, the gold standard for safety testing. This failure undermines the integrity of claims of vaccine safety. (page 53) [371]

(c) Vaccine producers such as Pfizer, Merck and GlaxoSmithKline have paid billions in criminal penalties and settlements for research fraud, faking drug safety studies, failing to report safety problems, bribery, kickbacks, and false advertising. [372] [373]

(d) Moderna has never before produced a vaccine.

(e) In 2009, Pfizer paid $2.3 billion to resolve criminal and civil allegations in what was then the largest health care fraud settlement in history. [374]

(f) The Vaccine Injury Compensation Program in the United States has paid out more than $4.4 B in compensation for vaccine injury and death since 1989. [375]

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[371] https://www.fda.gov/media/144416/download

[372] www.corp-research.org/merck

[373] https://www.theguardian.com/business/2012/jul/03/glaxosmithkline-fined-bribing-doctors-pharmaceuticals?CMP=share_btn_fb

[374] https://abcnews.go.com/Business/pfizer-fined-23-billion-illegal-marketing-off-label/story?id=8477617

(g) Canada is one of only two G20 Nations without a national vaccine injury compensation program.

(h) Canada is more than three decades behind other countries in acknowledging vaccine injury and providing financial compensation to those injured and killed by vaccination.

(i) While Prime Minister Trudeau promised a COVID vaccine injury compensation program in December 2020, the details of the program have yet to be revealed, and a vaccine injury compensation program has yet to be implemented.

(j) Vaccines are not benign medical products. Vaccination is an invasive medical procedure that delivers by injection complex biochemical drugs and now genetic modifying technology.

(k) Because of this complexity and uncertainty, the level of safety testing for a COVID-19 vaccine ought to be even more rigorous. But this is not the case. The safety testing of the COVID-19 vaccine is less rigorous and more incomplete as compared with other vaccines and pharmaceutical drugs.

(l) The consequences of rushing a novel and inadequately tested product can be serious, permanent, and even deadly. [376]

(m) Data following the administration of the Pfizer vaccine reveals that 2.8% of test subjects experienced a 'health impact' significant enough such that

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[375] https://crsreports.congress.gov/product/pdf/LSB/LSB10584

[376] https://hpv-vaccine-side-effects.com/covid-19-vaccine-side-effects-world-map/

they were *"unable to perform normal daily activities, unable to work, and required care from a health professional."* [377]

(n) If the entire Canadian population were to be vaccinated with the Pfizer vaccine, more than 900,000 people could experience a 'health impact' of this significance.

(o) There are significant conflicts of interest and a lack of transparency with COVID purchase contracts with the Government of Canada.

(p) Moderna's research and development partner is the National Institute of Allergy and Infectious Diseases (NIAID), directed by Dr Anthony Fauci. Moderna shares joint ownership of vaccine patent with NIAID scientists. [378] [379]

(q) NIAID and Dr. Fauci are financially conflicted when recommending this product.

(r) Health Canada lacks transparency by not releasing COVID purchase contract details or answering questions about leaked documents that raised questions about the integrity of the mRNA vaccines.[380]

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[377] https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-12/slides-12-19/05-COVID-Clark-508.pdf

[378] https://www.documentcloud.org/documents/6935295-NIH-Moderna-Confidential-Agreements.html

[379] https://www.statnews.com/pharmalot/2020/08/28/moderna-covid19-vaccine-coronavirus-patents-darpa/

[380] https://www.physiciansweekly.com/covid-19-ema-leaks-raise-concerns-over-vaccine-mrna-integrity/

- **Vaccines in General**

326. The Plaintiffs state, quite apart from the "Covid vaccines", which are not "vaccines" as medically and historically understood and medically defined, that with previous vaccines in general, the fact is that:

(a) it is undisputed that vaccines cause severe, permanent injury up to and including death in a certain percentage of those who are vaccinated, including physical, neurological, speech, and other disabilities;

(b) that, as a result of this reality, risk, and severe injury, certain North American jurisdictions, such as the USA, and Quebec, as well as all G-7 countries except Canada, have established compensation schemes for those injured and killed by vaccines;

(c) that British Columbia has no such compensation scheme;

(d) that there is no individual pre-screening, to attempt to pre-determine, which individual may have a propensity to be so injured, even in cases where older siblings, in the same family have been injured, no investigation is undertaken or weighed with respect to the risks of their younger siblings being vaccinated;

(e) the Plaintiffs state, and the fact is, that while peanuts and other nuts, as an absolute proposition, do not injure or kill, they do injure or kill those who are allergic to them. While schools have taken saturated and heightened steps to make their spaces "nut-free", the risks of vaccines to children, particularly those who are pre-disposed to injury and death from them, are completely ignored.

327. The individual, biological Plaintiffs state that compulsory vaccination, and or testing, schemes violates their rights, by act and omission. Mandatory vaccination removes the right to weigh the "risks" of vaccinating or not vaccinating, to allow for informed choice, in that vaccines can cause injury or death, is a violation of their rights as follows:

(a) an ***in limine*** compulsory vaccination scheme violates s.2(a) and (b) of the ***Charter*** in infringing the rights to freedom of conscience, religion, thought and belief, as well as infringing the rights to liberty and security of the person, in interfering with the physical and psychological integrity of the person and the right to make choices as to that integrity and autonomy, pursuant to s.7 of the ***Charter***;

(b) that the failure and omissions of the Defendants, their officials and delegees, in the vaccination scheme, to transparently and honestly present the risks of vaccination, pro and con, and the failure and omissions to make individual assessments to pre-determine and pre-screen those children who may have a propensity and pre-disposed to being vaccine injured, constitutes a violation of the same ***Charter*** cited above, in depriving the right to an informed consent before medical treatment through vaccine is compulsorily administered, by way of omission as set out by the Supreme Court of Canada in, ***inter alia, Vriend*** in unnecessarily exposing children and adults, to injury up to and including death, by an overly-broad, untailored, indiscriminate and blind vaccination scheme, notwithstanding the dire and pointed warnings in the manufacturers' own very inserts and warnings as to the risks.

328. The Plaintiffs state that the violations of their ss. 2(a) and (b) ***Charter*** rights are not justified under s.1 of the ***Charter*** and puts the Defendants to their onus of justifying the violations. The Plaintiffs further state that the violations of their s.7 ***Charter*** rights, as set out above in the statement of claim, are not in accordance with the tenets of fundamental justice in that the scheme and provisions suffer from overbreadth and that the protection of overbreadth in legislation has been recognized, by the Supreme Court of Canada, as a tenet of fundamental justice, and that further they cannot be saved under s.1 of the ***Charter,*** the onus of which lies with Defendants.

329. The Plaintiffs state that, with respect to facts pertinent to product safety testing, the facts and medical literature sets out that:

(a) Vaccines do not undergo the same level of safety testing as is required for all other drugs and medical products.

(b) None of the vaccines licensed for use in Canada have been tested for safety using long-term, double blind, placebo-controlled studies.

(c) Vaccine products licensed for use in Canada are not evaluated for safety using a neutral placebo, [381] a requirement for all other pharmaceutical products.

(d) Vaccines are an invasive medical intervention whose safety is determined primarily by the amount of injury or death reported *after* vaccination.

(e) Pre-licensing safety monitoring of childhood vaccines, prior to the vaccines being administered, is not long enough to reveal whether vaccines cause autoimmune, neurological or developmental disorders. [382]

(f) Studies designed to examine the long-term effects of the cumulative number of vaccines or other aspects of the vaccination schedule have not been conducted. [383]

(g) There are too few scientifically sound studies published in the medical literature to determine how many serious brain and immune system problems are or are not caused by vaccines. [384]

(h) The design and reporting of safety outcomes in MMR vaccine studies, both pre- and post-marketing, is largely inadequate. [385]

(i) Vaccines have not been tested for carcinogenicity, toxicity, genotoxicity, mutagenicity, ability to impair fertility, or for long-term adverse reactions.

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[381] https://www.icandecide.org/wp-content/uploads/2019/08/VaccineSafety-Version-1.0-October-2-2017-1.pdf

[382] https://icandev.wpengine.com/wp-content/uploads/2019/08/ICAN-Reply.pdf

[383] https://www.nap.edu/catalog/13563/the-childhood-immunization-schedule-and-safety-stakeholder-concerns-scientific-evidence.

[384] https://www.nvic.org/PDFs/IOM/2013researchgaps-IOMchildhoodimmunizationschedulea.aspx

[385] https://www.cochrane.org/CD004407/ARI_using-combined-vaccine-protection-children-against-measles-mumps-and-rubella

(j) Health Canada does not conduct its own independent clinical trials to determine vaccine safety and efficacy and instead relies on the data provided by the vaccine manufacturers.

(k) Studies comparing the overall health of vaccinated and unvaccinated children reveal that vaccinated children are significantly more likely to have neuro-developmental disorders and chronic illness. [386]

(l) There is evidence that vaccines are contaminated with unintended ingredients and that the health impact of injecting these ingredients is unknown. [387]

(m) Canada is the only G7 Nation without a national program to compensate those injured or killed by vaccination, and one(1) of two(2) G-20 Nations without a vaccine injury compensation program. The other nation being Russia.

(n) The United States Vaccine Injury Compensation Program has awarded more than $4.1 billion in compensation since 1989.

(o) The published medical literature recognizes that vaccines can cause permanent injury including death.

(p) The US government has acknowledged that vaccination can cause brain damage resulting in symptoms of autism in genetically susceptible children. [388]

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[386] https://antivakcina.org/files/MawsonStudyHealthOutcomes5.8.2017.pdf

[387] https://www corvelva.it/it/speciale-corvelva/vaccinegate-en.html

(q) The US Centre for Disease Control (CDC) has acknowledged that every domestic case of polio that occurred after 1979 was caused by the vaccine strain of polio. [389]

(r) Vaccines include ingredients that are classified as poisons, carcinogens, toxins, neurotoxins, immune-and-nervous-system disruptors, allergens, fertility inhibitors, and sterilizing agents.

(s) Health Canada exposed children to cumulative levels of mercury and aluminum, in the incubation of the vaccines that exceeded the US FDA's safety guidelines.

330. The Plaintiffs state that, with respect to the facts pertinent to screening for susceptibility to vaccine injury, that:

(a) Pre-screening to identify individuals who may be at increased susceptibility to vaccine injury and death does not occur in Canada.

(b) Health Canada has not committed resources to identify those individuals who may have increased susceptibility to experience vaccine injury or death.

(c) Policies to administer vaccines to "Mature Minors", often without the knowledge and consent of the parents and without the informed consent of the "Mature Minor",, in schools and medical settings without the knowledge or consent of the parents has inadequate safety protocols to

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[388] https://www.jeremyrhammond.com/wp-content/uploads/2019/10/080226-Vaccine-Autism-Court-Document-Kirby-HuffPost.pdf.

[389] https://web.archive.org/web/20150103130229/http://www.cdc.gov/vaccines/vpd-vac/polio/dis-faqs.htm.

fully consider the personal and family medical history prior to vaccination.

(d) This failure to fully consider personal and family medical history puts these youth at increased risk of vaccine injury.

331. The Plaintiffs state that, with respect to the facts pertinent to monitoring of adverse effects of vaccination, that:

(a) Doctors and health care workers are not trained to recognize and diagnose vaccine injury.

(b) There are no legal consequences when medical professionals fail to report vaccine injury.

(c) Parents' observations of health and behavioral changes following vaccination are routinely ignored and denied by doctors and rarely captured in adverse events reporting systems.

(d) It is recognized that fewer than 1% of vaccine adverse reactions are reported. [390]

(e) British Columbia's AEFI reporting system has no better record than the national one nor reporting rates than other provinces. [391]

(f) The medical industry has failed to fully consider the combined toxicology of vaccine ingredients and the synergistic effect of combining vaccine ingredients.

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[390] https://healthit.ahrq.gov/sites/default/files/docs/publication/r18hs017045-lazarus-final-report-2011.pdf

[391] https://www.myhealthunit.ca/en/health-professionals-partners/resources/Health-Care-Professionals/adverse-events/Annual_Report_Vaccine_Safet.pdf

(g) Bonnie Henry has instructed people to mix vaccines for 1st and 2nd shot even though Moderna, for instance, has clearly stated that they do not known the effects of interchangeability and therefore only recommend first and second shot of the Moderna vaccine. Bonnie Henry has further advocated the immunization of twelve (12) to seventeen (17) year olds **without the consent of their parents.**

255. The Plaintiffs state that, with respect to the facts pertinent to safeguarding policy over patient health, that:

(a) The primary metric used by Health Canada to measure the success of the vaccine program appears to be how many vaccines are delivered.

(b) The goal of public health vaccine policy is to persuade parents to comply with the full vaccine schedule. [392]

(c) The pursuit of the goal of persuading parents to comply with vaccination recommendations is incompatible with the goal of allowing parents to possess the knowledge they need to exercise their right to informed consent, and act in their child's best interests.

(d) The right to informed consent has been recognized as one of the most fundamental ethics in medicine.

(e) Public health professionals routinely fail to inform citizens of their legal right to personal, religious and medical exemptions where they exist.

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[392] https://cic-cci.ca/

(f) Health Canada, with respect to vaccines, places public policy over individual health considerations.

(g) Government policy makers have refused to consider the fact that the risks of the target diseases are not the same for every child and that some children are at greater risk of being harmed by vaccines due to genetic or environmentally caused predispositions.

(h) Government policymakers ignore that the fact that for informed consent to happen, the risk-benefit analysis must be conducted for *each* vaccine and *individually for each child.*

(i) Antibody titre testing is rarely conducted in an effort to avoid unnecessary vaccination.

(j) An increasing number of parents are choosing not to vaccinate because they recognize that public health vaccine policy poses a serious threat to both their health and liberty.

256. The Plaintiffs state that, with respect to the facts pertinent to lack of accountability for vaccine Injury, that:

(a) Vaccine manufacturers and medical professionals are not held legally and financially accountable when vaccine injury and death occurs.

(b) A consequence of this legal immunity is that there is no legal or financial incentive for the vaccine industry to make their products safer, even when there is clear evidence that vaccines *can* be made safer.

(c) Systemic corruption within the medical establishment is well recognized within the scientific community. [393] [394]

(d) Conflicts of interest in biomedical research are “very common”. [395]

257. The Plaintiffs state that, with respect to the facts pertinent to informed consent, that Consumers are rarely informed that:

(a) vaccines do not confer life-long immunity;

(b) not all vaccines eliminate susceptibility to infection;

(c) not all vaccines are designed to prevent the transmission of infection;

(d) most vaccines do not alter the safety of public spaces; [396]

(e) Health Canada has acknowledged that vaccines are voluntary in Canada and cannot be made mandatory due to the Canadian **Charter** of Rights and Freedoms;

(f) there is no scientific evidence that herd immunity can be achieved using vaccines due to the temporary nature of the immunity offered nor that vaccine herd immunity is more effective than natural herd immunity;

(g) vaccine can and do cause permanent injury and death;

(h) there is no scientific evidence that vaccines are primarily responsible for reduced mortality over the last century as is often claimed;

(i) the human body has an innate capability to fight off infections and heal itself;

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[393] https://www.nybooks.com/articles/2009/01/15/drug-companies-doctorsa-story-of-corruption/

[394] https://doi.org/10.1111/eci.12074

[395] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1182327/.

[396] https://childrenshealthdefense.org/news/why-you-cant-trust-the-cdc-on-vaccines/

(j) the pharmaceutical companies that produce almost all vaccines have been found guilty and paid billions of dollars in criminal penalties for research fraud, faking drug safety studies, failing to report safety problems, bribery, kickbacks and false advertising [397];

(k) Canadian children are among the most vaccinated children in the world

(l) there is no compensation available in Canada, except for Quebec, should vaccination result in injury or death;

(m)only two provinces in Canada (Ontario and New Brunswick) require exemptions to decline vaccination;

(n) recommended/required vaccines vary by province, by state, and by country.

258. Consumers are rarely provided with the product monograph (product information insert) by health care providers. Vaccines monographs warn of limitations to vaccine safety testing as well as recognized adverse events following vaccination which include severe and permanent injury and death.

259. Vaccine mandates violate the medical and legal ethic of informed consent.

260. Vaccine mandates violate *'The Universal Declaration of Bioethics and Human Rights'*, the *Nuremberg Code*, professional codes of ethics, and all provincial health Acts.

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[397] **GlaxoSmithKline Fined $3B After Bribing Doctors to Increase Drug Sales.**
https://www.theguardian.com/business/2012/jul/03/glaxosmithkline-fined-bribing-doctors-pharmaceuticals?CMP=share_btn_fb
Merck: Corporate Rap Sheet
http://www.corp-research.org/merck

261. A review of the available literature of the vaccine education materials produced by the British Columbia government reveals that the risk of vaccine injury is discussed superficially, if at all, and that consumers are given insufficient information to make an informed decision.

262. A review of Public Health Agency of Canada recommended curriculum for school children reveals that education on the risk of vaccine injury is absent, as is education on the right to informed consent. [398]

263. The vaccine risk information provided to consumers varies by health region.

264. Vaccines are routinely administered to youth in medical clinics and school settings without the knowledge or consent of their parents.

265. Youth vaccinated in school-based clinics routinely report being intimidated into vaccination and being threatened with expulsion if they refuse vaccination.

266. Public health presents as if all vaccines carry the exact same risk/benefit assessment for all individuals.

267. Individual benefit versus individual risk of vaccination is rarely considered.

268. Indigenous people are required to receive vaccines other than those required for non-Indigenous people based on assumed risk, not upon medical evidence of risk.

269. On May 21st, 2021, Dr. Bonnie Henry, and her department announced the availability of the Covid vaccines for twelve (12) to seventeen (17) year olds, without the need for their parents consent, notwithstanding:

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[398] https://kidsboostimmunity.com/sites/default/files/reusable_files/kbi_British Columbia.pdf

(a) That the Vaccines have **NOT** undergone required trial and safety protocols but were all made under an "emergency" basis;

(b) Furthermore, Bonnie Henry is falsely claiming that the vaccine is safe and approved for children, despite Health Canada's Summary Basis of Decision, updated May 20th, 2021, stating the trials have not proven that the Covid-19 treatments pevent infection or transmission, which trials will not be completed until 2023. The summary also reports that both Moderna and Pfizer identified that there are six areas of missing (limited/no clinical data) information: "use in paediatric (0-18)", "use in pregnant and breastfeeding women", "long-term safety", "long-term efficacy" including "real world use", and concomitant administration of non-Covid Vaccines". The WHO, on June 20th, 2021 called for an immediate halt to the vaccination of children and adolescents.

(c) That there has **NOT** been a recorded death or life-threatening case of any twelve (12) to seventeen (17) year old in Canada;

(d) That twelve (12) to seventeen (17) year olds are not at risk of Covid-19;

(e) That, in the absence of informed consent, it constitutes medical experimentation and thus constituted a "crime against humanity" emanating from the Nuremberg trials, and principles following the medical experimentations by the Nazi regime and codified in Canada, as a Criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act;***

(f) And that on June 5th, 2021 Dr. Joss Reimer, Medical Lead for the Manitoba Vaccine Implementation Task Force, in asserting that the various vaccines can be mixed, publicly declared that the Covid-19 vaccinations are a "big human experiment";

(g) That many twelve (12) to seventeen (17) year olds do not possess the intellectual capacity to give informed consent, however the government of British Columbia has been encouraging youth to make appointments on their own, with friends, or with "trusted adults" by way of s.17 of the ***Infants Act***. This propaganda aimed at children violates the parent-child relationship under s.7 of the ***Charter***.[399]

(h) And by doing so Dr. Bonnie Henry, and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

- **I/ THE MEDIA**

270. From the time of the declaration of "emergency" to the present, the Plaintiffs state that the Defendant CBC, and other mainstream media, is purposely suppressing valid, sound, and sober criticism of recognized experts with respect to the measures that amount to censorship and violation of freedom of speech, expression and the media.

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[399] https://www2.gov.bc.ca/gov/content/covid-19/vaccine/youth

271. The Plaintiffs state, and the fact is, that CBC, a completely publicly- funded news service, and national broadcaster, paid for by Canadian taxpayers, has been to the Trudeau goverument, and has acted as, PRAVDA did for the Soviet Union in the cold-war, with respect to coverage of the COVID-"pandemic", "emergency", and its draconian measures.

272. The Plaintiffs state that CBC, as the nationally and publicly-funded broadcaster under the public broadcasting policy for the Canadian public, under the **Broadcast Act,** owes:

(a) a Fiduciary duty to the Plaintiffs and all citizens; and

(b) a duty in Negligence (negligent investigation) to the Plaintiffs and all citizens;

To be independent, fair, balanced, and objective in its coverage of the "pandemic", declared "emergency", and the measures undertaken, which duties it has breached causing damages to the Plaintiffs.

- **Negligence**

273. The Plaintiff states that the Defendant, CBC, as a publicly-funded mandate to publicly broadcast on behalf of Canadians, owes a common-law, and statutory duty of care to the Plaintiffs, to fairly, independently, objectively report, and engage in responsible journalism, on the news and current affairs, and the Plaintiffs further state that:

(a) the CBC breached that duty of care; and

(b) as a result of the breach of that duty of care, the Plaintiffs suffered damages.

274. The Plaintiff states and the fact is, this duty was breached by the CBC's negligent acts and omissions, including **inter alia**, the following:

(a) The daily broadcasting of Trudeau's press-conferences, with absolutely no questions about the scientific and medical evidence behind the measures, and their source;

(b) Whether contrary expert views exist, to the secret advice being followed;

(c) If opposite, expert opinion exist, what is the government's response to it?;

(d) The CBC further dumps, on a daily basis, the government numbers on COVID-positive rates, and death rates, without any investigation or scrutiny as to the basis of compiling those numbers, and who and how the parameters are determined in complying those numbers nor any contextual analysis as to what they mean;

(e) The CBC has done **no** independent investigation, nor asked any questions, on the scientific or medical basis of the COVID- measures but simply parrots the government line, and has not investigated, exposed, nor published the avalanche of Canadian and World experts who firmly hold an opposite view, and severe criticism of the measures, nor put those criticism to the Federal Defendants for response.

275. In short, the Plaintiffs state, and the fact is, that CBC has breached its duty of care to the Plaintiffs, and has not acted in a fair, independent, objective, and

responsible manner, but has acted in a manner more akin to a propagandistic state news agency serving a dictatorial regime.

276. The Plaintiffs state, and the fact is, that CBC has actually gone far beyond the above in that, in the rare instance CBC pretends to tackle an opposite view, CBC irresponsibly belittles, and in fact intentionally misleads, the Plaintiffs and viewers. For example, in a story published May 21st, 2020, written by CBC's Andrea Bellemere, Katie Nicholson and Jason Ho entitled **"How a debunked COVID-19 video kept spreading after Facebook and YouTube took it down"**, these "reporters" falsely and intentionally distort with respect to the video in question entitled **"Plandemic"**. In the story they refer, with a picture, to a person CBC describes as: "featuring controversial virologist Judy Mikovitz". In the story, these three "reporters" choose to:

(a) Delete the fact that it is **Dr. Judy Mikovitz, Ph. D.**, is a **recognized expert in virology** who worked at the Centre for Disease Control (CDC) with Anthony Fauci, with whom she had serious disagreement which she documented in her book entitled **"Plague Corruption";**

(b) That she continues to work in, and be recognized as an expert in virology;

(c) The "reporters" do not give a hint as to by whom, when, on what medical basis her expert views were "debunked";

(d) Nor do the "reporters" investigate, nor pose any questions, about why it is appropriate to remove from Facebook, or YouTube, the views of a recognized, working World expert, of virology, with respect to issues of

COVID-19. This conduct by these "reporters" and CBC, is intentional at worst, and depraved and gross negligence at best.

- **Fiduciary Duty**

277. The Plaintiffs further state that the CBC further has a fiduciary relationship, and owed a corresponding fiduciary duty, to the Plaintiffs, as the national publicly-funded broadcaster to fairly, independently, objectively report, and engage in responsible journalism, on the news and current affairs for the following reasons:

(a) The Defendant CBC is in a position of power over the Plaintiffs, with respect to what it covers and reports; and was able to use this power so as to control and affect the Plaintiff's interests in their right to freedom of speech, expression, and the media for their national, publicly-funded broadcaster under the **Broadcast Act,** with respect to the covid - "pandemic', "emergency" and measures;.

(b) The Plaintiffs are in a corresponding position of vulnerability toward CBC in depending on CBC to put out fair, balanced, responsible, objective and responsible reports on the reality of the "pandemic", the declared "emergency" as well as measures undertaken;

(c) CBC impliedly and statutorily undertakes to so, to act in the best interests of the Plaintiffs', and the public, in its functions and work, in that:

   (i) the Defendant CBC performs a public function, to operate as Canada's national publicly-funded broadcaster under statute;

(ii) the Defendant CBC impliedly and statutorily undertakes to so to act in the best interests of the Plaintiffs'.

278. The Plaintiffs state that the Defendants breached this fiduciary duty as set out above in this Statement of Claim.

279. The Plaintiffs state, and the fact is, that CBC, Facebook, YouTube , Google, and other social media are viciously censoring, and removing any and all content that criticizes or takes issue with the WHO, and governments that follow WHO guidelines, with respect to covid-19, as purported "misinformation" contrary to "community standards" even when that content is posted by a recognized expert.

280. The Plaintiffs further state, and the fact is, that the Defendant Federal Crown is by way of act and omission, under **inter alia,** the **Broadcast Act** , and its Agencies such the CRTC, legislatively and administratively violating the Plaintiffs' rights under s. 2 of the **Charter,** to freedom of expression and the press in doing nothing to halt what has been described by members of the scientific community as " Stalinist censorship", by government, along with media the likes of CBC, Facebook, and YouTube. In fact, the Federal Crown goes further, in following suit with these social media censors, to propose criminal sanctions for posting such deemed and anointed "misinformation" by all, including experts.

281. On or about end of May, 2020 the UK " Scientific Advisory Group for Emergency (SAGE) –COVID-19 Response, in response to the unwarranted

measures of redaction, and removing, all criticism in respect of COVID-Measures, from the Report, of this government advisory body, the body responsible for their SAGE report referred to the government redaction as "Stalinist Censorship".

282. The Plaintiffs state, and the fact is, that CBC, Facebook, and YouTube, and other major social media, in their coverage of the COVID-19, have acted in the same fashion, by knowingly and intentionally suppressing and removing expert opinion not in line with the official dogma of the WHO, which is being blindly and deafly parroted and incanted by the Defendant governments (leaders) and their officials, to the detriment of the Plaintiffs and citizens at large, in violation of their constitutional rights.

- **J/ SUMMARY**

283. In summary, the Plaintiffs state that the COVID -19 Legislation, and Regulations By-Laws, and orders, violate, as follows, the Plaintiffs' statutory and constitutional rights in:

(a) That the conduct of Justin Trudeau, the British Columbia Premier John Horgan and the other Co-Defendants, constitute a dispensing of Parliament under the pretense of Royal prerogative contrary to the Plaintiffs' constitutional rights to a Parliament;

(b) That the declaration of an emergency by the Defendant John Horgan, in B.C, was **ultra vires** , and continues to be **ultra vires,** the **Act** in failing to meet the requisite criteria to declare an emergency;

(c) That the declared emergency, and measures implemented thereunder are:

   (i) Not based on any scientific or medical basis;

   (ii) Are ineffective , false, and extreme;

   (iii) Contravene ss. 2, 6, 7,8,9, and 15 of the **Charter ;**

   (iv) Contravene the same parallel unwritten constitutional rights, enshrined through the Pre-Amble of the **Constitution Act, 1867;**

   (v) Contravene the same rights found in international treaties, read in, as a minimal standard of protection, under s. 7 of the **Charter,** as ruled by the Supreme Court of Canada, in, **inter alia,** the **Hape** decision;

(d) That the "COVID- pandemic" was pre-planned, and executed, as a false pandemic, through the WHO, by Billionaire, Corporate, and Organizational Oligarchs the likes of Bill Gates, GAVI, the WHO, and their former and current associates such as Theresa Tam and Bonnie Henry, the WEF, and others, in order to install a New World (Economic) Order with:

   (i) **De facto** elimination of small businesses;

   (ii) Concentration of wealth and the power to control economic activity in large global corporations;

(iii) To disguise a massive bank and corporate bail-out;

(iv) To effect global, **mandatory** vaccination with chip technology, to effect total surveillance and testing of any and all citizens, including the Plaintiffs;

(v) To shift society, in all aspects into a virtual'' world at the control of these vaccine, pharmaceutical, technological, globalized oligarchs, whereby the Plaintiffs, and all others, cannot organize nor congregate.

(vi) To effectively immobilize resistance to the agenda by neutering Parliaments and the Courts, and by extension the Constitution and Constitutional Democracy and Sovereignty, in short to obtain "global governance".

284. The Plaintiffs rely on:

(a) the Statutory Schemes set out in the within statement of claim;

(b) The Pre-Amble to the **Constitution Act, 1867** and jurisprudence thereunder;

(c) ss. 2, 7,8,9, 15, and 24(1) of the ***Charter;***

(d) s. 52(1) of the ***Constitution Act, 1982;***

(d) the ***Common Law***;

(e) such further statutory or constitutional provisions as counsel may advise.

Part 2: RELIEF SOUGHT

285. Declarations that the "Covid-measures" and declaration of the "emergency" invoked by the Respondents:

(a) do not meet the prerequisite criteria of any "emergency" as prescribed by ss.9-10.2 nor ss.12-13 of the ***Emergency Program Act [RSBC 1996],*** nor is it within the jurisdictional purview s.52(2) of the ***Public Health Act, SBC [2008],*** and further contravenes s.3(1) and s.120(1) of the ***Public Health Act SBC [2008]***;

(b) that the invocation of the measures, dealing with health and public health, breach the Plaintiffs' right to consult and constitutional duty to consult, of the Respondents, both in procedure, and substance, with respect to broad sweeping public health measures both under administrative law, and the fundamental justice requirement under section 7 of the ***Charter*** as enunciated and ruled by the ***SCC***;

(c) that, in any event, if the pre-requisites of an "emergency" are met, as declared to be a national and international "emergency", the jurisdiction, and constitutional duty, to deal with this "national emergency", and its measures, is strictly with the Federal Parliament, under the ***Federal Emergencies Act*** and ***Quarantine Act,*** pursuant to s. 91(7) and (11) of the ***Constitution Act, 1867***, as well as under the "Peace, Order, and

Good Government ("POGG")" Power, under s.91 of the ***Constitution Act, 1867*** and not the jurisdiction of the provincial legislature;

(d) that quarantine is Federal jurisdiction and not within the jurisdiction of the Province;

(e) that "lock-downs", and "stay at home orders", and any curfews, in whole or in part, are forms of Martial law outside the Province's jurisdiction under s. 92 of the ***Constitution Act, 1867*** and, subject to constitutional review and constraints, matters of Federal jurisdiction under the POGG power and s. 91(7) of the ***Constitution Act, 1867;***

(f) that "lock-downs", in any event, and the arbitrary and irrational means by which businesses have been ordered closed and/or restricted constitute an unreasonable seizure contrary to s.8 of the ***Charter***;

286. As against the Crown (and Municipal) Defendants the Plaintiffs further claim:

(a) A Declaration that the purported order of the chief health officer, Dr. Bonnie Henry, dated April 30th, 2021, as well as June 30th, 2021, along with previous such orders, before and after June 30th, 2021 and any such duplicate future or extended orders, purportedly made under ss. 30, 31, 32 and 39(3) of the *Public Health Act,* S.B.C 2008 ("the Act"), are ***ultra vires*** that Act, and null and void, as an enveloping emergency order of national dimension; and the strict jurisdiction of the Federal Government under s.91 (7) and (11) as well as the "POGG" power of the ***Constitution Act, 1867***, which rests in the exclusive jurisdiction, subject to constitutional review and constraints, with the Federal Parliament.

(b) A further Declaration that ministerial order #M182 of April 30th, 2021, as well as the order of Bonnie Henry of June 30th, 2021, and the lockdown and travel restrictions are of no force and effect as constitutionally, Martial Law, pursuant to s.91(7) as well as the POGG Power;

287. A Declaration that the ***Public Health Act,*** and ss.30, 31, 32, and 39(3) of the *Act* is restricted to making orders of a local or regional scope and not of a completely provincial application in the context where the declared threat is not provincial in nature but national, and that the province is without jurisdiction to make such orders and measures as such orders and measures are the jurisdiction subject to constitutional review and constraints, of the ***Federal Parliament under the Emergencies Act,*** and under s. 91 under the POGG power, as well as ss.91(7) and (11) of the ***Constitution Act 1867.***

288. A Declaration that the Province, in any event, while maybe having jurisdiction with respect to some localized measures which coincidentally may have consequential impact on liberty, movement and association, has no constitutional jurisdiction to restrict or target the physical/psychological liberty, expression, association, and/ or assembly of every individual in the Province and that, if such

jurisdiction exists, subject to constitutional review and constraint, it rests with the Federal Parliament and government pursuant to the ***Federal Emergencies Act***.

289. A Declaration that the purported order, by Dr. Bonnie Henry, purportedly pursuant to s.52(2) of the ***Public Health Act***, that "the transmission of the infectious agent SARS-CoV-2, based on high "case counts", based on a PCR test, is ***ultra vires*** the ***Act*** and ***non est factum***, in that:

   (a) It does not constitute a "regional event" but, by its purported terms constitutes a national and international event, and is *ultra vires* the authority of the British Columbia Parliament and government with jurisdiction, if any, subject to constitutional review and constraints, resting with the **Federal Parliament** under the ***Emergencies Act***;

   (b) The classification as such is not scientifically nor medically based;

   (c) The evidence is lacking and contrary to the scientific and medical evidence;

   (d) That "cases' do not equate to "deaths" and that the purported death rate is no higher than complications from the annual influenza;

   (e) That the distorted "case" counts are fraudulent, based on the fraudulent use generating cases of "PCR" test, which is a test that:

      a) At best was designed as a "screening test" which requires a follow-up culture and blood test to ensure the detection of an **infectious virus**, and was **never** designed, nor equipped to be a diagnostic test;

b) That is is fraudulently being used as a diagnostic test;

c) That the PCR test has scientifically been debunked, as well as judicially determined, based on the scientific evidence, that when used at a "threshold cycle" of thirty five (35) or higher, to cause between 82% to 96.5% "false positives";

d) That British Columbia tests at a threshold cycle of well over forty (40) "threshold cycles". In weekly meetings with Bonnie Henry, doctors reported that her second in comman gave instruction to turn up the PCR for the sole purpose of creating increased cases.

290. A Declaration that the order of April 23rd, and June 30th, 2021 and previous such orders, and subsequent such orders or extensions, in any event, violate the ***Constitution Acts, 1867, 1982***, as follows:

(a) That the restrictions on freedom of expression, conscience, association, and assembly, were recognized, and continue to apply, as unwritten constitutional rights, through the Pre-amble of the ***Constitutional Act, 1867***, and that the Province has absolutely no jurisdiction to curtail those rights, as set out by the Supreme Court of Canada, and that if such curtailment were to be effected, it rests, subject to constitutional review, and constraints, in the jurisdiction of the Federal Parliament;

(b) That these same rights, contained in ss. 2(a)(b), 7, 8, 9 and 15 of the ***Charter*** are also being violated by the Order(s) of Bonnie Henry and none of the violations are justified under a free and democratic society under s. 1 of the ***Charter*** that that:

  (i) The measures do not evidentiarily, scientifically, nor medically set out a valid legislative objective;

  (ii) Are not rational;

  (iii)Are not tailored to minimally to infringe the constitutional rights; and

  (iv) The measures' deleterious effects far outweigh the beneficial effects in that the number of deaths **caused by the measures** are at a ratio of deaths well above for every death purportedly attributed to COVID-19.

291. A Declaration that administrating medical treatment without informed consent constitutes experimental medical treatment and contrary to the ***Nuremberg Code*** and ***Helsinki Declaration*** of 1960, still in vigor, and further and thus constitutes a crime against humanity under the ***Criminal Code of Canada***.

292. A declaration that the offering, promoting, and administering of Covid-Vaccines, or any other medical treatment to twelve (12) to seventeen (17) year olds without the informed consent of the parent(s) constitutes:

(a) In the absence of informed consent, medical experimentation and thus further constitutes a "crime against humanity" emanating from the

Nuremberg trials and principles following the medical experimentations by the Nazi regime and codified in Canada, as a criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act***;

(b) And by doing so Dr. Bonnie Henry and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada.***

(c) A Declaration that s.17 of the ***Infants Act [RSBC 1996] C. 223***, if it purports to grant (12) to (17) year olds, or children younger than (12), the ability to orally, or in writing, give informed, voluntary consent to any medical treatment, including vaccines, is of no force and effect as violating s.7 of the ***Charter*** in that:

   (i) It interferes with the parent-child relationship which has been recognized by the SCC, to be constitutionally protected by s.7 of the ***Charter***;

   (ii) It violates s.7 of the ***Charter*** with respect to the minor by violating the minor's physical and psychological integrity, in incurring a possible adverse reaction without the benefit of understanding the risk thereby vitiating the informed, voluntary consent required under s.7 of the ***Charter***;

   (iii)Given that the Covid vaccines have not been finally approved, with human trials not ending until the end of 2023 and the concession by Public Health officers that the “Covid Vaccines” are thus medically “experimental” it violates s.7 of the ***Charter*** by contravention of the ***Nuremberg Principles*** and ***Code***, as well as the ***Helsinki Declaration*** of 1960, both of which international instruments provide and are to be read in as the minimal protection under s.7 of the ***Charter*** as dictated by, ***inter alia***, by the ***SCC*** in the ***Hape*** decision; and

(iv) Violates s.15 of the ***Charter***, based on age, in not providing minors with the same constitutional protection of informed, voluntary consent provided and upheld under s.7 of the ***Charter***, that adults have.

293. A Declaration that the measures imposed by Dr. Bonnie Henry constitute a crime against humanity contrary to s.7 and 15 of the ***Charter*** in the unjustifiable deaths directly caused by her measures, including suicides, deaths from cancelled surgeries, drug over-doses, and depraved abuse of children, especially the physically and neurologically disabled, in that she knows that her measures are worse than the purported “Covid-deaths”, and that Dr. Bonnie Henry has in fact been complicit in crimes against humanity in her dispersing and administered deadly and unsafe vaccines in India (Pakistan) in or about the year 2000. Bonnie Henry has further advocated the immunization of twelve (12) to seventeen (17) year olds without the consent of their parents.

294. A Declaration that the "COVID Measures" undertaken and orchestrated by Prime Minister Trudeau ("Trudeau"), Premier Horgan, the Federal Crown, Provincial Crown, and their named officials constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act,1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference.**

295. A Declaration that the ***Public Health Act, [SBC 2008]*** (the **"Act),** and in particular vesting an indefinite emergency power in the Premier and Lt.-Governor, and further that the "COVID Measures", undertaken and orchestrated by Premier John HORGAN ("Horgan") as well as Bonnie Henry, Mike Farnworth, Jennifer Whiteside, Adrian Dix, and the Provincial Crown, constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act, 1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference;**

296. A Declaration that the COVID Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, at the

blind and unquestioned dictates of the World Health Organization ("WHO") bureaucrats, in defiance and ignoring of the avalanche of scientific and medical evidence to the contrary, constitute a constitutional violation of the abdication of the duty to govern, as enunciated in, **inter alia**, the **Re Gray** and **Canada (Wheat Board)** v. **Hallett and Carey Ltd.** decisions of the Supreme Court of Canada;

297. A Declaration that, in the imposition of the COVID Measures, the Defendants have engaged in **ultra vires** and unconstitutional conduct and have acted in, abuse and excess of their authority;

298. A Declaration that the concept of "social distancing" is neither scientifically, nor medically based, and is an ineffective and a fictional concept, which has no scientific nor medical basis and hitherto unknown, with respect to a seasonal viral respiratory illness;

299. A Declaration that any **mandatory** vaccine scheme against any purported COVID-19, by way of **mandatory** vaccine, ***or any coercive or extortive measures to force the Plaintiffs to "choose" to*** vaccinate, **without informed, voluntary, consent**, such as the use of "vaccine passports" or any and all other coercive measures, is unconstitutional, and no force and effect in that:

    (a) It infringes s. 2 of the **Charter** in violating freedom of conscience, religion and thought;

(b) Infringes s. 7, life, liberty, and security of the person in violating physical and psychological integrity in denying the right to choose, based on informed, voluntary, medical consent;

(c) Breaches the same parallel rights recognized prior to the **Charter,** as written constitutional rights through the Pre-Amble to the **Constitution Act, 1867;**

(d) Breaches parallel international treaty rights to no medical treatment without informed consent, and right to bodily integrity, which international treaty rights are to be read in, as a minimal s. 7 **Charter** protection, as enunciated by the Supreme Court of Canada in, **inter alia** the **Hape** decision;

(e) And that, under no circumstances are mandatory vaccines, nor coerced compliance to vaccines, in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

300. A Declaration that:

a) Social distancing, self-isolation, and limits as to the number of persons who can physically congregate, and where they can congregate, violates the unwritten rights contained, and recognized pre-**Charter**, by the SCC, through the pre-amble to the ***Constitution Act, 1867*** and that the Province has no jurisdiction to do so under s.92 of the ***Constitution Act, 1867***, as ruled by the ***SCC***, with respect to rights to freedom of association, thought, belief, and religion in banning association, including religious gatherings, as well as violate s. 2 **Charter** and further restricting physical and psychological liberty and security of the person rights under s.7 of the **Charter,** and are not in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

b) That prohibitions and obstacles to protest against COVID Measures in British Columbia, are a violation of the constitutional rights to freedom of expression, conscience, belief , and association, assembly, and petition, under s. 2 of the **Charter,** and not demonstrably justified by s. 1, as well as a violation of these constitutional rights, recognized **prior to** the **Charter,** through the Pre-Amble to the **Constitution Act, 1867** and against international treaty rights protected by s. 7 of the **Charter;**

301. A Declaration that the arbitrary, irrational, and standard-less sweep of closing businesses and stores as "non-essential", and the manner of determining and executing those closures, and "lock-downs", constitutes unreasonable search and seizure contrary to s. 8 of the **Charter** and not demonstrably justified under s.1 of the **Charter;**

302. A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a **bona fide,** nor an actual "pandemic", and declaration of a **bona fide** pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs;

303. A Declaration that any and all COVID Measures coercively restraining and curtailing the physical and psychological integrity of the Plaintiffs, and any and all physical and psychological restraints, including but not restricted to:

(a) "self-isolation";

(b) no gatherings of more than five (5) and later ten (10)persons, or any set number;

(c) the shutting down of children's playgrounds, daycares and schools;

(d) "social distancing";

(e) the compelled wearing of face-masks;

(f) prohibition and curtailment of freedom of assembly, including religious assembly, and petition;

(g) the imposition of charges and fines for the purported breach thereof;

(h) restriction of travel on public transport without compliance to physical distancing and masking;

(i) restrictions on shopping without compliance to masking and physical distancing;

(j) restrictions on attending restaurants and other food service establishments without compliance to masking, physical distancing, and providing name/address/contact information for contact tracing purposes.

(k) Crossing into and leave British Columbia and any and all subdivisions within British Columbia;

Constitute a violation of ss. 2,6,7,8, 9, and ss. 15 of the **Charter** , to freedom of association, conscience religion, assembly, and express on under s. 2, liberty and security of the person in violating the physical and psychological integrity of the liberty and security of the person, not in accordance tenets of fundamental justice, contrary to s.6(mobility rights) and well as s. 7(liberty), and further breach of the rights against unreasonable search and seizure contrary to s. 8, arbitrary detention under s. 9 of the **Charter** , and not demonstrably justified under s. 1, as well as breach of the unwritten parallel rights, recognized as constitutional rights, through the Pre-Amble of the **Constitution Act, 1867** and affected by means of removing measures against the "Liberty of the Subject" by way of **habeas corpus** as well as constituting Martial Law measures outside the scope of the Province under s.92, and subject to constitutional constraints, the exclusive jurisdiction of the Federal Parliament under s.91 (POGG), s.91(7) and (11) and the ***Federal Emergencies Act R.S.C. 1985***, and ***Quarantine Act S.C. 2005***;

304. Further Declarations that:

(a) the thoughtless imposition of "social distancing" and self-isolation at home breaches s. 2 of the **Charter,** in denying the right to freedom of association and further breaches the right to physical and psychological integrity, under s. 7 of the **Charter** (liberty) in curtailing and restricting physical movement, which measures are wholly unjustified on any

scientific or medical basis, and which are not in accordance with the tenets of fundamental justice in being vague, and suffering from overbreadth, and which cannot be justified under s. 1 of the **Charter;**

(b) That the measures themselves, and the arbitrary detention, by enforcement officers, in enforcing these vague and over-broad, and often **ultra vires,** and contradictory "orders", is a violation of the right against arbitrary detention under s. 9 of the **Charter** and that, in the course of such "enforcement" the search and seizure of private information, including medical information, from individuals, being charged with purported violations of such orders, constitutes a violation of ss.7 and 8 of the **Charter,** and that neither violation of s. 7 or 8 are in accordance with the tenets of fundamental justice nor justified under s. 1 of the **Charter;**

(c) That the use of "contact-tracing Apps" constitutes a violation of s. 8 of the **Charter**, and further violates ss. 7 and 8 of the **Charter** with respect to the constitutional rights to privacy, under both sections, and that such breaches are not in accordance with the tenets of fundamental justice, and are further not justified under s. 1 of the **Charter;**

(d) That the compelled use of face masks breaches, in restricting the right to breath, at the crux of life itself, and the liberty to choose how to breath, infringes s. 7 to the **Charter** liberty, security of the person and is not in

accordance with the tenets of fundamental justice and not justified by s. 1 of the **Charter;**

(e) That the above-noted infringements under s. 2,6, 7, 8, and 9, as well as the arbitrary decisions on what businesses to close, and which ones to be left open, constitutes a. 15 of the **Charter** violation based on:

  (i)Conscience, belief , and religion;
  (ii)Association, assembly and petition;
  (iii)Trade and profession;
  (iv)Mobility;

And further, that such measures are arbitrary, and discriminate before and under the law, contrary to s. 15 of the **Charter** (and not justified under s.1 of the **Charter**), and are further a violation of the unwritten constitutional right to equality recognized before the **Charter,** as unwritten constitutional rights through the Pre-Amble to the **Constitution Act, 1867** as emanating from the principles of Rule of Law, Constitutionalism, and Respect for Minorities as enunciated by the Supreme Court of Canada in **Quebec Secession Reference**;

305. A Declaration that the use of "vaccine passports" is a violation of ss. 2,7, and 15 of the ***Charter***, and that the use of "vaccine passports" and any and all other coercive measures to compel, as de facto mandatory, the constitutionally protected right to refuse medical procedure or treatment without informed consent, including vaccines further violates ss. 2, 7, and 15 of the ***Charter***, as

well as those mirrored unwritten rights established pre-***Charter*** under the ***Constitution Act, 1867***.

306. A Declaration that the Vaccine propaganda being pushed to twelve (12) to seventeen (17) year olds by the British Columbia government by way of s.17 of the ***Infants Act***, in fact, violates the child-parent relationship in s.7 of the ***Charter***.

307. A Declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to **de facto** put most small businesses and activities out of business;

308. A Declaration that:

(a) the Defendant Federal Crown, and its agencies and officials, including but not restricted to the CRTC, have, by glaring acts and omissions, breached the rights of the Plaintiffs to freedom of speech, expression, and the press, by not taking any action to curtail what has been described by the UK scientific community as "Stalinist censorship", particularly the CBC in knowingly refusing to cover/or publish the valid and sound criticism of the COVID measures, by recognized experts;

(b) a Declaration that the Federal Crown has in fact aided the suppressing and removing of "Facebook" and "YouTube" postings, even by experts, which in any way contradict or criticize the WHO and government measures as "misinformation" "contrary to community standards", by the federal Defendants threatening criminal sanction for such "misinformation";

thus violating s. 2 of the **Charter** by way of act, and omission, as delineated and ruled by the Supreme Court of Canada in, **inter alia**, **Vriend**.

309. A further Declaration that the failure, and in fact intentional choice, by the British Columbia Defendants, as well as Federal Defendants, to ensure that the Plaintiffs constitutional rights are not violated by those public officials purporting to enforce the Covid measures, as well as private agents purporting to enforce Covid measures, is not prevented and not legislated, and in fact such violations are encouraged, constitute violations of the Plaintiffs delineated by the Supreme Court of Canada in, ***inter alia, Vriend***.

310. A Declaration that the measures have a devastating impact on those with severe physical and neurological special needs, particularly children, and infringe s. 15 of the **Charter,** and are not justified under s. 1 of the **Charter**, and further violate the unwritten right to equality through the Pre-Amble to the **Constitution Act, 1867**, based on psychical and mental disability, and age;

311. A Declaration that the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are:

a) not scientifically, or medically, based;

b) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, **as a mere screening test,** of 3.5% accuracy;

c) that all measures of masking, social distancing, and school "lockdown" (closures) are a sole and direct result of the mounting, or "rising" "cases", being cases, which are 96.5% false positive;

d) that the PCR test, in and by itself, as used, cannot distinguish between dead (non-infectious) vs. live (infectious) virus fragments;

e) that (solitary confinement) isolation/quarantine of asymptomatic children, for any duration, is abusive, and constitutes violations under s.7 and 15, of the ***Constitution Act, 1982*** as violating the physical and psychological integrity, contrary to s. 7 of the ***Charter***, and further constitutes cruel and unusual treatment under s. 7 of the ***Charter***; and further violates s.7, by way of the International Law under the ***The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention")*** and the ***Convention on the Rights of the Child;*** and

f) that such treatment of children is particularly egregious with respect to children with special needs, suffering physical and neurological disabilities, in violating s.7 and s.15 of the ***Charter*** in that absolutely no particular or special provisions are made for them, to accommodate their disability(ies), with respect to the Covid measures.

312. A Declaration that the science, and preponderance of the scientific world community, is of the consensus that:

a) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARS-CoV-2 which leads to COVID-19;

b) that prolonged use of masks results, especially for children, in irreparable physical, neurological, psychological,language development, and social development harms, some of which are irreversible;

c) that "lockdowns", quarantine and isolation are ineffective and cause more damage than they prevent;

d) that Public Health officials, including the Defendants, as well as the WHO, have pronounced that the Covid "Vaccines" do **NOT** prevent transmission, in either direction, between vaccinated and non-vaccinated persons.

313. A Declaration that the mandatory use of masks, isolation and PCR testing, in the school context, violates children's constitutional rights under:

a) section 7 of the ***Charter*** in infringing their rights to physical and psychological safety, and integrity, as well as, medical procedure/treatment without informed consent;

b) section 7 in infringing their right to education, flowing from their right to education under the ***Education Act,*** and further under section 7 of the ***Charter*** as interpreted by the Canadian Courts, as well as under section 7 by way of the ***International Convention on the Rights of the Child*** as read in as a minimal protection under section 7 of the ***Charter,*** as enunciated, ***inter alia,*** by the Supreme Court of Canada in ***Baker***, ***Hape,*** and the Federal Court of Appeal in ***De Guzman***;

314. A Declaration that the notion of "asymptomatic" transmission, from children to adults, of an airborne respiratory virus, is "oxymoronic", without scientific, or medical basis, and hitherto scientifically and medically unknown;

315. A Declaration that masking, social distancing and testing in school settings, particularly elementary school(s), is unscientific, non-medical, unlawful, and unconstitutional and should be halted forthwith;

316. A Declaration that children do not pose a threat with respect to Covid-19, to their teachers;

317. A Declaration that teachers who do not wish to mask have the statutory and constitutional right not to mask.

318. A Declaration that the masking of children is unscientific, non-medical, physically, psychologically, neurologically, socially, and linguistically harmful to them and that the masking of children be prohibited, regardless and despite their parents' requests and/or directions, because as children have their own independent rights under the ***Education Act*** , s. 7 and 15 of the ***Charter,*** as well as s.7 of the ***Charter*** as read in, and through, the international law under the ***Convention on the rights of the Child;***

319. A Declaration that the mandatory vaccination of public service employees, or any citizens for that matter, without informed, voluntary, consent, is unconstitutional and of no force and effect as violating ss.2,7, and 15 as set out above in this statement of claim, in that compulsory medical treatment has been clearly ruled, by the Supreme Court of Canada, and other Appellate Courts, as violating s.7 of the ***Charter***.

320. A Declaration that **none** of the above ***Charter*** violations are saved by s.1 of the ***Charter***, as they fail to meet the test, thereunder, as enunciated in, inter alia, the ***Oakes*** decision, as the measures:

(a) Are not pursuant to valid statutory objective;

(b) The measures are not rational;

(c) The measures are not tailored for minimal impairment of the **Charter** rights;

(d) The measures dilatory effects far outweigh their beneficial effects;

321. Orders, in (the nature of) **Prohibition**, prohibiting the Respondent(s) from:

a) administering any PCR test that has above a 25 threshold cycle as a screening test only;

b) registering a "case", as "positive", based on a positive PCR screen test, without following up with a culture test to determine that it is the SARS-CoV-2 virus, as well as a further con-current blood test to determine antibody activity to verify that the virus is alive (infections) and not dead (not-infections), which procedure **constitutes** scientifically accepted method to isolate, identify, and confirm the presence of an infectious virus in a person;

c) "locking down" any school(s);

d) requiring any masking or face covering of **any children;**

e) Conducting classes and school by remote, online, distance learning over a computer which is not a statutory nor constitutionally acceptable alternative to in-person school learning, especially for children with physical and neurological disabilities and that the Respondents be prohibited from conducting remote classrooms outside the physical school setting;

f) requiring solitary confinement of children and barring contact with family members for any duration;

g) deeming of two "positive" PCR result(s) in a school as an "outbreak", which is absurd ad nauseam, and constitutes a violation of s.7 of the ***Charter*** in fraudulently creating undue panic and fear.

322. Orders, in the nature of **mandamus,** requiring the Respondent Ministers to:

a) reveal the source and substantive advice received, from whom, based on what specific scientific and medical evidence for the measures imposed;

b) reveal all data with respect to what threshold cycle rate **all** PCR tests are administered;

c) provide a release of all data comparing "cases" and co-relating them to "all-cause mortality", and the location(s) and ages of those purportedly dead **"from"** as opposed to "with", Covid, as well as the demographic age groups of the deaths;

d) Order the re-attendance of the Applicant children to return to their school without masks, and without PCR testing, for in-person learning.

323. The Plaintiffs, with respect to enforcements measures, of police, by-law, and health officers further seek:

(a) A Declaration that a "reception, or "informal gathering", under s. 19 and 20 of ***Order of the Provincial Health Officer – Gatherings and Events (March 24th, 2021)***, or any such subsequent order(s), pursuant to the ***Public Health Act [SBC 2008],*** does **not** include a gathering whose obvious purpose is to assemble, associate and otherwise gather to exercise freedom of speech, expression and/or assembly and religion as constitutionally recognized under the ***Constitution Act, 1867*** as well as s.2 of the ***Charter;***

(b) A Declaration that, with respect to the masking:

- (i)that no police officer has the jurisdiction to apply the ***Trespass Act, [RSBC 2018] c. 3*** to a person who declares a legal exemption to a mask, and who enters a public place; and
- (ii)that owners of places of business who refuse to comply with lawful exemptions may be charged with an offence pursuant to the ***Emergency Program Act [RSBC 1996] c 111*** and ***Ministerial Orders*** and ***Regulations*** thereunder;
- (iii)that Police Officers are equally entitled to masking exemptions and to be free from coercion by their superiors to take a Covid vaccine,

or PCR test contrary to their constitutional right to refuse based on informed consent;

(iv) That Police officers, like any other citizen, are constitutionally entitled, as ruled by the ***Supreme Court of Canada*** and ***Court of Appeal***, to refuse medical treatment without informed consent, including vaccines, and that Police officers should be free from coercion by superiors to be vaccinated;

(c) A Declaration that police, and/or a by-law, Provincial Offences, or Health Officer, with respect to an individual who fails and/or refuses to comply with any oral and written orders from any of the Provincial Respondents do not have the powers of arrest against that individual under Provincial ***Regulations*** such as those set out in Part 4, Division 6 of the ***Public Health Act SBC [2008]***, and the closing summation of Bonnie Henry's ***Orders***;

(d) That the bar of entry across "Provincial Borders", but for "essential travel" by residents/citizens coming from Alberta, as well as the **intra**-provincial travel bans without probable grounds of an offence being committed, which is a form of imposing Martial Law, without the jurisdiction to do so as per s.91(7) of the ***Constitution Act 1867.*** It is also contrary s.7 of the **Charter (Liberty)**, for vagueness and over-breadth as well as s.6 of the **Charter**, and thus compels the Police officer to breach their oath to uphold the Constitution and further, that the RCMP has no jurisdiction to set up roadblocks at British Columbia's "borders" and refuse passage into British Columbia, as well as set out by the SCC, Pre-**Charter**, in ***inter alia Winner***;

(e) That the measures and enforcement of the measures under ***Ministerial Orders 172/2021 and 182/2021***, as set out above in subparagraph (d) constitutes Martial Law, Police State measures outside the scope of the Province's jurisdiction under s.92 of the ***Constitution Act, 1867,*** and are within, subject to constitutional restraints, the jurisdiction of the Federal Parliament under s.91(7) and (1) and the "Peace, Order, and Good Government "(POGG)" Power on s.91 of the ***Constitution Act, 1867***, and thus further compels the Police officer to breach their oath to uphold the Constitution;

(f) A Declaration that failure and/or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the ***Criminal Code*** or constitute "obstruct peace officer" contrary to s. 129 of the ***Criminal Code*** thus granting the power of arrest to a police officer in the enforcement of a regulatory and/or municipal by-law as enunciated by the ***SCC*** in ***R v. Sharma [1993] 1 S.C.R. 650***;

(g) A Declaration that the RCMP has no jurisdiction to enforce Provincial Health nor "emergency" measures in the Province of British Columbia;

(h) A Declaration that, in any event, the restriction of physical movement and travel bans based on "essential travel", is a violation of s.7 liberty and security of the person, not in accordance with fundamental justice as being void for vagueness, as well as overbreadth, and impossible to enforce, in that it is nearly impossible to ascertain, while respecting an individual's ***Charter*** right to remain silent, and right against arbitrary detention and questioning, to determine whether that person has, "on reasonable and probable grounds" committed an offence;

(i) A Declaration that a police constable or by-law officer cannot, by way of general, blanket order(s), from his/her administrative supervisors, be directed how, when and in what circumstance, to lay a charge against an individual and thus dictate the discretion of that Police officer;

(j) A Declaration that no politician should be directing nor commenting on how, whom or in what circumstances any police officer should enforce nor apply the applicable law;

(k) A Declaration that the Covid emergency measures violate a police constable's duty, as office-holder to Her Majesty the Queen, in that the enforcement of the provisions, and the enforcement provision(s) are of no force and effect and unconstitutional in in allowing, and being directed by superiors, to violate a citizen's constitutional rights under the ***Constitution Act 1867***, as well as the ***Charter***, as follows:

(i) Violation of freedom of expression, speech, association, assembly and religion contrary to those unwritten constitutional rights recognized by the Supreme Court of Canada through the Preamble to the ***Constitution Act, 1867***, as well as s.2 of the ***Charter;***

(ii) Violation of the right to liberty and security of the person through the arbitrary and unreasonable detention, arrest, and interference with the physical liberty and movement of citizens, contrary to the Liberty of the Subject under ***Habeas Corpus***, as well as ss. 7, 9, and 10(c) of the ***Charter;***

(iii) Violation of the protection against unreasonable search and seizure contrary to s.8 of the ***Charter;***

(iv) Placing police officers in the potential violation, with respect to religious gatherings and services, of committing an offence contrary to s. 176 of the ***Criminal Code.***

323. Order(s), (in the nature of) **Prohibition** to:

(a) all police administrative supervisor(s) to cease and desist in interfering with a police constable's discretion as to how to apply and enforce the law, following the investigation by that individual police constable;

(b) all publicly elected politicians to cease and desist in interfering with a police constable's discretion as to how to apply and enforce the law, following the investigation by that individual police constable;

(c) all "public health officers" to cease and desist in interfering with a police constable's discretion as to how to apply and enforce the law, following the investigation by that individual police constable;

(d) All Police administrative superiors to cease and desist from coercive and illegal conduct, directions, and/or orders geared to denying masking exemptions of officers, PCR testing and vaccines contrary to the Police officer's constitutional rights to refuse any medical procedure and/or treatment with informed consent as enunciated and ruled by the ***Supreme Court of Canada***;

(e) All public officials, and the named Defendants, from implementing **any** mandatory vaccination measures, nor implementing any "Vaccine Passport" measures whatsoever.

324. The Plaintiffs seek the Declaratory and Prerogative/Injunctive relief set out in this Statement of Claim. In addition, the Plaintiffs seek damages, as set out below:

(a) With respect to **Action4Canada** damages in the amount of $1 Million for:

(i) A breach of s.2(a), (c), and (d) **Charter** rights to exercise freedoms of religion, peaceful assembly, and association via the limitations placed since the onset of the Covid-19 emergency measures.

(b) With respect to **Kimberly Woolman** Damages in the amount of $2 Million for:

(i) a breach of their s.7 **Charter** right to not be subjected to cruel and unusual punishment, in that the Yucalta Lodge care home unconstitutionally separated them from visiting their elderly mother, and caring for her on a number of occasions in retaliation to their voicing opinions in relation to their mother Jaqueline Woolman's care, and further violation and interference with their s.7 protected right to the parent-child relationship;

(ii) Violation of their s. 2(c) and (d) **Charter** right to association, in that the Yucalta Lodge care home prevented them from visiting their mother individually, and together, and monitored their association, and assembly on a number of occasions when they picked their mother up.

(iii) Violation of their s.2(b) **Charter** fundamental freedom of thought, belief, opinion, and expression, in that the Yucalta Lodge care home prevented them from sharing an open dialogue with their mother in relation to the Covid-19 emergency measures in general, and the specific measures that the care home had put into place.

(c) With respect to the **Estate of Jaqueline Woolman** damages in the amount of $2 Million for violations of the deceased, during her lifetime, recoverable by the estate for:

  (i) Violation, during the deceased's lifetime of her s.7 **Charter** right to not be subjected to cruel and unusual punishment. The Yucalta Lodge care home repeatedly breached this right by subjecting Jaqueline Woolman to abusive quarantining measures, as well as the cruel, and anxiety-inducing separation from her children that she was made to endure, and interference of the s.7 Charter protected right to the parent-child relationship;

  (ii) For a breach of the deceased's s.15 **Charter** equality rights to not face discrimination, which the Yucalta Lodge care home breached by taking advantage of Jaqueline Woolman's mental, physical disability, as well as her age by ignoring her wishes.

  (iii) damages for a breach of her s.2 (c) and (d) **Charter** fundamental freedoms to associate with her own children, and in particular, her two (2) daughters Kimberly and Michelle Woolman.

  (iv) For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(d) With respect to **Jane Doe #1** damages in the amount of $200,000.00 for:

   (i) a breach of her s.7 **Charter** rights to life, liberty, and security of the person in that the Covid-19 emergency measures enacted by Bonnie Henry have resulted in her employer enforcing the use of masks on their premises, including forcing Jane to wear a mask while at work.

   (ii) The cause of anxiety and pain and suffering as a result.

(e) With respect to **Brian Edgar** damages in the amount of $200,000 for:

   (i) A breach of his s.7, 8, 9, and 10 **Charter** rights, as Brian, and his party were detained for questioning, and asked to produce identification documentation by the police after exiting a BC Ferries vessel, although their only allegedly suspicious behaviour had been associating with a group of people heading to the same event in Vancouver.

   (ii) A breach of his s.2 (c) and (d) **Charter** rights to associate, which the BC Ferries infringed upon by targeting Brian and his party for peacefully assembling, and associating with each other, and another group on the vessel that were all attending the same event in Vancouver on that given date.

(iii)A breach of his s.15 **Charter** right to be free from discrimination, which the BC Ferries staff infringed by specifically targeting Brian, and his party for the simple reason that they were attending a specific event in Vancouver on that given date.

(f) With respect to **Amy Muranetz** damages in the amount of $200,000 for:

(i) A breach of her s.7 ***Charter*** rights to life, liberty, and security of the person as she was stopped, and questioned about her mask prior to entering a BC Ferries vessel, and several times while aboard the vessel, by the BC Ferries staff.

(ii) A breach of her s.15 ***Charter*** right to be free from discrimination, which the BC Ferries staff infringed by specifically targeting her for not wearing a mask.

(iii) A breach of her s.8, 9 and 10 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. BC Ferries staff stopped, detained, and questioned Amy at length and leisure without reasonable explanation.

(iv)A breach of her s.6 ***Charter*** mobility rights, as Amy, was banned by BC Ferries staff indefinitely from travelling back home on the BC Ferries.

(v) A breach of her s.7 ***Charter*** right to be free from cruel and unusual treatment, and punishment. Amy was treated inhumanely by BC Ferries staff in that they continued to detain, and mistreat her while she experienced a Post-traumatic Stress Disorder ("PTSD") episode while under their watch. It was also an excessive punishment, for the BC Ferries staff to prevent Amy from returning home on the ferries, for simply exercising a medical masking exemption.

(vi)For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(g) With respect to **Jane Doe #2** damages in the amount of $2 Million for:

(i) A breach of her s.15 ***Charter*** right to be free from discrimination, which the Hospital staff infringed upon by specifically targeting her for not wearing a mask, and deciding to deny her imminent medical treatment based on such.

(ii) A breach of her s.7 ***Charter*** rights to life, liberty, and security of the person as she was stopped, and questioned about her lack of mask throughout her time at the hospital, and this took precedence over carrying out her imminent and necessary medical treatment.

(iii)A breach of her s.7 ***Charter*** right to be free from cruel and unusual treatment, and punishment. Jane was punished, and denied critical medical treatment for a life-threatening illness for exercising a valid, medical masking exemption.

(iv)For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations;

(v) For endangering her very life.

(h) With respect to **Valerie Ann Foley** damages in the amount of $2 Million for:

(i) A breach of her s.7 ***Charter*** rights to life, liberty, and security of the person as she was stopped, and questioned about her lack of mask, for which she carried a medical exemption.

(ii) A breach of her s.8, 9 and 10 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. The Vancouver Skytrain Transit Officer not only lacked the jurisdiction to do so, but went on to verbally, and physically harass, and viciously assault, and subsequently handcuff Valerie while failing to provide any reasonable explanation for the severity of his actions.

(iii)A breach of her s.7 ***Charter*** right to be free from cruel and unusual treatment, and punishment. Valerie was disproportionately treated, including being physically assaulted by the Vancouver Skytrain Transit Officer, for the alleged crime of being un-masked with a valid medical exemption.

(iv)For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(i) With respect to **Linda** and **Gary Morken** damages in the amount of $250,000 each for:

(i) A breach of their s.7 ***Charter*** rights to life, liberty, and security of the person as they were stopped, and questioned about their lack of masks, for which they carried valid medical exemptions.

(ii) A breach of Linda's s.8, 9 and 10 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. The store staff, and RCMP Officers failed to provide the explicit, and reasonable causes behind Linda's search, and detention.

(iii)A breach of both Linda, and Gary's s.15 ***Charter*** right to be free from discrimination, which the store staff, and RCMP Officers infringed upon by specifically targeting them for being unmasked, and going above and beyond the reasonable protocol that the situation had called for, simply for that reason;

(iv) Unlawful detention and confinement.

(j) With respect to **Pastor Randy Beatty** damages in the amount of $500,000 for:

(i) A breach of s.2 (a), (b), (c), and (d) rights for Randy to exercise his freedom of expression, religion, peaceful assembly, and association, as the result of emergency measures that not only limited his church services, but at times saw them close entirely, despite following strict safety protocols;

(ii) A breach of Randy's s.15 ***Charter*** right to be free from discrimination due to religious beliefs, and many Covid-19 measures discriminate upon religious peoples, including Christians to refrain from engaging with the measures and mandates due to their religious beliefs.

(k) With respect to **Ilona Zink** damages in the amount of $500,000 for:

(i) A breach of her s. 6(2)(b) ***Charter*** right to gain a livelihood, which becomes difficult and next-to-impossible when covid-19 mandates involve the closure of specific businesses, calling some essential, and others "non-essential";

(ii) Unreasonable seizure contrary to s.8 of the ***Charter***.

(l) With respect to **Federico Fuoco** damages in the amount of $750,000 for:

  (i) A breach of his s. 6(2)(b) ***Charter*** right to gain a livelihood, which becomes difficult when covid-19 mandates involve the closure of specific businesses, calling some essential, and others "non-essential".

  (ii) A breach of Federico's s.15 ***Charter*** right to be free from discrimination due to his beliefs, and his masking exemption, yet he was discriminated against by the city of Vancouver who denied him the attempt to open his restaurant safely, and served him with closure notices, and revocation of his licensing in relation to his business.

  (iii) For the slanderous, and baseless attacks on his business as the result of the rampant environment of division that has been created in British Columbia due to the Covid-19 emergency measures, and this has impacted not only public opinion on Federico, a well-known restauranteur in Vancouver, but also his restaurant business.

(m) With respect to **Fire Productions Limited**, and **F2 productions Incorporated**, damages in the amount of $750,000.00 for:

(i) Violation of s.8 of the ***Charter*** in the unreasonable seizure of the businesses as a result of "lock-downs";

(ii) Damages, to be calculated at trial, for loss of income as a result of the unconstitutional lock-downs and violations of s.8 of the ***Charter***.

(n) With respect to **Michael Martinz** damages in the amount of $250,000 for:

(i) A breach of his s.7 ***Charter*** rights to life, liberty, and security of the person as he was stopped, from passing through airport security, despite holding a Canadian passport so that he could be forced to take a PCR test, contrary to s.14(1) of the ***Quarantine Act***.

(ii) A breach of Michael's s.8, and 9 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, as he was stopped from leaving the airport, and detained for a lengthy time period as airport staff, and a nurse made attempts to force him to take the penetrative PCR test against his will and contrary to s.14(1) of the ***Quarantine Act***.

(o) With respect to **Makhan S. Parhar** damages in the amount of $250,000 for:

(i) A breach of his s.7 ***Charter*** rights to life, liberty, and security of the person as he was stopped, from passing through airport security, despite holding a Canadian passport so that he could be forced to take a PCR test.

(ii) A breach of Makhan's s.8, 9, 10(c) and 11 ***Charter*** rights to remain secure against unreasonable search and seizure, as well as not be arbitrarily detained, and be informed of the reason for detention. For much of the time that Makhan was detained, his questions as to why were left unanswered.

(iii) A breach of his s.7 ***Charter*** rights to be free from cruel and unusual treatment and punishment. Not only was Makhan placed in quarantine, but during his time detained in jail, he was denied vegetarian meals that he specifically requested.

(iv) A breach of his s. 6 ***Charter*** mobility rights, as he was placed under quarantine restrictions.

(v) For the intentional causing of pain and suffering of the Plaintiff as a result of the constitutional violations.

(p) With respect to **North Delta Real Yoga Real Hot Yoga Limited** damages in the amount of $750,000 for:

(i) Violation of s.8 of the ***Charter*** in the unreasonable seizure of the businesses as a result of "lock-downs";

(ii) Damages, to be calculated at trial, for loss of income as a result of the unconstitutional lock-downs and violations of s.8 of the ***Charter***.

(q) With respect to **Melissa Anne Neubauer** damages in the amount of $250,000 for:

(i) A breach of her s.15 ***Charter*** rights to be free from discrimination, as her employers discriminated against her for seeking a valid masking exemption, which they eventually denied. She is now seeking employment in another region entirely.

(ii) A breach of the s.6(2)(b) ***Charter*** right to gain a livelihood in any province in Canada, and can not do so due to the discrimination she faced at the hands of her employer, as a result of the Covid-19 restrictions.

(r) With respect to **Jane Doe #3** damages in the amount of $750,000 for:

  (i) A breach of the s.15 ***Charter*** rights to be free from discrimination, and she felt that due to being unvaccinated, she was not able to comfortably carry out her work as a vital essential medical worker.

  (ii) A breach of the s.6(2)(b) ***Charter*** right to gain a livelihood in any province in Canada, due to the aforementioned reason, and the discrimination that she faced as a result thereof, having had to leave her place of work on a stress leave.

324. The Plaintiffs further seek such other or further monetary damages, to be calculated at trial, as counsel may advise and this Honourable Court grant.

325. The Plaintiffs further state that the damages they have suffered, as a result of the unlawful actions of both public and private actors, lie at the feet of the Crown Defendants in that they have chosen and/or failed to institute measures and enforcement to ensure that, in the execution of the "Covid measures", the Plaintiffs/ rights under those measures were respected and enforced thus violating their statutory and constitutional rights by act and omission, for which the Crown is liable in damages.

326. As against the **CBC**:

(a) A Declaration that:

   (i) The CBC, as the publicly- funded broadcaster under the **Broadcast Act,** owes a fiduciary duty to be fair, independent, impartial, objective, and responsible, in its news coverage and investigation of the "pandemic", and COVID- Measures, which fiduciary duty it has flagrantly and knowingly breached;

   (ii) That the CBC, owing a duty of care to the Plaintiffs as the national, publicly - funded broadcaster, has been grossly negligent in its coverage and reporting on the COVID-19; and

   (iii) That the CBC has knowingly and intentionally suppressed, censored, and unjustifiably belittled expert opinion opposed and critical of the WHO and government line on COVID, and thus propagated "misinformation" and "false news".

(b) Further as against the CBC, general damages in the amount of $10 Million dollars;

(c) Punitive damages in the amount of $10 Million dollars;

(d) Such further or other injunctive relief as counsel may advise and this Honorable Court grant.

327. The Plaintiffs further seek Costs of this action and such further and/or other Declaratory relief as counsel may advise and this Honorable Court entertain.

Part 3: LEGAL BASIS

327. That the "Covid-measures" and declaration of the "emergency" invoked by the Respondents:

(a) Do not meet the prerequisite criteria of any "emergency" as prescribed by ss.9-10.2 nor ss.12-13 of the ***Emergency Program Act [RSBC 1996],*** nor is it within the jurisdictional purview of s.52(2) of the ***Public Health Act, SBC [2008],*** and further contravenes s.3(1) and s.120(1) of the ***Public Health Act SBC [2008]***;

(b) Breach the Plaintiffs' right to consult and constitutional duty to consult, of the Respondents, both in procedure, and substance, with respect to broad sweeping public health measures both under administrative law, and the fundamental justice requirement under section 7 of the ***Charter*** as enunciated and ruled by the ***SCC***;

(c) If the pre-requisites of an "emergency" are met, as declared to be a national and international "emergency", the jurisdiction, and constitutional duty, to deal with this "national emergency", and its measures, is strictly with the Federal Parliament, under the ***Federal Emergencies Act*** and ***Quarantine Act,*** pursuant to

s. 91(7) and (11) of the ***Constitution Act, 1867***, as well as under the "Peace, Order, and Good Government ("POGG")" Power, under s.91 of the ***Constitution Act, 1867*** and not the jurisdiction of the provincial legislature;

(d) That quarantine is Federal jurisdiction;

(e) That "lock-downs", and "stay at home orders", and any curfews, in whole or in part, are forms of Martial law outside the Province's jurisdiction under s. 92 of the ***Constitution Act, 1867*** and, subject to constitutional review and constraints, matters of Federal jurisdiction under the POGG power and s. 91(7) of the ***Constitution Act, 1867***.

(f) that "lock-downs", in any event, and the arbitrary and irrational means by which businesses have been ordered closed and/or restricted constitute an unreasonable seizure contrary to s.8 of the ***Charter***.

328. As against the Crown Defendants, and Officials:

(a) That the purported order of the chief health officer, Dr. Bonnie Henry, dated April 30th, 2021, as well as June 30th, 2021 along with previous such orders, before and after June 30th, 2021, and any such duplicate future or extended orders, purportedly made under ss. 30, 31, 32 and 39(3) of the *Public Health Act,* S.B.C 2008 ("the Act"), are ***ultra vires*** that Act, and null and void as an enveloping emergency order of national dimension; and the strict jurisdiction of the Federal Government under s.91 (7) and (11) as well as the "POGG" power of the ***Constitution Act, 1867***, which rests in the exclusive jurisdiction, subject to constitutional review and constraints, with the Federal Parliament.

(b) That Ministerial order #M182 of April 30th, 2021, as well as the order of Bonnie Henry on June 30th, 2021, and the lockdown and travel restrictions are of no force and effect as constitutionally, Martial Law, pursuant to s.91(7) as well as the POGG Power;

329. That the ***Public Health Act,*** and ss.30, 31, 32, and 39(3) of the *Act* is restricted to making orders of a local or regional scope and not of a completely provincial application in the content where the declared threat is not provincial in nature but national, and that the province is without jurisdiction to make such orders and measures as such orders and measures are the jurisdiction subject to constitutional review and constraints, of the ***Federal Parliament under the Emergencies Act,*** and under s. 91 under the POGG power, as well as ss.91(7) and (11) of the ***Constitution Act 1867.***

330. That the Province, in any event, while maybe having jurisdiction with respect to some localized measures which coincidentally may have consequential impact

on liberty, movement and association, has no constitutional jurisdiction to restrict or target the physical/psychological liberty, expression, association, and/ or assembly of every individual in the Province and that, if such jurisdiction exists, subject to constitutional review and constraint, it rests with the Federal Parliament and government pursuant to the ***Federal Emergencies Act***.

331. That the purported order, by Dr. Bonnie Henry, purportedly pursuant to s.52(2) of the ***Public Health Act***, that "the transmission of the infectious agent SARS-CoV-2, based on high "case counts", based on a PCR test, is ***ultra vires*** the ***Act*** and ***non est factum***, in that:

(a) It does not constitute a "regional event" but, by its purported terms constitutes a national and international event, and is *ultra vires* the authority of the British Columbia Parliament and government with jurisdiction, if any, subject to constitutional review and constraints, resting with the **Federal Parliament** under the ***Emergencies Act***;

(b) The classification as such is not scientifically nor medically based;

(c) The evidence is lacking and contrary to the scientific and medical evidence;

(d) That "cases' do not equate to "deaths" and that the purported death rate is no higher than complications from the annual influenza;

(e) That the distorted "case" counts are fraudulent, based on the fraudulent use generating cases of "PCR" test, which is a test that:

  (i) At best was designed as a "screening test" which requires a follow-up culture and blood test to ensure the detection of an **infectious virus**, and was **never** designed, nor equipped to be a diagnostic test;

  (ii) That is fraudulently being used as a diagnostic test;

  (iii)That the PCR test has scientifically been debunked, as well as judicially determined, based on the scientific evidence, that when used at a "threshold cycle" of thirty five (35) or higher, to cause between 82% to 96.5% "false positives";

  (iv)That British Columbia tests at a threshold cycle of well over forty (40) "threshold cycles". In weekly meetings with Bonnie Henry, doctors reported that her second in comman gave instruction to turn up the PCR for the sole purpose of creating increased cases.

332. That the order of April 23rd, 2021 and previous such orders, and subsequent such orders or extensions, in any event, violate the ***Constitution Acts, 1867, 1982***, as follows:

(a) That the restrictions on freedom of expression, conscience, association, and assembly, were recognized, and continue to apply, as unwritten constitutional rights, through the Pre-amble of the ***Constitutional Act, 1867***, and that the Province has absolutely no jurisdiction to curtail those rights, as set out by the Supreme Court of Canada, and that if such curtailment were to be effected, it rests, subject to constitutional review, and constraints, in the jurisdiction of the Federal Parliament;

(b) That these same rights, contained in ss. 2(a)(b), 7, 8, 9 and 15 of the ***Charter*** are also being violated by the Order(s) of Bonnie Henry and none of the violations are justified under a free and democratic society under s. 1 of the ***Charter*** that that:

(i) The measures do not evidentiarily, scientifically, nor medically set out a valid legislative objective;

(ii) Are not rational;

(iii)Are not tailored to minimally infringe the constitutional rights; and (iv)The measures' deleterious effects far outweigh the beneficial effects in that the number of deaths **caused by the measures** are at a ratio of 10-12 deaths for every death purportedly attributed to COVID-19.

333. That administrating medical treatment without informed consent constitutes experimental medical treatment and contrary to the ***Nuremberg Code*** and ***Helsinki Declaration*** of 1960, still in vigor, and further and thus constitutes a crime against humanity under the ***Criminal Code of Canada.***

325. The offering, promoting, and administering of Covid-Vaccines, or any other medical treatment to twelve (12) to seventeen (17) year olds without the informed consent of the parent(s) constitutes:

(d) In the absence of informed consent, medical experimentation and thus further constitutes a "crime against humanity" emanating from the Nuremberg trials and principles following the medical experimentations by the Nazi regime and codified in Canada, as a criminal act, pursuant to the ***War Crime and Crimes Against Humanity Act***;

(e) And by doing so Dr. Bonnie Henry and the Province of British Columbia are violating the s.7 ***Charter*** protected right of the parent-child relationship and in contempt and subversion of the "mature minor" doctrine of the ***Supreme Court of Canada***.

(f) S.17 of the ***Infants Act [RSBC 1996] C. 223***, if it purports to grant (12) to (17) year olds, or children younger than (12), the ability to orally, or in writing, give informed, voluntary consent to any medical treatment, including vaccines, is of no force and effect as violating s.7 of the ***Charter*** in that:

  (i) It interferes with the parent-child relationship which has been recognized by the SCC, to be constitutionally protected by s.7 of the ***Charter***;

  (ii) It violates s.7 of the ***Charter*** with respect to the minor by violating the minor's physical and psychological integrity, in incurring a possible adverse reaction without the benefit of understanding the risk thereby vitiating the informed, voluntary consent required under s.7 of the ***Charter***;

  (iii)Given that the Covid vaccines have not been finally approved, with human trials not ending until the end of 2023 and the concession by Public Health officers that the "Covid Vaccines" are thus medically "experimental" it violates s.7 of the ***Charter*** by contravention of the ***Nuremberg Principles*** and ***Code***, as well as the ***Helsinki Declaration*** of 1960, both of which international instruments provide and are to be read in as the minimal protection under s.7 of the ***Charter*** as dictated by, ***inter alia***, by the ***SCC*** in the ***Hape*** decision; and

(iv) Violates s.15 of the ***Charter***, based on age, in not providing minors with the same constitutional protection of informed, voluntary consent provided and upheld under s.7 of the ***Charter***, that adults have.

334. That the measures imposed by Dr. Bonnie Henry constitute a crime against humanity contrary to s.7 and 15 of the ***Charter*** in the unjustifiable deaths directly caused by her measures, including suicides, deaths from cancelled surgeries, drug over-doses, and depraved abuse of the elderly and children, especially the physically and neurologically disabled, in that she knows that her measures are worse than the purported "Covid-deaths", and that Dr. Bonnie Henry has in fact been complicit in crimes against humanity in her dispersing and administered deadly and unsafe vaccines in India (Pakistan) in or about the year 2000. Bonnie Henry has further advocated the immunization of twelve (12) to seventeen (17) year olds without the consent of their parents.

335. That the "COVID Measures" undertaken and orchestrated by Prime Minister Trudeau ("Trudeau"), Premier Horgan, the Federal Crown, Provincial Crown, and their named officials constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act,1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as

enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference.**

336. That the ***Public Health Act, [SBC 2008]*** (the **"Act),** and in particular vesting an indefinite emergency power in the Premier and Lt.-Governor, and further that the "COVID Measures", undertaken and orchestrated by Premier John HORGAN ("Horgan") as well as Bonnie Henry, Mike Farnworth, Jennifer Whiteside, Adrian Dix, and the Provincial Crown, constitute a constitutional violation of "dispensing with Parliament, under the pretense of Royal Prerogative", contrary to the **English Bill of Rights (1689)** as read into our unwritten constitutional rights through the Pre-Amble of **the Constitution Act, 1867,** emanating from the unwritten constitutional principles of Rule of Law, Constitutionalism and Democracy , as enunciated by the Supreme Court of Canada in, **inter alia** , **Quebec Secession Reference;**

326. The COVID Measures Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, at the blind and unquestioned dictates of the World Health Organization ("WHO") bureaucrats, in defiance and ignoring of the avalanche of scientific and medical evidence to the contrary, constitute a constitutional violation of the abdication of the duty to govern, as enunciated in, **inter alia**, the **Re Gray** and **Canada (Wheat Board)** v. **Hallett and Carey Ltd.** decisions of the Supreme Court of Canada;

337. That in the imposition of the COVID Measures, the Defendants have engaged in **ultra vires** and unconstitutional conduct and have acted in, abuse and excess of their authority;

338. That the concept of "social distancing" is neither scientifically, nor medically based, and is an ineffective and a fictional concept, which has no scientific nor medical basis and hitherto unknown, with respect to a seasonal viral respiratory illness;

339. That any **mandatory** vaccine scheme against any purported COVID-19, by way of **mandatory** vaccine, ***or any coercive or extortive measures to force the Plaintiffs to "choose" to*** vaccinate, **without informed, voluntary consent**, such as the use of "vaccine passports" or any and all other coercive measures, is unconstitutional, and no force and effect in that:

(a) It infringes s. 2 of the **Charter** in violating freedom of conscience, religion and thought;

(b) Infringes s. 7, life, liberty, and security of the person in violating physical and psychological integrity in denying the right to choose, based on informed medical consent;

(c) Breaches the same parallel rights recognized prior to the **Charter,** as written constitutional rights through the Pre-Amble to the **Constitution Act, 1867;**

(d) Breaches parallel international treaty rights to no medical treatment without informed consent, and right to bodily integrity, which international treaty rights are to be read in, as a minimal s. 7 **Charter** protection, as enunciated by the Supreme Court of Canada in, **inter alia** the **Hape** decision;

(e) And that, under no circumstances are mandatory vaccines, nor coerced compliance to vaccines, in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

340. That:

a) Social distancing, self-isolation, and limits as to the number of persons who can physically congregate, and where they can congregate, violates the unwritten rights contained, and recognized pre-**Charter**, by the SCC, through the pre-amble to the ***Constitution Act, 1867*** and that the Province has no jurisdiction to do so under s.92 of the ***Constitution Act, 1867***, as ruled by the ***SCC***, with respect to rights to freedom of association, thought, belief, and religion in banning association, including religious gatherings, as well as violate s. 2 **Charte**and further restricting physical and psychological liberty and security of the person rights under s.7 of the **Charter,** and are not in accordance with the tenets of fundamental justice, nor demonstrably justified under s. 1 of the **Charter;**

b) That prohibitions and obstacles to protest against COVID Measures in British Columbia, are a violation of the constitutional rights to freedom of expression, conscience, belief , and association, assembly, and petition, under s. 2 of the **Charter,** and not demonstrably justified by s. 1, as well as a violation of these constitutional rights, recognized **prior to** the **Charter,** through the Pre-Amble to the **Constitution Act, 1867** and against international treaty rights protected by s. 7 of the **Charter;**

341. That the arbitrary, irrational, and standardless sweep of closing businesses and stores as "non-essential", and the manner of determining and executing those closures, and "lock-downs", constitutes unreasonable search and seizure contrary to s. 8 of the **Charter** and not demonstrably justified under s.1 of the **Charter;**

342. That the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a **bona fide,** nor an actual "pandemic", and declaration of a **bona fide** pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs;

343. That any and all COVID Measures coercively restraining and curtailing the physical and psychological integrity of the Plaintiffs, and any and all physical and psychological restraints, including but not restricted to:

(a) "self-isolation";

(b) no gatherings of more than five (5) and later ten (10) persons, or any set number;

(c) the shutting down of children's playgrounds, daycares and schools;

(d) "social distancing";

(e) the compelled wearing of face-masks;

(f) prohibition and curtailment of freedom of assembly, including religious assembly, and petition;

(g) the imposition of charges and fines for the purported breach thereof;

(h) restriction of travel on public transport without compliance to physical distancing and masking;

(i) restrictions on shopping without compliance to masking and physical distancing;

(j) restrictions on attending restaurants and other food service establishments without compliance to masking, physical distancing, and providing name/address/contact information for contact tracing purposes.

(k) Crossing into and leave British Columbia and any and all subdivisions within British Columbia;

Constitute a violation of ss. 2,6,7,8, 9, and ss. 15 of the **Charter** , to freedom of association, conscience religion, assembly, and express on under s. 2, liberty and security of the person in violating the physical and psychological integrity of the liberty and security of the person, not in accordance tenets of fundamental justice, contrary to s.6(mobility rights) and well as s. 7(liberty), and further breach of the rights against unreasonable search and seizure contrary to s. 8, arbitrary detention under s. 9 of the **Charter** , and not demonstrably justified under s. 1, as well as breach of the unwritten parallel rights, recognized as constitutional rights, through the Pre-Amble of the **Constitution Act, 1867** and affected by means of removing measures against the "Liberty of the Subject" by way of **habeas corpus** as well as constituting Martial Law measures outside the scope of the Province under s.92, and subject to constitutional constraints, the exclusive jurisdiction of the Federal Parliament under s.91 (POGG), s.91(7) and (11) and the ***Federal Emergencies Act R.S.C. 1985***, and ***Quarantine Act S.C. 2005***;

344. That:

(a) The thoughtless imposition of "social distancing" and self-isolation at home breaches s. 2 of the **Charter,** in denying the right to freedom of association and further breaches the right to physical and psychological integrity, under s. 7 of the **Charter** (liberty) in curtailing and restricting physical movement, which measures are wholly unjustified on any

scientific or medical basis, and which are not in accordance with the tenets of fundamental justice in being vague, and suffering from overbreadth, and which cannot be justified under s. 1 of the **Charter;**

(b) The measures themselves, and the arbitrary detention, by enforcement officers, in enforcing these vague and over-broad, and often **ultra vires,** and contradictory "orders", is a violation of the right against arbitrary detention under s. 9 of the **Charter** and that, in the course of such "enforcement" the search and seizure of private information, including medical information, from individuals, being charged with purported violations of such orders, constitutes a violation of ss.7 and 8 of the **Charter,** and that neither violation of s. 7 or 8 are in accordance with the tenets of fundamental justice nor justified under s. 1 of the **Charter;**

(c) The use of "contact-tracing Apps" constitutes a violation of **s.** 8 of the **Charter**, and further violates ss. 7 and 8 of the **Charter** with respect to the constitutional rights to privacy, under both sections, and that such breaches are not in accordance with the tenets of fundamental justice, and are further not justified under s. 1 of the **Charter;**

(a) The compelled use of face masks breaches, in restricting the right to breath, at the crux of life itself, and the liberty to choose how to breath, infringes s. 7 to the **Charter** liberty, security of the person and is not in

accordance with the tenets of fundamental justice and not justified by s. 1 of the **Charter;**

(b) The above-noted infringements under s. 2,6, 7, 8, and 9, as well as the arbitrary decisions on what businesses to close, and which ones to be left open, constitutes a. 15 of the **Charter** violation based on:

   (i) Conscience, belief, and religion;

   (ii) Association, assembly and petition;

   (iii) Trade and profession;

   (iv) Mobility;

And further that such measures are arbitrary, and discriminate before and under the law, contrary to s. 15 of the **Charter** (and not justified under s.1 of the **Charter**), and are further a violation of the unwritten constitutional right to equality recognized before the **Charter,** as unwritten constitutional rights through the Pre-Amble to the **Constitution Act, 1867** as emanating from the principles of Rule of Law, Constitutionalism, and Respect for Minorities as enunciated by the Supreme Court of Canada in **Quebec Secession Reference**.

345. That the use of "vaccine passports" is a violation of ss. 2,7, and 15 of the ***Charter***, and that the use of "vaccine passports" and any and all other coercive measures to compel, as de facto mandatory, the constitutionally protected right to

refuse medical procedure or treatment without informed consent, including vaccines further violates ss. 2, 7, and 15 of the ***Charter***, as well as those mirrored unwritten rights established pre-***Charter*** under the ***Constitution Act, 1867***.

346. The Vaccine propaganda being pushed to twelve (12) to seventeen (17) year olds by the British Columbia government by way of s.17 of the ***Infants Act***, in fact, violates the child-parent relationship in s.7 of the ***Charter***.

347. That the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to **de facto** put most small businesses and activities out of business;

348. That:

(a) The Defendant Federal Crown, and its agencies and officials, including but not restricted to the CRTC, have, by glaring acts and omissions, breached the rights of the Plaintiffs to freedom of speech, expression, and the press, by not taking any action to curtail what has been described by the UK scientific community as "Stalinist censorship", particularly the CBC in knowingly refusing to cover/or publish the valid and sound criticism of the COVID measures, by recognized experts;

(b) The Federal Crown has in fact aided the suppressing and removing of "Facebook" and "YouTube" postings, even by experts, which in any way contradict or criticize the WHO and government measures as "misinformation" "contrary to community standards", by the federal Defendants threatening criminal sanction for such "misinformation";

thus violating s. 2 of the **Charter** by way of act, and omission, as delineated and ruled by the Supreme Court of Canada in, **inter alia**, **Vriend;**

349. That the failure and in fact intentional choice by the British Columbia Defendants, as well as Federal Defendants, to ensure that the Plaintiffs constitutional rights are not violated by those public officials purporting to enforce the Covid measures, as well as private agents purporting to enforce Covid measures, is not prevented and not legislated, and in fact such violations are encouraged, constitute violations of the Plaintiffs delineated by the Supreme Court of Canada in, ***inter alia, Vriend.***

350. That the measures have a devastating impact on those with severe physical and neurological special needs, particularly children, and infringe s. 15 of the **Charter,** and are not justified under s. 1 of the **Charter**, and further violate the unwritten right to equality through the Pre-Amble to the **Constitution Act, 1867,** based on psychical and mental disability, and age;

351. That the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are:

(i) not scientifically, or medically, based;

(ii) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, **as a mere screening test,** of 3.5% accuracy;

(iii)All measures of masking, social distancing, and school "lockdown" (closures) are a sole and direct result of the mounting, or "rising" "cases", being cases, which are 96.5% false positive;

(iv)The PCR test, in and by itself, as used, cannot distinguish between dead (non-infectious) vs. live (infectious) virus fragments;

(v) The (solitary confinement) isolation/quarantine of asymptomatic children, for any duration, is abusive, and constitutes violations under s.7 and 15, of the ***Constitution Act, 1982*** as violating the physical and psychological integrity, contrary to s. 7 of the ***Charter***, and further constitutes cruel and unusual treatment under s. 7 of the ***Charter***; and further violates s.7, by way of the International Law under the ***The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention")*** and the ***Convention on the Rights of the Child;*** and

(vi) is particularly egregious with respect to children with special needs, suffering physical and neurological disabilities, in violating s.7 and s.15 of the ***Charter*** in that absolutely no particular or special provisions are made for them, to accommodate their disability(ies), with respect to the Covid measures;

352. That the science, and preponderance of the scientific world community, is of the consensus that:

(i) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARS-CoV-2 which leads to COVID-19;

(ii) that prolonged use of masks results, especially for children, in irreparable physical, neurological, psychological, language development, and social development harms, some of which are irreversible;

(iii)that "lockdowns", quarantine and isolation are ineffective and cause more damage than they prevent;

(iv)that Public Health officials, including the Defendants, as well as the WHO, have pronounced that the Covid "Vaccines" do NOT prevent transmission, in either direction, between vaccinated and non-vaccinated persons.

353. That the mandatory use of masks, isolation and PCR testing, in the school context, violates children's constitutional rights under:

(i) section 7 of the ***Charter*** in infringing their rights to physical and psychological safety, and integrity, as well as, medical procedure/treatment without informed consent;

(ii) section 7 in infringing their right to education, flowing from their right to education under the ***Education Act,*** and further under section 7 of the ***Charter*** as interpreted by the Canadian Courts, as well as under section 7 by way of the ***International Convention on the Rights of the Child*** as read in as a minimal protection under section 7 of the ***Charter,*** as enunciated, ***inter alia,*** by the Supreme Court of

Canada in ***Baker***, ***Hape,*** and the Federal Court of Appeal in ***De Guzman***;

354. That the notion of "asymptomatic" transmission, from children to adults, of an airborne respiratory virus, is "oxymoronic", without scientific, or medical basis, and hitherto scientifically and medically unknown.

355. That masking, social distancing and testing in school settings, particularly elementary school(s), is unscientific, non-medical, unlawful, and unconstitutional and should be halted forthwith.

356. That children do not pose a threat with respect to Covid-19, to their teachers;

357. That teachers who do not wish to mask have the statutory and constitutional right not to mask;

358. That the masking of children is unscientific, non-medical, physically, psychologically, neurologically, socially, and linguistically harmful to them and that the masking of children be prohibited, regardless and despite their parents' requests and/or directions, because as children have their own independent rights under the ***Education Act*** , s. 7 and 15 of the ***Charter,*** as well as s.7 of the ***Charter*** as read in, and through, the international law under the ***Convention on the rights of the Child;***

359. that the mandatory vaccination of public service employees, or any citizens for that matter, without informed, voluntary, consent, is unconstitutional and of no

force and effect as violating ss.2,7, and 15 as set out above in this statement of claim, in that compulsory medical treatment has been clearly ruled, by the Supreme Court of Canada, and other Appellate Courts, as violating s.7 of the Charter.

360. That **none** of the above ***Charter*** violations are saved by s.1 of the ***Charter***, as they fail to meet the test, thereunder, as enunciated in, inter alia, the ***Oakes*** decision, as the measures:

(a) Are not pursuant to valid statutory objective;

(b) The measures are not rational;

(c) The measures are not tailored for minimal impairment of the **Charter** rights;

(d) The measures dilatory effects far outweigh their beneficial effects;

361. That, with respect to enforcements measures, of police, by-law, and health officers:

(a) A "reception, or "informal gathering", under s. 19 and 20 of ***Order of the Provincial Health Officer – Gatherings and Events (March 24th, 2021)***, or any such subsequent order(s), pursuant to the ***Public Health Act [SBC 2008]***, does **not** include a gathering whose obvious purpose is to assemble, associate and otherwise gather to exercise freedom of speech, expression and/or assembly and religion as constitutionally recognized under the ***Constitution Act, 1867*** as well as s.2 of the ***Charter;***

(b) With respect to the masking that:

(i) No police officer has the jurisdiction to apply the ***Trespass Act, [RSBC 2018] c. 3*** to a person who declares a legal exemption to a mask, and who enters a public place; and

(ii) Owners of places of business who refuse to comply with lawful exemptions may be charged with an offence pursuant to the ***Emergency Program Act [RSBC 1996] c. 111*** and ***Ministerial Orders*** and ***Regulations*** thereunder;

(iii) Police Officers are equally entitled to masking exemptions and to be free from coercion by their superiors to take a Covid vaccine, or PCR test contrary to their constitutional right to refuse based on informed consent;

(iv) Police officers, like any other citizen, are constitutionally entitled, as ruled by the ***Supreme Court of Canada*** and ***Court of Appeal***, to refuse medical treatment without informed consent, including vaccines, and that Police officers should be free from coercion by superiors to be vaccinated;

(c) That police, and/or a by-law, Provincial Offences, or Health Officer, with respect to an individual who fails and/or refuses to comply with any oral and written orders from any of the Provincial Respondents do not have the powers of arrest against that individual under Provincial ***Regulations*** such as those set out in Part 4, Division 6 of the ***Public Health Act SBC [2008]***, and the closing summation of Bonnie Henry's ***Order*** of March 31st, 2021;

(d) That the bar of entry across "Provincial Borders", but for "essential travel" by residents/citizens coming from Alberta, as well as the **intra**-provincial travel bans without probable grounds of an offence being committed, which is a form of imposing Martial Law, without the jurisdiction to do so as per s.91(7) of the ***Constitution Act 1867***. It is also contrary s.7 of the **Charter (Liberty)**, for vagueness and over-breadth as well as s.6 of the **Charter**, and thus compels the Police officer to breach their oath to uphold the Constitution and further, that the RCMP has no jurisdiction to set up roadblocks at British Columbia's "borders" and refuse passage into British Columbia, as well as set out by the SCC, Pre-**Charter**, in ***inter alia Winner***;

(e) That the measures and enforcement of the measures under ***Ministerial Orders 172/2021 and 182/2021***, as set out above in subparagraph (d) constitutes Martial Law, Police State measures outside the scope of the Province's jurisdiction under s.92 of the ***Constitution Act, 1867,*** and are within, subject to constitutional restraints, the jurisdiction of the Federal Parliament under s.91(7) and (1) and the "Peace, Order, and Good Government "(POGG)" Power on s.91 of the ***Constitution Act, 1867***, and thus further compels the Police officer to breach their oath to uphold the Constitution;

(f) That the failure and/or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the ***Criminal Code*** or constitute "obstruct peace officer" contrary to s. 129 of the ***Criminal Code*** thus granting the power of arrest to a police officer in the enforcement of a regulatory and/or municipal by-law as enunciated by the ***SCC*** in ***R v. Sharma [1993] 1 S.C.R. 650***;

(g) That the RCMP has no jurisdiction to enforce Provincial Health nor "emergency" measures in the Province of British Columbia;

(h) That the restriction of physical movement and travel bans based on "essential travel", is a violation of s.7 liberty and security of the person, not in accordance with fundamental justice as being void for vagueness, as well as overbreadth, and impossible to enforce, in that it is nearly impossible to ascertain, while respecting an individual's ***Charter*** right to remain silent, and right against arbitrary detention and questioning, to determine whether that person has, "on reasonable and probable grounds" committed an offence;

(i) A police constable or by-law officer cannot, by way of general, blanket order(s), from his/her administrative supervisors, be directed how, when and in what circumstance, to lay a charge against an individual and thus dictate the discretion of that Police officer;

(j) No politician should be directing nor commenting on how, whom or in what circumstances any police officer should enforce nor apply the applicable law;

(k) The Covid emergency measures violate a police constable's duty, as office-holder to Her Majesty the Queen. in that the enforcement of the provisions, and the enforcement provision(s) are of no force and effect and unconstitutional in in allowing, and being directed by superiors, to violate a citizen's constitutional rights under the ***Constitution Act 1867***, as well as the ***Charter***, as follows:

  (i) Violation of freedom of expression, speech, association, assembly and religion contrary to those unwritten constitutional rights recognized by the Supreme Court of Canada through the Preamble to the ***Constitution Act, 1867***, as well as s.2 of the ***Charter;***

  (ii) Violation of the right to liberty and security of the person through the arbitrary and unreasonable detention, arrest, and interference with the physical liberty and movement of citizens, contrary to the

Liberty of the Subject under ***Habeas Corpus***, as well as ss. 7, 9, and 10(c) of the ***Charter;***

(iii)Violation of the protection against unreasonable search and seizure contrary to s.8 of the ***Charter;***

(iv)Placing police officers in the potential violation, with respect to religious gatherings and services, of committing an offence contrary to s. 176 of the ***Criminal Code;***

362. That the Constitutional Rights of the Plaintiffs have been violated as set out in the within Statement of Claim as set out in the facts, as well as the relief sought, including the relief sought for monetary damages.

363. Such further or other grounds as counsel may advances and this Honourable Court accept.

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Date: August 16th, 2021

Signature of
[ ] plaintiff [x]lawyer for plaintiff(s)

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Rule 7-1 (1) of the Supreme Court Civil Rules states:

> (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
>
> (a) Prepare a list of documents in Form 22 that lists
>
> (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
>
> (ii) all other documents to which the party intends to refer at trial, and
>
> (b) serve the list on all parties of record.

APPENDIX

[*The following information is provided for data collection purposes only and is of no legal effect.*] **Part1: CONCISE SUMMARY OF NATURE OF CLAIM:**

This claim challenges the statutory and constitutional validity of the Covid measures, both Federal and Provincial by way of Declaratory, and other relief.

Part2: THIS CLAIM ARISES FROM THE FOLLOWING:

[*Check one box below for the case type that best describes this case.*]

A personal injury arising out of:

[ ] a motor vehicle accident

[ ] medical malpractice

[ ] another cause

A dispute concerning:

[ ] contaminated sites

[ ] construction defects

[ ] real property (real estate)

[ ] personal property

[ ] the provision of goods or services or other general commercial matters

[ ] investment losses

[ ] the lending of money

[ ] an employment relationship

[ ] a will or other issues concerning the probate of an estate

[ ] a matter not listed here

Part 3: THIS CLAIM INVOLVES:

[*Check all boxes below that apply to this case*]

[ ] a class action

[ ] maritime law

[ ] aboriginal law

[x] constitutional law

[ ] conflict of laws

[ ] none of the above

[] do not know

Part 4:

[*If an enactment is being relied on, specify. Do not list more than 3 enactments.*]

-ss.2, 6, 7, 8, 9, 10, 15, 24 and 52 of the **Constitution Act, 1982**

-**Emergency Program Act [RSBC 1996] c. 111 [RSBC 1996]** ss: 2,7,8,9,15,24

-**Public Health Act [SBC 2008] c. 28**

TAB 2

Vancouver
14-Oct-21
REGISTRY

No. VLC-S-S-217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

RESPONSE TO CIVIL CLAIM

Filed by: Vancouver Island Health Authority and Providence Health Care (The "Health Authority Defendants")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants' Response to Facts

1. The facts alleged in none of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in all of Part 1 of the notice of civil claim are denied.

3. The facts alleged in none of Part 1 of the notice of civil claim are outside the knowledge of the Health Authority Defendants.

Division 2 –Health Authority Defendants' Version of Facts

4. Vancouver Island Health Authority is regional health board constituted pursuant to the *Health Authorities Act* R.S.B.C. 1996 c. 180, ("VIHA").

5. Providence Health Care is not a legal entity. Providence Health Care Society ("Providence") is a non-profit organization incorporated pursuant to the *Society Act*, RCBC 1996, c. 433.

6. The Health Authority Defendants deny every allegation of fact contained in the notice of civil claim and put the plaintiffs to strict proof thereof.

7. At all material times, the Health Authority Defendants provided appropriate and reasonable service and/or care.

8. At all material times, the Health Authority Defendants complied with the *COVID-19 Related Measures Act*, S.B.C. 2020, c. 8, *Emergency Program Act*, R.S.B.C. 1996, c. 111, regulations thereto, and Ministerial Orders.

Division 3 – Additional Facts

9. None at this time.

Part 2: RESPONSE TO RELIEF SOUGHT

10. The Health Authority Defendants oppose the granting of the relief sought in all of Part 2 of the notice of civil claim.

11. The Health Authority Defendants seek an order dismissing the plaintiffs' action against them with costs.

Part 3: LEGAL BASIS

12. The Health Authority Defendants deny every allegation of law contained in the notice of civil claim and put the plaintiffs to strict proof thereof.

13. The allegations contained in the notice of civil claim do not disclose a cause of action as against the Health Authority Defendants. There is no basis for granting the orders sought.

14. The notice of civil claim filed by the plaintiffs:

    a. discloses no reasonable claim,

    b. is unnecessary, scandalous, frivolous or vexatious,

    c. will prejudice, embarrass or delay the fair trial or hearing of the proceeding,

    d. is prolix and improperly pleads evidence; and

    e. is otherwise an abuse of the process of the court,

and ought to be dismissed as against the Health Authority Defendants on these basis.

15. In further answer to the whole of the notice of civil claim, no action for damages lies or may be brought against the Health Authority Defendants, as all of their allegedly impugned actions were rendered pursuant to the *COVID-19 Related Measures Act* and/or the *Emergency Program Act*, R.S.B.C. 1996, c. 111, and the Health Authority Defendants plead and rely upon Section 5 of the *COVID-19 Related Measures Act,* and section 18 of the *Emergency Program Act*, R.S.B.C. 1996, c. 111. and amendments, regulations, and ministerial orders thereto, including Ministerial Order 120/2020 – Protection Against Liability (COVID-19) Order No. 2.

16. Further and in the alternative the *Canadian Charter of Rights and Freedoms* does not apply to the Health Authority Defendants.

17. In the further alternative and in further response, there is no basis in fact or law for a claim against the Health Authority Defendants pursuant to the *Canadian Charter of Rights and Freedoms.*

18. In the further alternative and in further response, the Health Authority Defendants deny that they breached any of the plaintiffs' rights under the *Canadian Charter of Rights and Freedoms.*

19. The Health Authority Defendants specifically deny that they owe the plaintiffs, or any of them, a duty of care (common law, statutory, or otherwise) as alleged or at all.

20. If the Health Authority Defendants did owe the plaintiffs, or any of them, a duty of care (common law, statutory, or otherwise), which is not admitted but denied, the Health Authority Defendants deny that they breached any duty to the plaintiffs (common law, statutory, or otherwise), or any of them.

21. In the alternative, no act or omission on the part of the Health Authority Defendants or on the part of any of their employees, agents or servants constituted negligence or breach of

any duty (common law, statutory, or otherwise) owed to the plaintiffs, or any of them, as alleged or at all, and any service, care or treatment provided by their employees, servants, or agents, in respect of the service, care or treatment provided to the plaintiffs met the applicable standard of care and was in accordance with standard and approved practice and procedures and was rendered competently with reasonable care, skill and diligence, and without fault or neglect, in the manner of a reasonably prudent health authority.

22. The Health Authority Defendants deny that the plaintiffs, or any of them, suffered, or continue to suffer, any injury, loss, damage or expense which is recoverable at law and put the plaintiffs to strict proof thereof.

23. In the alternative, the Health Authority Defendants say that if the plaintiffs, or any of them, did suffer injury, loss, damage or expense, which is not admitted but denied, this injury, loss, damage or expense was not caused or contributed to by any acts or omissions of the Health Authority Defendants, or their employees, servants, or agents.

24. Decisions regarding diagnosis, treatment, and level of care a patient receives are solely made by physicians. Physicians are independent contractors and not employees of the Health Authority Defendants. The Health Authority Defendants are not vicariously liable for any acts or omissions of the independent contractor physicians.

25. The Health Authority Defendants says that any care or treatment rendered to the plaintiffs by its employees, servants or agents, was performed and provided pursuant to physicians' orders.

26. If the plaintiffs suffered any injury, loss, damage or expense, as alleged or at all, which is denied, then:

    f. such losses would not have reasonably been predicted or foreseen by a reasonable health authority or its employees, servants or agents;

    g. the Health Authority Defendants could not have prevented, avoided, or minimized the plaintiffs' loss by the exercise of reasonable care;

    h. these were caused by the plaintiffs' own negligence, or alternatively the plaintiffs' negligence was a contributing cause, the particulars of which will be plead as soon as they become known to the Health Authority Defendants, in which case the Health Authority Defendants seeks an apportionment of fault at the trial of this matter pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333; and,

    i. such losses were caused by the fault of other parties for whom the Health Authority Defendants are not responsible or, in the alternative, such fault contributed to the plaintiffs' alleged losses, the particulars of which will be plead when they become known to the Health Authority Defendants, in which case the

Health Authority Defendants pleads and relies on the *Negligence Act*, R.S.B.C. 1996, c. 333, and shall seek apportionment of fault at the trial of this proceeding.

27. In the alternative, if the plaintiffs suffered, or will suffer, any injury, loss, damage or expense, which is not admitted but specifically denied, the plaintiffs failed to mitigate their losses by failing to take all reasonable steps to minimize or avoid such loss, damage, or expense.

Health Authority Defendants' address for service:	Carfra Lawton LLP 6th Floor - 395 Waterfront Crescent Victoria BC V8T 5K7
Fax number address for service (if any):	(250) 381-7804
E-mail address for service (if any):	N/A

Dated: 14/Oct/2021

Signature of Timothy J. Wedge
☐ defendant ☑ lawyer for the Vancouver Island Health Authority and Providence Health Care Society

Rule 7-1(1) of the Supreme Court Civil Rules states:

> (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
>
> (a) prepare a list of documents in Form 22 that lists
>
> (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
>
> (ii) all other documents to which the party intends to refer at trial, and
>
> (b) serve the list on all parties of record.

TAB 3

Vancouver
17-Jan-22
REGISTRY

No. S 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

APPLICATION RESPONSE

Application response of: The defendants, Vancouver Island Health Authority and Providence Health Care (the "application respondents")

THIS IS A RESPONSE TO the notice of application of Her Majesty the Queen in Right British Columbia filed 12/Jan/2022.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: all.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in none of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in none of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. N/A

Part 5: LEGAL BASIS

1. N/A

Part 6: MATERIAL TO BE RELIED ON

1. N/A

The application respondents estimate that the application will take 1 day.

☒ The application respondents have filed in this proceeding a document that contains the application respondents' address for service.

Date: 17/Jan/2022

Signature of ☐ application respondent
☑ lawyer for application respondents
Timothy J. Wedge

Pursuant to BC Supreme Court Notice No. 42 "COVID-19: CHAMBERS APPLICATIONS BY TELEPHONE AND MICROSOFT TEAMS", the Application Respondent provides the following contact details for the telephone or Microsoft Teams hearing:

Attn: Timothy J. Wedge
Carfra Lawton LLP
6th Floor – 395 Waterfront Crescent
Victoria BC V8T 5K7
Phone: 250-995-4264
Email: twedge@carlaw.ca

TAB 4

Vancouver
19-Jan-22
REGISTRY

NO. S217586
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martin, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

AND:

Her Majesty the Queen in Right of British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

APPLICATION RESPONSE

Application Response of: The Defendant, British Columbia Ferry Services Inc. (operating as British Columbia Ferries) ("**BC Ferries**")

THIS IS A RESPONSE TO the Notice of Application of Her Majesty the Queen in Right of British Columbia; Dr. Bonnie Henry; Premier John Horgan; Adrian Dix, Minister of Health; Jennifer Whiteside, Minister of Education; and Mike Farnworth, Minister of Public Safety and Solicitor General filed the 12th day of January, 2022.

PART 1: ORDERS CONSENTED TO

BC Ferries consents to the orders sought in paragraphs 1-2 of Part 1 of the Notice of Application.

PART 2: ORDERS OPPOSED

BC Ferries opposes the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

PART 3: ORDERS ON WHICH NO POSITION IS TAKEN

BC Ferries takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of Application.

PART 4: FACTUAL BASIS

1. N/A.

PART 5: LEGAL BASIS

1. N/A.

PART 6: MATERIAL TO BE RELIED ON

1. The pleadings filed herein; and
2. Such further and other materials as counsel may advise.

BC Ferries estimates that the application will take one day.

BC Ferries has not filed in this proceeding a document that contains an address for service.

BC Ferries' address for service:

McCarthy Tétrault LLP
Barristers & Solicitors
Suite 2400, 745 Thurlow Street
Vancouver, BC V6E 0C5
Attention: Michael A. Feder, Q.C.
Connor Bildfell

Email address for service:

mfeder@mccarthy.ca
cbildfell@mccarthy.ca

DATED: January 19, 2022

Michael Feder

MICHAEL A. FEDER, Q.C.
CONNOR BILDFELL
Counsel for the Defendant,
British Columbia Ferry Services Inc.

From: "Macaspac, Edel" <emacaspac@mccarthy.ca>
Subject: Action4Canada et al. v. HMTQ et al. (S217586) - January 20, 2022 letter [MT-MTDOCS.FID3596907]
Date: Thu, January 20, 2022 12:27 pm
To: "rocco@idirect.com" <rocco@idirect.com>,"lwong@lwacorp.com" <lwong@lwacorp.com>
Cc: "Feder, Michael" <mfeder@mccarthy.ca>,"Bildfell, Connor" <CBILDFELL@mccarthy.ca>

Counsel,

Please see enclosed letter attaching BC Ferries' application response.

Thank you.

mccarthy tetrault

Edel Macaspac
Legal Assistant | Adjointe juridique
Litigation | Litige
Jill Yates, Kate Macdonald, Connor Bildfell, Patrick Williams
T: 604-643-7934
E: emacaspac@mccarthy.ca

MT Services Limited Partnership
Administrative services provider for McCarthy Tétrault LLP
Suite 2400
745 Thurlow Street
Vancouver BC V6E 0C5

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Canada's Top 100 Employers 2022

2021 CANADA'S BEST DIVERSITY EMPLOYERS

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Attachments:

LT R. Galati & L. Wong (Jan 20_22) enc application response(43530597.1).pdf	
Size:	77 k
Type:	application/pdf
Info:	LT R. Galati & L. Wong (Jan 20_22) enc application response(43530597.1).pdf

TAB 5

Vancouver
12-Jan-22
REGISTRY

No. S217586
Vancouver Registry

In the Supreme Court of British Columbia

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

NOTICE OF APPLICATION

(Application Pursuant to Rule 9-5 of the Supreme Court Civil Rules)

Name of Applicants: Her Majesty the Queen in right British Columbia (the "Province"); Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General (collectively, the "Provincial Defendants")

To: **The Plaintiffs**

c/o ROCCO GALATI
Rocco Galati Law Firm Professional Corporation
1062 College Street
Lower Level Toronto, Ontario, M6H 1A9
Tel: (416) 530-9684
Fax: (416) 530-8129

c/o LAWRENCE WONG
Barrister & Solicitor
210-2695 Granville Street
Vancouver, B.C., V6P 4Z7
Tel: (604) 739-0118
Fax: (604) 739-0117

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia, at 10:00 am on February 3, 2022 via MS Teams for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order striking the whole of the Plaintiffs' Notice of Civil Claim filed in this matter on August 17, 2021, without leave to amend.

2. Costs.

Part 2: FACTUAL BASIS

1. On August 17, 2021, the Plaintiffs filed a 391-page Notice of Civil Claim (the "Claim") that attempts to challenge the scientific and legal basis for the entirety of British Columbia and Canada's response to the COVID-19 pandemic. Part 1 of the Claim contains over 1,300 paragraphs and sub-paragraphs.

2. In addition to Her Majesty the Queen in Right of the Province and the Attorney General of Canada, the Plaintiffs have also named as defendants: Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, the Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, and TransLink (British Columbia).

3. The Claim is a prolix and convoluted document that is replete with groundless accusations against public officials, inflammatory language, and conspiracy theories.

4. The Claim characterises the COVID-19 pandemic as a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs" such as Bill Gates in order to "install a New World (Economic) Order" (Part 1, paras. 155, 283).

Part 3: LEGAL BASIS

5. The Plaintiffs' Claim is deficient in form and substance. It is a scandalous, frivolous, and vexatious pleading that fails to meet the basic requirements for pleadings and is an abuse of the Court's process. The Claim should be struck in accordance with Rule 9-5(1) of the *Supreme Court Civil Rules*, without leave to amend.

Pleadings Generally

6. Supreme Court Civil Rule ("Rule") 3-1 provides, in part:

> **Contents of notice of civil claim**
>
> (2)A notice of civil claim must do the following:
>
> (a) set out a concise statement of the material facts giving rise to the claim;
>
> (b) set out the relief sought by the Plaintiff against each named defendant;
>
> (c) set out a concise summary of the legal basis for the relief sought;
>
> ...
>
> (g) otherwise comply with Rule 3-7. [emphasis added]

7. Rule 3-7 provides, in part:

> **Pleading must not contain evidence**
>
> (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
>
> ...
>
> **Pleading conclusions of law**
>
> (9)Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
>
> ...
>
> **General damages must not be pleaded**
>
> (14)If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading. ...

8. The function of pleadings is to clearly define the issues of fact and law to be determined by the court. The plaintiff must state, for each cause of action, the material facts. Material facts are those facts necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

    Homalco Indian Band v. British Columbia, [1998] B.C.J. No. 2703 (S.C.), para. 5

9. As the Court of Appeal recently held in *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, para 44:

> None of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the *Rules* and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

Application to Strike

8. Rule 9-5(1) provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> ...
>
> (d) it is otherwise an abuse of the process of the court ...

9. A pleading may be struck under Rule 9-5(1) if it is plain and obvious that the pleading contravenes any of Rule 9-5(1)(a) through (d).

Knight v. Imperial Tobacco Canada Ltd., 2011 SCC 42 at para. 17.

10. Evidence is inadmissible on an application under Rule 9-5(1)(a) but may be considered on an application under the remaining paragraphs of Rule 9-5(1). The Province relies on subparagraphs 9-5(1)(a)(b) and (d).

Rule - 9-5(1)(a) – The Notice of Civil Claim Discloses No Reasonable Claim

11. The Claim is premised upon non-justiciable questions and relies heavily upon international treaties, *Criminal Code* provisions, and unknown causes of action that are incapable of disclosing a reasonable cause of action for the purposes of Rule 9-5(1)(a).

12. For example, the Plaintiffs' petition the Court for declarations pertaining to questions of science, public health, and conspiracy theories that are not justiciable, including:

    a. "A Declaration that the science, and preponderance of the scientific world community, is of the consensus that: a) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARS-CoV-2 which leads to COVID-19" (Part 2, para. 312(1));

    b. "A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a bona fide, nor an actual "pandemic", and declaration of a bona fide pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs" (Part 2, para. 302);

    c. "A Declaration that administrating medical treatment without informed consent constitutes experimental medical treatment" (Part 2, para. 321);

    d. "A Declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to de facto put most small businesses and activities out of business" (Part 2, para. 307); and

   e. "A Declaration that the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are: a) not scientifically, or medically, based; b) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, as a mere screening test, of 3.5% accuracy" (Part 2, para. 311).

13. The Plaintiffs allege numerous violations (and non-violations) of the *Criminal Code* that are not properly raised in a civil action (*Simon v. Canada,* 2015 BCSC 924, para. 45), including:

   a. "Crime[s] against humanity under the Criminal Code of Canada" (Part 1, para. 299; Part 3, para. 333);

   b. "Medical experimentation" that constitute "Criminal act[s] … pursuant to the War Crime and Crimes against Humanity Act" (Part 2, para. 292(a));

   c. "Criminal extortion" (Part 1, para. 261);

   d. "The 'extra' suicides and drug over-doses undisputedly tied to Covid-measures constitutes criminal negligence causing death" (Part 1, para. 264);

   e. "Criminal vaccine experiments causing horrific damage to innocent children in India, Pakistan, Africa and other developing countries" (Part 1, para. 211(a));

   f. A Declaration that failure and/or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the Criminal Code or constitute "obstruct peace officer" contrary to s. 129 of the Criminal Code (Part 2, para. 323(f)).

14. The Plaintiffs allege numerous violations of international legal instruments, unwritten constitutional principles, and causes of action unknown to law that are not actionable in Canadian courts (*Li v. British Columbia,* 2021 BCCA 256, paras. 107-109; *Toronto v. Ontario,* 2021 SCC 34, para. 5), including the following:

   a. "Vaccine mandates violate 'The Universal Declaration of Bioethics and Human Rights', the Nuremberg Code, professional codes of ethics, and all provincial health Acts." (Part 1, para. 260);

   b. "Administering medical treatment without informed consent constitutes experimental medical treatment contrary to the Nuremberg Code and Helsinki Declaration of 1960" (Part 1, para. 299; Part 3, para. 333);

   c. "Vesting an indefinite emergency power in [various defendants] constitutes constitutional violation of 'dispensing with Parliament, under the pretense of Royal Prerogative', contrary to the English Bill of Rights (1689) as read into our unwritten constitutional rights through the Pre-Amble of the Constitution Act, 1867" (Part 2, para. 295; Part 3, para. 336);

   d. "The declared state of emergency, and measures implemented thereunder contravene" … "the same parallel unwritten constitutional rights, enshrined through the Pre-Amble of the Constitution Act, 1867" (Part 1, para. 283(c)(iv);

e. "[T]hat (solitary confinement) isolation/quarantine of asymptomatic children" violates the "*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") and the Convention on the Rights of the Child*" (Part 2, para. 311(e); and

f. "The COVID Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, ... constitute a constitutional violation of the abdication of the duty to govern" (Part 2, para. 296; Part 3, para. 326).

15. To the extent that the Claim attempts to plead causes of action that are known to law, such as breaches of *Charter* rights or the separation of powers, the Claim fails to set out material facts which, if true, support these claims.

16. The general rule that facts pleaded should be accepted as true for the purposes of a strike application does not apply in a "case like this where the notice of civil claim is replete with assumptions, speculation, and in some instances, outrageous allegations. The law is clear that allegations based on assumption and speculation need not be taken as true."

Willow v. Chong, 2013 BCSC 1083, para. 19

See, also, Simon v. Canada, 2015 BCSC 924, para. 54

17. The Plaintiffs have failed to plead the *concise* statement of *material* facts that is necessary to support any complete cause of action. The *Charter* claims are inextricably bound up in a prolix, argumentative, and wildly speculative narrative of grand conspiracy that is incapable of supporting a viable cause of action. It is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from another, or conjecture and conspiracy from asserted facts.

Fowler v. Canada (Attorney General), 2012 BCSC 367, para. 54

Simon, supra, paras 54-59

18. It is plain and obvious that the Claim, as pleaded, fails to disclose a reasonable cause of action.

9-5(1)(b) The Notice of Civil Claim is Scandalous, Frivolous and Vexatious

Scandalous and Embarrassing

19. A pleading is scandalous if it does not state the real issue in an intelligible form and would require the parties to undertake useless expense to litigate matters irrelevant to the claim.

Gill v. Canada, 2013 BCSC 1703, para. 9

20. A claim is also scandalous or embarrassing if it is prolix, includes irrelevant facts, argument or evidence, such that it is nearly impossible for the defendant to reply to the pleading and know the case to meet. Pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck.

Gill, supra para. 9

Strata Plan LMS3259 v. Sze Hang Holding Inc., 2009 BCSC 473, at para. 36

Kuhn v. American Credit Indemnity Co., [1992] B.C.J. No. 953 (S.C.)

21. The Claim is a scandalous pleading because it is prolix, confusing, and nearly impossible to respond to:

    a. The 391-page Claim attempts to plead dozens of causes of action and *Charter* breaches and seeks over 200 declarations. It is, as a result, nearly impossible to know the case to be met.

    b. The Claim contains extensive passages of completely irrelevant information, including:

        i. A COVID-19 timeline beginning in 2000 with Bill Gates stepping down as Microsoft CEO (Part 1, para 44) and including such other events as Bill Gates pledging $10 billion in funding in 2010 for the World Health Organization and announcing the "Decade of Vaccines" (Part 1, para. 50);

        ii. A lengthy narrative describing an alleged "global political agenda behind [the] unwarranted measures" (Part 1, paras. 207-300);

        iii. A detailed 81-page narrative about the individual Plaintiffs dealings with government employees, health care professionals, and police officers (Part 1, pages 1-81).

    c. The Claim relies extensively on the *Criminal Code of Canada* (Part 1, paras. 11(b)(h), 115, 141(h), 207(l), 299; Part 2 para. 291, Part 3 paras. 322(k)(iv), 323(f), 333, 361(f)(k)(iv));

    d. The Claim contains lengthy and convoluted legal arguments (i.e., Part 1 page 108 para. 141; Part 2, paras. 286, 324, 358);

    a. The Claim raises allegations against individuals and entities who are not named as parties such as Bill Gates (Part 1, paras. 216-222), Facebook, Amazon, Google, Yahoo (Part 1, paras. 174, 216), Doug Ford (Part 1, para. 152(c)), and others.

22. The Claim is also a scandalous pleading because it fails to meet the basic requirements for pleadings under the *Rules*.

    a. The Claim contains over 1600 paragraphs and subparagraphs. It fails to set out a concise statement of the material facts, relief sought, and legal basis in violation of Rules 3-1(1)-(3);

    b. The Claim pleads evidence in contravention of Rule 3-7(1), including dozens of lengthy quotations from various COVID-19 commentators and activists and hundreds of footnotes to miscellaneous websites, articles, policy documents, and articles;

    c. The Claim pleads conclusions of law, unsupported by facts, in contravention of Rule 3-7(9);

    d. The Claim appears to plead amounts of damages in contravention of Rule 3-7(14).

Frivolous

23. A pleading is frivolous if it is without substance, is groundless, fanciful, 'trifles with the court' or wastes time".

Borsato v. Basra, [2000] B.C.J. No. 84, 43 C.P.C. (4th) 96, at para 24

24. The Claim is a frivolous pleading because it promotes fanciful conspiracy theories about the origins of the COVID-19 pandemic, the efficacy of COVID-19 measures, and the motivations of the Provincial Defendants. These allegations include, by way of example only:

    a. "The Plaintiffs state, and the fact is, that the illegal actions, and decrees issued by The Defendants and other public officials were done, in abuse and excess of their offices, knowingly to propagate a groundless and falsely-declared 'pandemic'' … designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs." (Part 1, para. 155);

    b. "The Plaintiffs state, and the fact is, that the non-medical aims and objectives to declare the "pandemic", for something it is not beyond one of many annual seasonal viral respiratory illnesses, was to, inter alia, effect the following non-medical agendas, by using the COVID- 19 [*sic*] as a cover and a pretext: (a) To effect a massive bank and stock market bail-out needed because the banking system was poised to again collapse since the last collapse of 2008 in that the World debt had gone from $147 Trillion dollars in 2008 to $321 Trillion dollars in January, 2020" (Part 1, para 208(a));

    c. "The fact is that the pandemic pretense is there to establish a "new normal", of a New (Economic) World Order, with a concurrent neutering of the Democratic and Judicial institutions and an increase and dominance of the police state; (c) A massive and concentrated push for mandatory vaccines of every human on the planet earth with concurrent electronic surveillance by means of proposed: (i) Vaccine "chips", bracelets", and "immunity passports"; (ii) Contract- tracing via cell-phones; (iii) Surveillance with the increased 5G capacity; (d) The elimination of cash- currency and the installation of strictly digital currency to better-effect surveillance." (Part 1, para. 208(b)-(d)); and

    d. "The Plaintiffs state that, and fact is, this global vaccination scheme which is being propelled and pushed by the Defendants, is with the concurrent aim of total and absolute surveillance of the Plaintiffs and all citizens." (Part 1, para. 308)

Rule 9-5(1)(a) and (d) – The Claim is Vexatious and an Abuse of Process

25. Little distinction exists between a vexatious action and one that is an abuse of process as the two concepts have strikingly similar features.

Dixon v. Stork Craft Manufacturing Inc., 2013 BCSC 1117

26. Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (C.U.P.E.),* [2003] 3 S.C.R. 77, the court stated at para. 37:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

27. Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights. Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

Lang Michener Lash Johnston v. Fabian, [1987] O.J. No. 355, at para. 19

28. There are a multitude of bases upon which to conclude that the Claim is an abuse of process. These include the Plaintiffs' attempt to use the judicial process to adjudicate conspiracy theories and seek declarations on non-justiciable questions of medical science and public health policy.

29. More concerning, the Claim bears the hallmarks of a vexatious and abusive claim that is intended to harass and oppress the parties (and non-parties):

    a. The Claim advances against the Defendant Provincial Health Officer, without factual foundation, spurious allegations of "crimes against humanity" in relation to the implementation of COVID-19 measures and international public health work in the early 2000s (Part 1, para. 293);

    b. The Claim advances irrelevant allegations about alleged conflicts of interests or hypocritical conduct relating to the private lives of both parties and non-parties (Part 1 para 8(k), 44, 154(c)-(f), 155, 207(b), 298);

    c. The Plaintiffs make broad, sweeping criminal allegations against a large number of named and unnamed government employees and officials (Part 1, para 11, 141(h), 151(d), 261 (pg. 234) 264 (pg. 235) 300(d));

    d. The Claim uses inflammatory and inappropriate language to describe alleged actions of Defendants and public officials such as "egregious crimes against humanity", (Part 1 para. 290) "fraudulent" (Part 1 para. 251), or "Stalinist censorship" (Part 1 para. 280 (pg. 308), or to suggest that politicians or officials have "no clue" (Part 1 para. 154), are "wholly unqualified" (Part 1 para. 154) or are "outright lying" (Part 1 para. 279 (pg. 240)).

30. The Province submits the Claim has been brought for an improper purpose.

31. The Plaintiffs and their counsel must know, or ought to know, that a 391-page Claim seeking over 200 declarations concerning alleged criminal conduct and the efficacy of public health measures "cannot succeed … [and] would lead to no possible good": *Lang Michener, supra.*

32. The Claim is intended, at least in part, to intimidate and harass public officials and politicians, including the Provincial Health Officer, by advancing spurious, public allegations of criminal conduct, conflicts of interest, and ulterior motives. This intention is further corroborated by the Plaintiff Action4Canada's simultaneous campaign to

encourage individuals to serve government officials and politicians with "Notices of Liability" for their actions in responding to the COVID-19 pandemic (Affidavit #1 of Rebecca Hill, Ex. G, I).

33. The Claim is also intended, at least in part, to consolidate, publicize, and amplify COVID-19 conspiracy theories and misinformation. The Claim is a book-length tirade against the entirety of British Columbia's respond to the pandemic, with dozens of quotes from, and hundreds of footnotes to, anti-mask, anti-lockdown, and anti-vaccine resources. Both Action4Canada and its counsel have promoted the Claim online and on social media (Affidavit #1 of Rebecca Hill, Ex. D, K).
34. These are improper purposes to file and prosecute a civil action. There can be no question that the Claim is an abuse of process. Permitting this litigation to proceed would violate the principles of judicial economy and the integrity of the administration of justice.
35. Providing the Plaintiffs with an opportunity to redraft their pleadings would only further this abuse of the Court's process.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Rebecca Hill, made on January 10, 2022.

The Applicant estimates that the application will take 1 day.

[x] This matter is within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to the application, you must, within the time for response to application described below,

(a) file an Application Response in Form F32;

(b) file the original of every affidavit, and of every other document, that

  (i) you intend to refer to at the hearing of this application, and

  (ii) has not already been filed in the family law case; and,

(c) serve on the applicant 2 copies, and on every other party one copy, of the following

  (i) a copy of the filed Application Response,

  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person, and

  (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Date: January 11, 2022

Signature of lawyer for the applicant
Mark Witten

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs .... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

....

....

....

Date: ....

Signature of [ ] Judge [ ] Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

[ ] discovery: comply with demand for documents
[ ] discovery: production of additional documents
[ ] other matters concerning document discovery
[ ] extend oral discovery
[ ] other matter concerning oral discovery
[ ] amend pleadings
[ ] add/change parties
[ ] summary judgment
[ ] summary trial
[ ] service
[ ] mediation
[ ] adjournments
[ ] proceedings at trial
[ ] case plan orders: amend
[ ] case plan orders: other
[ ] experts

This **NOTICE OF APPLICATION** is prepared by **Mark Witten**, Barrister & Solicitor, of the Ministry of Attorney General, whose place of business and address for service is 1301 - 865 Hornby Street, Vancouver, British Columbia, V6Z 2G3; Telephone: (604) 660-5476; Facsimile: (604) 660-6797

Vancouver
12-Jan-22
REGISTRY

S217586

No. 217586
Vancouver Registry

In the Supreme Court of British Columbia

Between

Action4Canada, Kimberly Woolman, The Estate of Jaqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

and

Her Majesty the Queen in right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)

Defendants

RESPONSE TO CIVIL CLAIM

Filed by: Her Majesty the Queen in right British Columbia, Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General (the "Province" or the "Provincial Defendants")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendants' Response to Facts

1. The facts alleged in paragraphs 23-24, 27, 30-37, 39, and 42 of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in paragraphs 25-26, 28-29, 38, and 44-331 of Part 1 of the notice of civil claim are denied.

3. The facts alleged in paragraphs 1-22, 40-41, and 43 of Part 1 of the notice of civil claim are outside the knowledge of the Province.

Division 2 – Defendants' Version of Facts

Introduction

1. The COVID-19 pandemic is an ongoing global pandemic of the novel coronavirus SARS-CoV-2, which causes the illness known as COVID-19. As of January 1, 2022, the global death toll from COVID-19 exceeded 5.4 million. Across Canada there have been over 30,000 deaths and 95,000 hospitalizations. In British Columbia, there have been over 2,400 deaths and 12,900 hospitalizations.

2. Nations, territories, and jurisdictions throughout the world, including British Columbia, have implemented a variety of public health measures designed to combat the spread of infection, protect citizens against serious illness and death, and prevent hospital and critical care facilities from being overwhelmed.

3. The plaintiffs' 391-page notice of civil claim (the "Claim") is a prolix and convoluted document that attempts to challenge the scientific and legal basis for the entirety of British Columbia's response to the COVID-19 pandemic. The Claim is replete with factual inaccuracies, misinformation, groundless accusations against public officials, inflammatory language, and conspiracy theories.

4. Part 1 of the Claim contains over a 1,300 paragraphs and sub-paragraphs. The Claim is not, in its current form, amenable to a comprehensive response from the Province and will be addressed only summarily at this time.

5. In response to the whole of Part 1 of Claim, the Province denies every fact and allegation pleaded by the plaintiffs, unless expressly admitted in Part 1, Division 1 of the Province's response to civil claim.

6. In response to paragraphs 155 and 283 of Part 1 and the whole of the Claim, the COVID-19 pandemic is patently not a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs" such as Bill Gates in order to "install a New World (Economic) Order".

7. In general response to the Claim's allegations of misconduct or bad faith on the part of individually named Provincial Defendants, the Province says these are spurious claims, with no merit whatever, that are unequivocally denied.

The COVID-19 Pandemic

8. The Provincial Health Officer (the "PHO") is the senior public health official for the Province, appointed pursuant to the *Public Health Act,* SBC 2008, c. 28 (the "*Public Health Act*"). The PHO leads the public health response under the *Public Health Act* to public health emergencies in British Columbia, including the transmission of the novel coronavirus SARS-CoV-2 that causes the illness known as COVID-19.

9. The first diagnosis of a case of COVID-19 in British Columbia occurred on January 27, 2020.

10. In response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim:
    a. SARS-CoV-2 is a highly transmissible virus that can be spread by symptomatic and asymptomatic people primarily through virus containing droplets and aerosols that are then inhaled by others;
    b. SARS-CoV-2 has a higher transmissibility rate (i.e., a higher basic reproductive number) compared to influenza;
    c. Ongoing transmission in populations leads to the emergence of new variants of SARS-CoV-2, some of which are more transmissible and/or can cause more severe illness than earlier strains of SARS-CoV-2; and

11. In further response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim, the Province and the PHO have been actively trying to prevent and contain the transmission of SARS-CoV-2 and maintain the ability of the healthcare system to meet the needs of the population for COVID-19 related care and other healthcare, including critical care and surgical services, through a series of comprehensive public health measures, including health promotion, prevention, testing, case identification, isolation of cases and contact tracing, and more recently vaccination and vaccine cards, all based on the best available and generally accepted scientific evidence, including epidemiological data for COVID-19 in British Columbia, nationally and internationally.

12. In further response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim, without adequate public health measures SARS-CoV-2 would spread exponentially.

13. In further response to paragraphs 52, 164, 167-175, 185-206 of Part 1 and the whole of the Claim, preventing and controlling transmission of communicable diseases is essential to maintaining the provincial health system's ability to deliver quality care and continue the safe delivery of essential health services, for both COVID-19 related care and other healthcare, including critical care and surgical services.

14. In response to paragraphs 306-331 of Part 1 and the whole of the Claim, the presently available vaccines for SARS-CoV-2 are safe, highly effective and an important preventative measure that provides protection for individuals and other persons with whom they come into contact from infection, severe illness, and possible death from COVID-19.

Declarations by the PHO and the Minister of Public Safety and Solicitor General

15. On March 17, 2020, the PHO declared the transmission of the infectious agent SARS-CoV-2, which had caused cases and outbreaks of COVID-19 within British Columbia, to be a "regional event" as defined under s. 51 of the *Public Health Act* (the "PHO Declaration").

16. Pursuant to s. 51 of the *Public Health Act*, a regional event is that which poses "an immediate and significant risk to public health."

17. In response to paragraphs 289 and 331 of Part 3 and the whole of the Claim, the designation of a regional event allows the PHO to exercise powers under Part 5 of the *Public Health Act*, including the power to make oral and written public health orders in response to the COVID-19 pandemic.

18. On March 18, 2020, the Minister of Public Safety and Solicitor General ("MPSSG") declared a state of provincial emergency under the *Emergency Program Act*, RSBC 1996 c.111 (the "*Emergency Program Act*") due to the COVID-19 pandemic. The declaration of emergency was extended numerous times before it eventually expired on June 30, 2021 (the "MPSSG Declaration").

19. In response to paragraphs 130-151 of Part 1 and the whole of the Claim, the declaration of a state of emergency allows the MPSSG to exercise powers under Part 3 of the *Emergency Program Act*, including section 10(1) which empowers the MPSSG to "do all acts and implement all procedures he considers necessary to prevent, respond to or alleviate the effects of the emergency."

Orders issued by the PHO

20. From March 2020 to date, the PHO has made orders under the *Public Health Act* in response to the COVID-19 regional event, including new orders relating to commercial establishments, types of gatherings, prescribed industries, prescribed recreational activities, and preventative health measures and orders varying, revoking or amending prior orders in response to the changing circumstances of the COVID-19 pandemic in British Columbia (the "PHA Orders").

21. In response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, the aim of the PHA Orders is to prevent and contain the transmission of SARS-CoV-2 and maintain the ability of the health care system to meet the needs of the population for COVID-10 related care and other healthcare, including critical care and surgical services, based on the best available and generally accepted scientific evidence and epidemiological data at the time the particular order is issued.

22. In further response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, over the course of the pandemic, the scientific community and public health officials have learned that the likelihood of transmission of SARS-CoV-2 is greater when people, particularly unvaccinated and partially vaccinated people, are interacting:

a. in communal settings (e.g. gatherings, events, celebrations), other than in transactional settings (e.g. at retail outlets);

b. in close proximity to each other;

c. in crowded settings;

d. in indoor settings; and

e. when speaking, and especially when singing, chanting or engaging in excited expression.

23. In further response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, the overriding concern is to ensure that PHA Orders and other public health guidance protect the most vulnerable members of society while minimizing social disruption and preserving the ability of the healthcare system to meet the needs of the population for COVID-19 related care and other healthcare, including critical care and surgical services.

24. In further response to paragraphs 125, 164, 185-189 and 226-228 of Part 1 and the whole of the Claim, in appropriate circumstances, many of the PHA Orders include a section that advises people who are affected by an order that they can request a variance by making a request for reconsideration to the PHO under s. 43 of the *Public Health Act*.

25. In response to paragraphs 167-189 of Part 1 and the whole of the Claim, the Province denies that the PHA Orders have caused the impacts and effects alleged in the Claim and further deny that any effects that the PHA Orders may have had give rise to or support the legal causes of actions advanced, or the remedies sought, in the Claim.

Orders issued by the MPSSG

26. From March 2020 to date, the MPSSG has made orders under the *Emergency Program Act* in response to the declared provincial state of emergency due to COVID-19, including new orders and orders revoking or amending prior orders in response to the changing circumstances of the COVID-19 pandemic in British Columbia (the "MPSSG Orders").

27. In response to paragraphs 144-151 of Part 1 and the whole of the Claim, the MPSSG Orders have been issued in relation to a wide-range of topics which, in the view of the MPSSG, were necessary to address, prevent, respond to or alleviate the effects of the COVID-19 pandemic in British Columbia including, but not limited to:

a. the adjustment of limitations periods applying to court proceedings;

b. travel;

c. electronic witnessing of wills and other documents;

d. the facilitation of local government meetings and bylaw processes and electronic attendance at statutory meetings;

e. the ongoing provision of critical services, essential goods and supplies; and

f. the maximum charges to be applied for food delivery services.

28. In further response to paragraph 144-151 of Part 1 and the whole of the Claim, the *COVID-19 Related Measures Act*, SBC 2020, c. 8 ("*CRMA*") enacted the MPSSG Orders listed in its Schedules 1 and 2 as legislative provisions. Many of the MPSSG Orders identified in the Claim have legislative force by virtue of *CRMA* as of March 17, 2020 (for M139/2020) or as of the date that the MPSSG Order was issued under the *Emergency Program Act*.

29. In further response to paragraphs 144-151 of Part 1 and the whole of the Claim, the Province denies that the MPSSG Orders have caused the effects and impacts alleged in the Claim and further deny that any effects that the MPSSG Orders may have had give rise to or support the legal causes of actions advanced, or the remedies sought, in the Claim.

Part 2: RESPONSE TO RELIEF SOUGHT

30. The defendants consent to the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **none.**

31. The defendants oppose the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **all.**

32. The defendants take no position on the granting of the relief sought in the following paragraphs of Part 2 of the notice of civil claim: **none.**

Part 3: LEGAL BASIS

33. The Claim is a scandalous, frivolous, and vexatious pleading. The Claim fails to meet the basic requirements for pleadings and is an abuse of the Court's process. The Claim should be struck in accordance with Rule 9-5(1) of the *Supreme Court Civil Rules*.

34. The Province denies all of the allegations set out in Part 3 of the Claim.

35. The impugned PHA Orders, MPSSG Orders, Declarations, and actions or conduct of the Provincial Defendants specified in the Claim (the "Impugned Orders and Actions") were implemented or undertaken in good faith, in accordance with the best available and generally accepted medical science, to minimize the spread of the novel SARS-CoV-2 virus and associated illness and death, with an overarching goal of protecting the health and safety of British Columbians during an unprecedented global pandemic.

36. The Province denies that any of ss. 30-32 or 39 of the *Public Health Act* or s. 17 of the *Infants Act*, RSBC. 1996, c. 223 (the "Impugned Provisions"), or the Impugned Orders and Actions set out in the Claim, violate the *Charter of Rights and Freedoms*, including ss. 2, 6, 7, 8, 9, and 15, are *ultra vires* the Province's jurisdiction under s. 92 of the *Constitution Act, 1867*, or are otherwise unlawful or unconstitutional.

37. In the event any of the Impugned Provisions or Impugned Orders and Actions infringe upon *Charter* rights, which is firmly denied, such limits are demonstrably justified in a free and democratic society and saved by s. 1 of the *Charter*.

Defendants' address for service:

Ministry of Attorney General
Legal Services Branch
1301 – 865 Hornby Street
Vancouver, BC V6Z 2G3
Attention: Mark Witten

Fax number address for service (if any): (604) 660-6797

E-mail address for service (if any): mark.witten@gov.bc.ca

Date: January 11, 2022

Solicitor for the Provincial Defendants
Mark Witten

Rule 7-1 (1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

  (a) prepare a list of documents in Form 22 that lists

    (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

    (ii) all other documents to which the party intends to refer at trial, and

  (b) serve the list on all parties of record.

TAB 6

Vancouver
17-Jan-22
REGISTRY

No. S 217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL, BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

NOTICE OF APPLICATION

Names of applicants: The Defendants, Vancouver Island Health Authority and Providence Health Care (the "Applicants")

To: Plaintiffs

And to: Their Counsel

And to: Her Majesty the Queen in Right British Columbia, Dr. Bonnie Henry, Premier John Horgan, Minister of Health, Jennifer Whiteside, Minister of Education, Mike Farnworth, Minister of Public Safety and Solicitor General

And to: Their counsel

TAKE NOTICE that an application will be made by the applicants to the presiding judge or master of the courthouse at 800 Smithe Street, Vancouver, British Columbia, **by Microsoft Teams**, on 3/Feb/2022 at 10:00 am for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. An order striking the whole of the Plaintiffs' notice of civil claim filed in this matter on August 17, 2021, without leave to amend; and,
2. Costs

Part 2: FACTUAL BASIS

1. On August 17, 2021, the Plaintiffs filed a 391-page notice of civil claim (the "Claim") that attempts to challenge the scientific and legal basis for the entirety of British Columbia and Canada's response to the COVID-19 pandemic. Part 1 of the Claim contains over 1,300 paragraphs and sub-paragraphs.
2. The Plaintiffs have named numerous defendants: Her Majesty the Queen in Right of the Province, the Attorney General of Canada, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, the Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, and TransLink (British Columbia).
3. The Claim is a prolix and convoluted document that is replete with groundless accusations against public bodies and public officials, inflammatory language, and conspiracy theories.
4. The Claim characterises the COVID-19 pandemic as a "false pandemic" that was "designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs" such as Bill Gates in order to "install a New World (Economic) Order" (Part 1, paras. 155, 283). Bill Gates is not a party to this proceeding.
5. The Applicants filed their response to civil claim on October 14, 2021 in which they deny the entirety of the Claim and assert that it ought to be struck.

Part 3: LEGAL BASIS

6. The Plaintiffs' Claim is deficient in form and substance. It is a scandalous, frivolous, and vexatious pleading that fails to meet the basic requirements for pleadings and is an abuse of

the Court's process. The Claim should be struck in accordance with Rule 9-5(1) of the Supreme Court Civil Rules, without leave to amend.

Pleadings Generally

7. *Supreme Court Civil Rule* (the "*Rules*") 3-1 provides, in part:

> **Contents of notice of civil claim**
> (2) A notice of civil claim must do the following:
> (a) set out a concise statement of the material facts giving rise to the claim;
> (b) set out the relief sought by the Plaintiff against each named defendant;
> (c) set out a concise summary of the legal basis for the relief sought;
> ...
> (g) otherwise comply with Rule 3-7. [emphasis added]

8. Rule 3-7 provides, in part:

> **Pleading must not contain evidence**
> (1) A pleading must not contain the evidence by which the facts alleged in it are to be proved.
> ...
> **Pleading conclusions of law**
> (9) Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.
> ...
> **General damages must not be pleaded**
> (14) If general damages are claimed, the amount of the general damages claimed must not be stated in any pleading. ...

9. The function of pleadings is to clearly define the issues of fact and law to be determined by the court. The plaintiff must state, for each cause of action, the material facts. Material facts are those facts necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.

Homalco Indian Band v. British Columbia, [1998] B.C.J. No. 2703 (S.C.), para. 5

10. As the Court of Appeal recently held in *Mercantile Office Systems Private Ltd. v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362, para 44:

> None of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the Rules and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

Application to Strike

11. Rule 9-5(1) provides:

> **Scandalous, frivolous or vexatious matters**

> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,
>
> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> ...
>
> (d) it is otherwise an abuse of the process of the court ...

12. A pleading may be struck under Rule 9-5(1) if it is plain and obvious that the pleading contravenes any of Rule 9-5(l)(a) through (d).

Knight V. Imperial Tobacco Canada Ltd, 2011 SCC 42 at para. 17

13. Evidence is inadmissible on an application under Rule 9-5(l)(a) but may be considered on an application under the remaining paragraphs of Rule 9-5(1). The Applicants rely on subparagraphs 9-5(l)(a)(b) and (d).

Rule - 9-5(l)(a)-The Notice of Civil Claim Discloses No Reasonable Claim

14. The Claim is premised upon non-justiciable questions and relies heavily upon international treaties, Criminal Code provisions, and unknown causes of action that are incapable of disclosing a reasonable cause of action for the purposes of Rule 9-5(1)(a).

15. For example, the Plaintiffs petition the Court for declarations pertaining to questions of science, public health, and conspiracy theories that are not justiciable, including:

    a. "A Declaration that the science, and preponderance of the scientific world community, is of the consensus that: a) masks are completely ineffective in avoiding or preventing transmission of an airborne, respiratory virus such as SARSCoV-2 which leads to COVID-19" (Part 2, para. 312(1));

    b. "A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a bona fide, nor an actual "pandemic", and declaration of a bona fide pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs" (Part 2, para. 302);

    c. "A Declaration that administrating medical treatment without informed consent constitutes experimental medical treatment" (Part 2, para. 321);

    d. "A Declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being "essential", or not, was designed and implemented to favor mega-corporations and to de facto put most small businesses and activities out of business" (Part 2, para. 307); and

    e. "A Declaration that the measures of masking, social distancing, PCR testing, and lockdowns of schools in British Columbia, by the Respondents, are: a) not scientifically, or medically, based; b) based on a false, and fraudulent, use of the PCR test, using a threshold cycle of 43-45 cycles in that once used above the 35 threshold cycles, of all the positives it registers, 96.5%, are "false positives", resulting in an accuracy rate, as a mere screening test, of 3.5% accuracy" (Part 2, para. 311).

16. The Plaintiffs allege numerous violations (and non-violations) of the Criminal Code that are not properly raised in a civil action (*Simon v. Canada*, 2015 BCSC 924, para. 45); including:
    a. "Crime[s] against humanity under the Criminal Code of Canada" (Part 1, para. 299; Part 3, para. 333);
    b. "Medical experimentation" that constitute "Criminal act[s] ... pursuant to the War Crime and Crimes against Humanity Act" (Part 2, para. 292(a));
    c. "Criminal extortion" (Part 1, para. 261);
    d. "The 'extra' suicides and drug over-doses undisputedly tied to Covid-measures constitutes criminal negligence causing death" (Part 1, para. 264);
    e. "Criminal vaccine experiments causing horrific damage to innocent children in India, Pakistan, Africa and other developing countries" (Part 1, para. 21 l(a));
    f. A Declaration that failure and/ or refusal to comply with Provincial Covid Measures does not constitute a "common nuisance" contrary to s.180 of the Criminal Code or constitute "obstruct peace officer" contrary to s. 129 of the Criminal Code (Part 2, para. 323(f)).
17. The Plaintiffs allege numerous violations of international legal instruments, unwritten constitutional principles, and causes of action unknown to law that are not actionable in Canadian courts (*Li v. British Columbia*, 2021 BCCA 256, paras. 107-109; *Toronto v. Ontario*, 2021 SCC 34, para. 5), including the following:
    a. "Vaccine mandates violate 'The Universal Declaration of Bioethics and Human Rights', the Nuremberg Code, professional codes of ethics, and all provincial health Acts." (Part 1, para. 260);
    b. "Administering medical treatment without informed consent constitutes experimental medical treatment contrary to the Nuremberg Code and Helsinki Declaration of 1960" (Part 1, para. 299; Part 3, para. 333);
    c. "Vesting an indefinite emergency power in [various defendants] constitutes constitutional violation of 'dispensing with Parliament, under the pretense of Royal Prerogative', contrary to the English Bill of Rights (1689) as read into our unwritten constitutional rights through the Pre-Amble of the Constitution Act, 1867" (Part 2, para. 295; Part 3, para. 336);
    d. "The declared state of emergency, and measures implemented thereunder contravene" ... "the same parallel unwritten constitutional rights, enshrined through the Pre-Amble of the Constitution Act, 1867" (Part 1, para. 283(c)(iv);
    e. "[T]hat (solitary confinement) isolation/quarantine of asymptomatic children" violates the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") and the Convention on the Rights of the Child" (Part 2, para. 311 (e); and
    f. "The COVID Measures taken by both Trudeau, Horgan, Farnworth, Dix, Whiteside, and Henry, and their respective governments, ... constitute a constitutional

violation of the abdication of the duty to govern" (Part 2, para. 296; Part 3, para. 326).

18. To the extent that the Claim attempts to plead causes of action that are known to law, such as breaches of Charter rights or the separation of powers, the Claim fails to set out material facts which, if true, support these claims.

19. The general rule that facts pleaded should be accepted as true for the purposes of a strike application does not apply in a "case like this where the notice of civil claim is replete with assumptions, speculation, and in some instances, outrageous allegations. The law is clear that allegations based on assumption and speculation need not be taken as true."

Willow v. Chong, 2013 BCSC 1083, para. 19
See, also, Simon v. Canada, 2015 BCSC 924 ["*Simon*"], para. 54

20. The Plaintiffs have failed to plead the concise statement of material facts that is necessary to support any complete cause of action. The Charter claims are inextricably bound up in a prolix, argumentative, and wildly speculative narrative of grand conspiracy that is incapable of supporting a viable cause of action. It is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from another, or conjecture and conspiracy from asserted facts.

Fowler v. Canada (Attorney General), 2012 BCSC 367, para. 54
Simon, supra, paras 54-59

21. It is plain and obvious that the Claim, as pleaded, fails to disclose a reasonable cause of action.

9-5(l)(b) The Notice of Civil Claim is Scandalous, Frivolous and Vexatious

Scandalous and Embarrassing

22. A pleading is scandalous if it does not state the real issue in an intelligible form and would require the parties to undertake useless expense to litigate matters irrelevant to the claim.

Gill v. Canada, 2013 BCSC 1703 ["*Gill*"], para. 9

23. A claim is also scandalous or embarrassing if it is prolix, includes irrelevant facts, argument or evidence, such that it is nearly impossible for the defendant to reply to the pleading and know the case to meet. Pleadings that are so prolix and confusing that it is difficult, if not impossible, to understand the case to be met, should be struck.

Gill, supra para. 9
Strata Plan LMS3259 v. Sze Hang Holding Inc., 2009 BCSC 473, at para. 36
Kuhn v. American Credit Indemnity Co., [1992] B.C.J. No. 953 (S.C.)

24. The Claim is a scandalous pleading because it is prolix, confusing, and nearly impossible to respond to:
    a. The 391 page Claim attempts to plead dozens of causes of action and Charter breaches and seeks over 200 declarations. It is, as a result, nearly impossible to know the case to be met.
    b. The Claim contains extensive passages of completely irrelevant information, including:

        i. A COVID-19 timeline beginning in 2000 with Bill Gates stepping down as Microsoft CEO (Part 1, para 44) and including such other events as Bill Gates pledging $10 billion in funding in 2010 for the World Health Organization and announcing the "Decade of Vaccines" (Part 1, para. 50);

        ii. A lengthy narrative describing an alleged "global political agenda behind [the] unwarranted measures" (Part 1, paras. 207-300);

        iii. A detailed 81 page narrative about the individual Plaintiffs dealings with government employees, health care professionals, and police officers (Part 1, pages 1-81).

    c. The Claim relies extensively on the Criminal Code of Canada (Part 1, paras. 1 l(b)(h), 115, 141(h), 207(1), 299; Part 2 para. 291, Part 3 paras. 322(k)(iv), 323(f), 333, 361 (f)(k)(iv));

    d. The Claim contains lengthy and convoluted legal arguments (i.e., Part 1 page 108 para. 141; Part 2, paras. 286, 324, 358);

    e. The Claim raises allegations against individuals and entities who are not named as parties such as Bill Gates (Part 1, paras. 216-222), Facebook, Amazon, Google, Yahoo (Part 1, paras. 174,216), Doug Ford (Part 1, para. 152(c)), and others.

25. The Claim is also a scandalous pleading because it fails to meet the basic requirements for pleadings under the *Rules*.

    a. The Claim contains over 1600 paragraphs and subparagraphs. It fails to set out a concise statement of the material facts, relief sought, and legal basis in violation of Rules 3-1(1)-(3);

    b. The Claim pleads evidence in contravention of Rule 3-7(1), including dozens of lengthy quotations from various COVID-19 commentators and activists and hundreds of footnotes to miscellaneous websites, articles, policy documents, and articles;

    c. The Claim pleads conclusions of law, unsupported by facts, in contravention of Rule 3-7(9);

    d. The Claim appears to plead amounts of damages in contravention of Rule 3-7(14).

Frivolous

26. A pleading is frivolous if it is without substance, is groundless, fanciful, 'trifles with the court' or wastes time".

Borsato v. Basra, [2000] B.C.J. No. 84, 43 C.P.C. (4th) 96, at para 24

27. The Claim is a frivolous pleading because it promotes fanciful conspiracy theories about the origins of the COVID-19 pandemic, the efficacy of COVID-19 measures, and the motivations of the Provincial and Health Authority Defendants. These allegations include, by way of example only:

    a. "The Plaintiffs state, and the fact is, that the illegal actions, and decrees issued by The Defendants and other public officials were done, in abuse and excess of their offices, knowingly to propagate a groundless and falsely-declared 'pandemic" ...

designed and implemented for improper and ulterior purposes, at the behest of the WHO, controlled and directed by Billionaire, Corporate, and Organizational Global Oligarchs." (Part 1, para. 155);

b. "The Plaintiffs state, and the fact is, that the non-medical aims and objectives to declare the "pandemic", for something it is not beyond one of many annual seasonal viral respiratory illnesses, was to, inter alia, effect the following non-medical agendas, by using the COVID- 19 [sic] as a cover and a pretext: (a) To effect a massive bank and stock market bail-out needed because the banking system was poised to again collapse since the last collapse of 2008 in that the World debt had gone from $147 Trillion dollars in 2008 to $321 Trillion dollars in January, 2020" (Part 1, para 208(a));

c. "The fact is that the pandemic pretense is there to establish a "new normal", of a New (Economic) World Order, with a concurrent neutering of the Democratic and Judicial institutions and an increase and dominance of the police state; (c) A massive and concentrated push for mandatory vaccines of every human on the planet earth with concurrent electronic surveillance by means of proposed: (i) Vaccine "chips", bracelets", and "immunity passports"; (ii) Contract- tracing via cell-phones; (iii) Surveillance with the increased 50 capacity; (d) The elimination of cash- currency and the installation of strictly digital currency to better-effect surveillance." (Part 1, para. 208(b)-(d)); and

d. "The Plaintiffs state that, and fact is, this global vaccination scheme which is being propelled and pushed by the Defendants, is with the concurrent aim of total and absolute surveillance of the Plaintiffs and all citizens." (Part 1, para. 308)

Rule 9-5(l)(a) and (d) - The Claim is Vexatious and an Abuse of Process

28. Little distinction exists between a vexatious action and one that is an abuse of process as the two concepts have strikingly similar features.

Dixon v. Stork Craft Mamifacturing Inc., 2013 BCSC 1117

29. Abuse of process is not limited to cases where a claim or an issue has already been decided in other litigation, but is a flexible doctrine applied by the court to values fundamental to the court system. In *Toronto (City) v. Canadian Union of Public Employees, Local 79 (CUPE)*, [2003] 3 S.C.R. 77, the court stated at para. 37:

> Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.

30. Vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights. Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

Lang Michener Lash Johnston v. Fabian, [1987] O.J. No. 355 ["*Lang Michener*"], at para. 19

31. There are a multitude of bases upon which to conclude that the Claim is an abuse of process. These include the Plaintiffs' attempt to use the judicial process to adjudicate conspiracy theories and seek declarations on non-justiciable questions of medical science and public health policy.

32. More concerning, the Claim bears the hallmarks of a vexatious and abusive claim that is intended to harass and oppress the parties (and non-parties):

    a. The Claim advances against the Defendant Provincial Health Officer, without factual foundation, spurious allegations of "crimes against humanity" in relation to the implementation of COVID-19 measures and international public health work in the early 2000s (Part 1, para. 293);

    b. The Claim advances irrelevant allegations about alleged conflicts of interests or hypocritical conduct relating to the private lives of both parties and non-parties (Part 1 para 8(k), 44, 154(c)-(f), 155, 207(b), 298);

    c. The Plaintiffs make broad, sweeping criminal allegations against a large number of named and unnamed government employees and officials (Part 1, para 11, 141 (h), 151(d), 261 (pg. 234) 264 (pg. 235) 300(d));

    d. The Claim uses inflammatory and inappropriate language to describe alleged actions of Defendants and public officials such as "egregious crimes against humanity", (Part 1 para. 290) "fraudulent" (Part 1 para. 251), or "Stalinist censorship" (Part 1 para. 280 (pg. 308), or to suggest that politicians or officials have "no clue" (Part 1 para. 154), are "wholly unqualified" (Part 1 para. 154) or are "outright lying" (Part 1 para. 279 (pg. 240))

33. The Applicants submit the Claim has been brought for an improper purpose. The Plaintiffs and their counsel must know, or ought to know, that a 391 page Claim seeking over 200 declarations concerning alleged criminal conduct and the efficacy of public health measures "cannot succeed ... [and] would lead to no possible good": *Lang Michener, supra*.

34. The Claim is intended, at least in part, to intimidate and harass health authorities, public officials and politicians, including the Provincial Health Officer, by advancing spurious, public allegations of criminal conduct, conflicts of interest, and ulterior motives. This intention is further corroborated by the Plaintiff Action4Canada's simultaneous campaign to encourage individuals to serve government officials and politicians with "Notices of Liability" for their actions in responding to the COVID-19 pandemic (Affidavit #1 of Rebecca Hill, Ex. G, I).

35. The Claim is also intended, at least in part, to consolidate, publicize, and amplify COVID-19 conspiracy theories and misinformation. The Claim is a book-length tirade against the entirety of British Columbia's response to the pandemic, with dozens of quotes from, and hundreds of footnotes to, anti-mask, anti-lockdown, and anti-vaccine resources. Both Action4Canada and its counsel have promoted the Claim online and on social media (Affidavit #1 of Rebecca Hill, Ex. D, K).

36. These are improper purposes to file and prosecute a civil action. There can be no question that the Claim is an abuse of process. Permitting this litigation to proceed would violate the principles of judicial economy and the integrity of the administration of justice.

37. Providing the Plaintiffs with an opportunity to redraft their pleadings would only further this abuse of the Court's process.

Part 4: MATERIAL TO BE RELIED ON

1. The pleadings filed in this action;
2. Affidavit #1 of Rebecca Hill made 10 January 2022

The applicants estimates that the application will take 1 day collectively with the application of the Province of British Columbia.

☒ This matter is within the jurisdiction of a master.

☐ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,
(b) file the original of every affidavit, and of every other document, that
  (i) you intend to refer to at the hearing of this application, and
  (ii) has not already been filed in the proceeding, and
(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
  (i) a copy of the filed application response;
  (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
  (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Date: 17/Jan/2022

Signature of Timothy J. Wedge
☐ applicant ☑ lawyer for applicants, Vancouver Island Health Authority and Providence Health Care

Attn: Timothy J. Wedge
Carfra Lawton LLP
6th Floor – 395 Waterfront Crescent
Victoria BC V8T 5K7
Phone: 250-995-4264
Email: twedge@carlaw.ca

To be completed by the court only:

Order made:

☐ in the terms requested in paragraphs .... of Part 1 of this notice of application

☐ with the following variations and additional items:

....

....

....

Dated:
....

Signature of ☐ Judge ☐ Master

Appendix

THIS APPLICATION INVOLVES THE FOLLOWING:

☐ discovery: comply with demand for documents

☐ discovery: production of additional documents

☐ other matters concerning document discovery

☐ extend oral discovery

☐ other matter concerning oral discovery

☐ amend pleadings

☐ add/change parties

☐ summary judgment

☐ summary trial

☐ service

☐ mediation

☐ adjournments

☐ proceedings at trial

☐ case plan orders: amend

☐ case plan orders: other

☐ experts

TAB 7

Vancouver
28-Apr-22
REGISTRY

No. VLC-S-S217586
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JAQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

NOTICE OF APPLICATION

NAME OF APPLICANT: The Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("Canada").

TO: the Plaintiffs

TAKE NOTICE that an application will be made by the Applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, BC on **May 31, 2022 at 9:45 am** for the orders set out in Part 1 below.

Part 1: ORDERS SOUGHT

1. That the Notice of Civil Claim of the Plaintiffs be struck out in its entirety, without leave to amend, pursuant to Rule 9-5(1) on the grounds that it:

    a. discloses no reasonable claim;

    b. fails to conform to the requirements of proper pleadings;

    c. is unnecessary, scandalous, frivolous, vexatious, embarrassing, and prejudicial; and,

    d. is likewise an abuse of process of the court.

2. In the alternative, that the Plaintiffs be ordered to amend the Notice of Civil Claim in its entirety pursuant to the instructions of this Honourable Court; and

3. Costs.

PART 2: FACTUAL BASIS

1. The Plaintiff filed the Notice of Civil Claim (the "Claim") on August 17, 2021.

2. The Claim is prolix, comprising 391 pages, alleging a long list of wrongs against a long list of defendants, including the defendants represented by Canada.

3. It does not plead with any clarity the sufficient material facts or a discernable legal basis for Canada to file a response.

PART 3: LEGAL BASIS

1. Canada relies on Rule 9-5 of the *Supreme Court Civil Rules*, and says that the Claim ought to be struck on the grounds that it discloses no reasonable claim.

2. Rule 9-5 of the *Supreme Court Civil Rules*, BC Reg 168/2009 ("*SCCR Rules*") provides:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

> (a) it discloses no reasonable claim or defence, as the case may be,
> (b) it is unnecessary, scandalous, frivolous or vexatious,
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

3. The test to strike out a pleading is whether it is plain and obvious that the claim discloses no reasonable cause of action: ***Nevsun Resources Ltd v Araya***, 2020 SCC 5 ("***Nevsun***"), para 64.

4. On a motion to strike, the Court is required to accept the facts as set out in the Claim: ***Hunt v Carey Canada Inc***, [1990] 2 SCR 959; ***Nevsun***, para 64.

5. The pleadings may be subjected to a "skeptical analysis" by the Court where the plaintiff has made speculative and "sweeping allegations of things like intolerance, deceit harassment, intimidation and falsifying documents against the defendants": ***Young v Borzoni***, 2007 BCCA 16, paras 30-32. The Supreme Court of Canada established that, "[n]o violence is done to the rule where allegations, incapable of proof, are not taken as proven": ***Operation Dismantle Inc v The Queen***, [1985] 1 SCR 441, para 27.

6. The function of pleadings is to clearly define the issues of fact and law to be determined by the Court. A plaintiff must plead all material facts necessary to formulate a cause of action. It is incumbent on the plaintiff to plead the facts upon which it relies in making its claim. The plaintiff is not entitled to rely on the possibility that new facts may come up as the case progresses: ***R v Imperial Tobacco Canada Ltd***, 2011 SCC 42, para 22.

7. Where pleadings are "overwhelmed with difficulty, the various provisions of [Rule] 9-5(1) may apply together": ***Grosz v Royal Trust Corporation of Canada***, 2020 BCSC 128 ("***Grosz***"), para 97.

The Claim generally

8. In the case at hand, the Claim contains conclusions of law without supporting material facts, fails to concisely plead material facts, fails to set out what allegations are being made against

whom and generally fails to conform with the rules of pleadings, such that it is impossible to determine what causes of action the plaintiffs are attempting to advance.

9. The verbose and undefined nature of the Claim fails to ensure efficiency and fairness, and fundamentally does not allow Canada to identify the claims to be addressed.

10. The Claim intertwines several seemingly distinct and unrelated events, and in so doing fails to clearly, concisely, and lucidly define the issues of fact and law the Court is being asked to determine: ***Sahyoun v Ho***, 2013 BCSC 1143 (**"*Sahyoun*"**), paras 21 & 23.

11. The Claim fails to include a summary of the legal basis for the relief sought, which includes naming which cause of action each of the Plaintiffs seeks to advance against whom in Part 3 of the Claim: ***SCCR Rules***, Rule 3-1(2)(c); ***Sahyoun***, para 33.

12. The Claim describes several different events and fails to include a concise statement of the material facts, and "if a material fact is omitted, a cause of action is not effectively pled": ***Sahyoun***, para 25; ***SCCR Rules***, Rule 3-1(2)(a).

13. That Claim fails to make clear what cause of action is alleged against each defendant and what relief is sought: ***Sahyoun***, paras 30-31. Neither Canada, nor the other defendants should be required to divine the claims being made against them. They should not have to guess what it is they are alleged to have done: ***Sahyoun***, paras 19 & 30-31.

Amending Pleadings

14. There are instances where amending a pleading or merely striking a portion of the pleadings will remedy any defects identified under Rules 3-1(2) or Rule 9-5. Striking the pleadings in full is permitted where "an amendment would be fruitless because the proposed claim, regardless of how it is drafted, is without legal foundation": ***Camp Development Corp v Greater Vancouver Transportation Authority***, 2009 BCSC 819 (aff'd 2010 BCCA 284), para 19. Where pleadings are fundamentally deficient and lack particularized damages, then it is better to strike the claim than amend: ***Grosz***, para 109.

Costs

15. Canada asks for its costs fixed as a lump sum of $550 payable forthwith, pursuant to Rule 14-1(1)(d) and (15).

16. Pursuant to Rules 14-1(1)(d) and (15), the Court may award lump sum costs and set the amount of those costs. The award of costs is highly discretionary, and a lump sum costs award may reflect a judge's concern with the conduct of a party or be an appropriate and expedient means of avoiding further proceedings and submissions on costs from the parties: ***Mousa v The Institute of Electrical and Electronics Engineers, Incorporated***, 2014 BCCA 415, para 34.

Part 4: MATERIAL TO BE RELIED ON

1. The Petition filed August 17, 2021;
2. *Supreme Court Civil Rules*, BC Reg 168/2009;
3. Authorities cited in the notice of application; and
4. Such other authorities and materials as counsel may advise and the court may permit.

The applicant estimates that the application will take 3 hours.

[**X**] This matter is within the jurisdiction of a master.

[ ] This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that

(i) you intend to refer to at the hearing of this application, and

(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:

(i) a copy of the filed application response;

(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;

(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: April 28, 2022

Signature of lawyer for filing party

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
British Columbia Regional Office
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Fax: (604) 666-1462

Per: Olivia French
Email: olivia.french@justice.gc.ca

Per: Andrea Gatti
Email: andrea.gatti@justice.gc.ca

File: LEX-500065130

Solicitor for the Applicant

THIS Notice of Application is prepared and served by the Attorney General of Canada whose place of business and address for service is the Department of Justice Canada, British Columbia Regional Office, 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9

To be completed by the court only:

Order made

[ ] in the terms requested in paragraphs .... of Part 1 of this notice of application

[ ] with the following variations and additional terms:

....

....

....

Date: ....
[dd/mmm/yyyy]

....
Signature of [ ] Judge [ ] Master

From: "Pirmohamed, Ariyana" <Ariyana.Pirmohamed@justice.gc.ca>
Subject: RE: Action4Canada et al. v. Her Majesty the Queen et al. - BCSC No. VLC-S-S-217586
Date: Fri, April 29, 2022 12:00 pm
To: "rocco@idirect.com" <rocco@idirect.com>,"Witten, Mark AG:EX" <Mark.Witten@gov.bc.ca>,"jhamilton@lklaw.ca" <jhamilton@lklaw.ca>,"TDelaney@lklaw.ca" <TDelaney@lklaw.ca>,"twedge@carlaw.ca" <twedge@carlaw.ca>
Cc: "French, Olivia" <Olivia.French@justice.gc.ca>,"Gatti, Andrea" <Andrea.Gatti@justice.gc.ca>,"ADavidson@lklaw.ca" <ADavidson@lklaw.ca>,"Hill, Rebecca AG:EX" <Rebecca.Hill@gov.bc.ca>,"Lewis, Heather AG:EX" <Heather.Lewis@gov.bc.ca>

Hello,

Further to my email below, please see a copy of our filed Notice of Application attached.

Thank you,

Ariyana Pirmohamed She/Her

Legal Assistant | British Columbia Regional Office

900 – 840 Howe Street, Vancouver, BC V6Z 2S9

National Litigation Sector

Department of Justice Canada | Government of Canada

C: (604) 754-0320 | F: 1 888-333-1252

ariyana.pirmohamed@justice.gc.ca

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This communication contains information that may be confidential, exempt from disclosure, subject to litigation privilege or protected by the privilege that exists between lawyers or notaries and their clients. If you are not the intended recipient, you should not read, rely on, retain, or distribute it. Please delete or otherwise destroy this communication and all copies of it immediately, and contact the sender by email at ariyana.pirmohamed@justice.gc.ca.

From: Pirmohamed, Ariyana
Sent: April 28, 2022 9:26 AM
To: rocco@idirect.com; Witten, Mark AG:EX <Mark.Witten@gov.bc.ca>; jhamilton@lklaw.ca; TDelaney@lklaw.ca; twedge@carlaw.ca
Cc: French, Olivia <Olivia.French@justice.gc.ca>; Gatti, Andrea <Andrea.Gatti@justice.gc.ca>; ADavidson@lklaw.ca; Hill, Rebecca AG:EX <Rebecca.Hill@gov.bc.ca>; Lewis, Heather AG:EX <Heather.Lewis@gov.bc.ca>
Subject: Action4Canada et al. v. Her Majesty the Queen et al. - BCSC No. VLC-S-S-217586

Good Morning All,

Please see attached correspondence and enclosure of today's date.

Kind regards,

Ariyana Pirmohamed She/Her

Legal Assistant | British Columbia Regional Office

900 – 840 Howe Street, Vancouver, BC V6Z 2S9

National Litigation Sector

Department of Justice Canada | Government of Canada

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Size:	626 k
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Info:	2022 04 28 FILED Notice of Application (2).pdf

From: "Pirmohamed, Ariyana" <Ariyana.Pirmohamed@justice.gc.ca>
Subject: RE: Action4Canada et al. v. Her Majesty the Queen et al. - BCSC No. VLC-S-S-217586
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Cc: "French, Olivia" <Olivia.French@justice.gc.ca>,"Gatti, Andrea" <Andrea.Gatti@justice.gc.ca>,"ADavidson@lklaw.ca" <ADavidson@lklaw.ca>,"Hill, Rebecca AG:EX" <Rebecca.Hill@gov.bc.ca>,"Lewis, Heather AG:EX" <Heather.Lewis@gov.bc.ca>

Hello,

Further to my email below, please see a copy of our filed Notice of Application attached.

Thank you,

Ariyana Pirmohamed She/Her

Legal Assistant | British Columbia Regional Office

900 – 840 Howe Street, Vancouver, BC V6Z 2S9

National Litigation Sector

Department of Justice Canada | Government of Canada

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Cc: French, Olivia <Olivia.French@justice.gc.ca>; Gatti, Andrea <Andrea.Gatti@justice.gc.ca>; ADavidson@lklaw.ca; Hill, Rebecca AG:EX <Rebecca.Hill@gov.bc.ca>; Lewis, Heather AG:EX <Heather.Lewis@gov.bc.ca>
Subject: Action4Canada et al. v. Her Majesty the Queen et al. - BCSC No. VLC-S-S-217586

Good Morning All,

Please see attached correspondence and enclosure of today's date.

Kind regards,

Ariyana Pirmohamed She/Her

Legal Assistant | British Columbia Regional Office

900 – 840 Howe Street, Vancouver, BC V6Z 2S9

National Litigation Sector

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2022 04 28 FILED Notice of Application (2).pdf	
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Info:	2022 04 28 FILED Notice of Application (2).pdf

TAB 8

Vancouver
18-May-22
REGISTRY

No. S217586
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General **British Columbia Ferry Services Inc**. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority, The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)**

Defendants

AMENDED APPLICATION RESPONSE

Application Response of: The Plaintiffs (Respondents)

THIS IS A RESPONSE TO THE Notice(s) of Application of:

(a) Her Majesty the Queen in Right of British Columbia, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Minister of Health, Jennifer Whiteside, Minister of Education; and Mike Farnworth, Minister of Public Safety and Solicitor General ("Provincial

Defendants"); which application was filed April 28th, 2022, and received by the Plaintiffs (Respondents) April 29th, 2022;

(b) The Attorney General of Canada, Prime Minister Justin Trudeau, the Royal Canadian Mounted Police (RCMP), Chief Public Health Officer Dr. Theresa Tam, and Omar Alghabra Minister of Transport ("The Federal Defendants" or "Canada");

(c) Peter Kwok and Translink;

(d) Vancouver Island Health Authority and Providence Health Care.

All of which Applications, and Application Responses, are scheduled to be heard together, to the presiding judge or master, at the courthouse at 800 Smithe Street, Vancouver, B.C., on May 31, 2022, at 9:45am.

TAKE NOTICE THAT the Application Response will be made by the Plaintiffs(Respondents) by Microsoft Teams.

PART 1: ORDERS CONSENTED TO

The Respondent Plaintiffs do not consent to any order sought by the Applicant Defendants.

PART 2: ORDERS OPPOSED

The Respondent Plaintiffs oppose the motion to strike in whole and in part.

PART 3- ORDERS ON WHICH NO POSITION IS TAKEN

N/A

PART 4: FACTUAL BASIS:

The factual basis is as plead and set out in the Notice of Liability (Claim) filed by the Plaintiffs.

PART 5- LEGAL BASIS

1. It is submitted, as reflected by the Plaintiff's Notice of Liability, filed August 17th, 2021, that:

   (a) all material facts necessary to support the causes of action have been properly plead and set out;

   (b) that all the causes of action have been fully and properly plead; and

   (c) there is no basis, in law to strike they Notice of Liability (Claim) in whole or in part.

- **Motion to Strike – General Principles**

2. It is submitted, by the Supreme Court of Canada, and the Appellate Courts, that:

   (a) the facts pleaded by the Plaintiff must be taken as proven and fact:

   - ***A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735***
   - ***Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC)***
   - ***Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441***
   - ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959***
   - ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279***
   - ***Trendsetter Ltd. v. Ottawa Financial Corp. (1989) 32 O.A.C. 327 (C.A.)***
   - ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.)***
   - ***Canada v. Arsenault 2009 FCA 242***
   - ***R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42, [2011] 3 S.C.R. 45***

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
>
> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."
>
> - ***Nelles, supra,* p. 627**

and rephrased, re-iterated by the Supreme Court of Canada, in ***Dumont,*** wherein the Court stated that,

> ***"It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'.***
>
> Issues as to the proper interpretation of relevant provisions…and the effect…upon them would appear to be better determined at trial where a proper factual base can be laid."
>
> - ***Dumont, supra.* p. 280**

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."
>
> - ***Hunt, supra (SCC)***

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
>
> …

> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the Plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the Plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the Plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.
>
> \- ***Hunt, supra at p. 14***

and further that:

> [21] Valuable as it is, the Motion to Strike **is a tool that must be used with care.** The Law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedly Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like that one at issue in *Donoghue v. Stevenson.* therefore, on a Motion to Strike, it is not determinative that the law has not yet recognized the particular claim. **The Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.**
>
> ***- R. v. Imperial Tobacco Canada Ltd., supra at para 21.***

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";

- ***Trendsetter Ltd**, **supra,*** **(Ont. C.A.).**

(c) (i) and that a statement of claim should not be struck just because it is "novel";

- ***R. v. Imperial Tobacco Canada Ltd., supra.***
- ***Nash v. Ontario (1995) 27 O.R. (3d) (C.A.)***
- ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)***
- ***Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)***
- ***Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";

- ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)

(iii) and that to strike, the Defendant must produce a "decided case ***directly on point*** from the same jurisdiction demonstrating that the very same issue has been ***squarely dealt with and rejected***";

- ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div).

(d) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.

- ***Grant v. Cormier – Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.)
- ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)

- **Declaratory Relief Sought**

3. It is submitted that the Declaratory relief is plead with respect to the material facts and available to the Plaintiffs.

4. The Plaintiffs submit that Declaratory relief goes to the crux of the constitutional right to judicial review, which right the Supreme Court of Canada has re-affirmed in ***Dunsmuir:***

> **28** By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> ...
>
> **31** The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". ***In short, judicial review is constitutionally guaranteed in Canada,*** particularly with regard to the definition and enforcement of jurisdictional limits...,.

5. This Court, in ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,*** re-affirmed the ample and broad right to seek declaratory relief, in quoting the Supreme Court of Canada in ***Solosky***:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> ***- Canada v. Solosky, [1980] 1 S.C.R. 821, @ p. 830***

6. More recently, the Supreme Court of Canada, in the ***Manitoba Metis*** case reaffirmed the breadth of the right to declaratory relief to rule that it cannot be statute-barred:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. ***The constitutionality of legislation has always***

> ***been a justiciable question:*** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. ***The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).
>
> ...
>
> [140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Charter* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. ***The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.
>
> ...
>
> [143] ***Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available.*** As argued by the intervener Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: factum, Assembly of First Nations' at para. 31. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.
>
> - ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

7. It has been long-stated, by the Supreme Court of Canada that "The constitutionality of legislation has always been a justiciable issue".

> ***- Thorson v. AG of Canada [1975] 1 SCR 138, @ p. 151***
> ***- Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, @ paragraph 134***

8. It is further submitted that, with respect to the mandatory order sought against crown actions, including the named word, based on constitutional grounds, that such remedies are available, pre as well as post Charter.

9. It has always been trite law, even prior to the ***Charter***, that where constitutional rights are engaged, the Courts may issue ***mandamus*** to the exercise of the highest order of discretion, namely royal ***fiat***.

- ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC)
- ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44It

wherein the Court ruled @ pp. 545-6:

> ...
> All executive powers, whether they derive from statute, Common Law or prerogative, must be adapted to conform with constitutional imperatives.
> ...
> I need not consider which of these views should prevail in ordinary cases. For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution .... .

- ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC)

which ruling has been echoed by the Supreme Court of Canada in the ***Reference re Secession of Quebec***.

- ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217, paragraphs 32, 44, 70-72.

10. It is further submitted that other relief for misfeasance public office is properly plead and remedies available.

- ***Roncarelli v. Duplessis,*** [1959] S.C.R. 121
- ***Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263, 2003 SCC 69***

11. It is further submitted that relief by way of the tort of conspiracy is also properly plead and available as set out, **inter alia**, by the Supreme Court of Canada.

- ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959***

12. It is lastly submitted that all other relief, including in monetary damages, without proof of **mala fides**, has been plead and available.

- ***Ward*** v. ***Canada*** [1993] 2 S.C.R. 689 (SCC) @ pp.724-25

13. It is lastly submitted that the Respondents intend to file a full written argument as permitted by the **Rules**, for the return date of the within application.

PART 6: MATERIAL TO BE RELIED ON

14. The Respondents (Plaintiffs) intend to rely on the following:

(a) the facts and Claim as set out in the Notice of Liability ruled August 17th, 2021;
(b) a written argument to be filed by the Respondents;
(c) the jurisprudence set out in within response and written argument of the Respondent Plaintiffs to filed;
(d) a Book of Authorities; and
(e) such further material as counsel may advise and this Honourable Court permits.

15. The Respondents (Plaintiffs) estimate that the application will take one day, which has been scheduled for May 31, 2022.

16. The Respondents (Plaintiffs) have filed in this proceeding a document that contains the application respondent's address for service.

Date: May 2nd, 2022

Signature of
[ ] plaintiff [x]lawyer for plaintiff(s)

For ROCCO GALATI LAW FIRM
PROFESSIONAL CORPORATION
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Toronto, Ontario M6H 1A9
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Lawrence Wong
Barrister & Solicitor

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jhamilton@lklaw.ca

TAB 9

No. VLC-S-S217586
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General
British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester,** Peter **Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)**

Defendants

WRITTEN ARGUMENT

(On motion to strike returnable May 31st, 2022)

PART I: THE FACTS:

1. The factual basis of this case is as plead and set out in the Notice of Civil Claim filed by the Plaintiffs.

PART II- LEGAL BASIS

2. It is submitted, as reflected by the Plaintiff's Notice of Civil Claim, filed August 17th, 2021, that:

(a) all material facts necessary to support the causes of action have been properly plead and set out;

(b) that all the causes of action have been fully and properly plead; and

(c) there is no basis, in law, to strike the Notice of Civil Claim, in whole or in part.

- **Motion to Strike – General Principles**

3. It is submitted, by the Supreme Court of Canada, and the Appellate Courts, that:

(a) the facts pleaded by the Plaintiff must be taken as proven and fact:

- ***A.G. Canada v. Inuit Tapirasat of Canada [1980[2 S.C.R. 735***
- ***Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC)***
- ***Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441***
- ***Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959***
- ***Dumont v. A.G. Canada [1990] 1 S.C.R. 279***
- ***Trendsetter Ltd. v. Ottawa Financial Corp. (1989) 32 O.A.C. 327 (C.A.)***
- ***Nash v. Ontario (1995) 27 O.R. (3d) 1 (Ont. C. A.)***
- ***Canada v. Arsenault 2009 FCA 242***
- ***R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42, [2011] 3 S.C.R. 45***

(b) it has been further held, that on a motion to strike, the test is a rather high one, namely that,

> "A Court should strike a pleading under Rule 126 **only in plain and obvious cases where the pleading is bad beyond argument.**
>
> **Furthermore, I am of the view that the rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case.** Rule1.04(1) of the Rules of Civil Procedure in Ontario, O. Reg 560/84, confirms this principle in stating that "these rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."
>
> - ***Nelles, supra,* p. 627**

and rephrased, re-iterated by the Supreme Court of Canada, in ***Dumont***, wherein the Court stated that,

> ***"It cannot be said that the outcome of the case is 'plain and obvious' or 'beyond doubt'.***
>
> Issues as to the proper interpretation of relevant provisions…and the effect…upon them would appear to be better determined at trial where a proper factual base can be laid."

- ***Dumont, supra.* p. 280**

and further, that:

> "It is not for this Court on a motion to strike to reach a decision as to the Plaintiff's chance of success."

- ***Hunt, supra (SCC)***

and further that:

> **The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.**
>
> …
>
> This brings me to the second difficulty I have with the defendants' submission. **It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the Plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel.** If the Plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the Plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

- ***Hunt, supra at p. 14***

and further that:

> [21] Valuable as it is, the Motion to Strike **is a tool that must be used with care.** The Law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedly Byrne & Co. v. Heller & Partners*, Ltd., [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like that one at issue in *Donoghue v. Stevenson.* therefore, on a Motion to Strike, it is not determinative that the law has not yet recognized the particular claim. **The Court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.**

- ***R. v. Imperial Tobacco Canada Ltd., supra at para 21.***

and that "the court should make an order only in ***plain and obvious cases*** which it is satisfied to be beyond doubt";

- ***Trendsetter Ltd**, **supra,*** **(Ont. C.A.).**

(c) (i) and that a statement of claim should not be struck just because it is "novel";

- ***R. v. Imperial Tobacco Canada Ltd., supra.***
- ***Nash v. Ontario (1995) 27 O.R. (3d) (C.A.)***
- ***Hanson v. Bank of Nova Scotia (1994) 19 O.R .(3d) 142 (C.A.)***
- ***Adams-Smith v. Christian Horizons (1997)14 C.P.C.(4th)78 (Ont. Gen. Div.)***
- ***Miller (Litigation Guardian of) v. Wiwchairyk (1997) 34 O.R. (3d) 640 (Ont.Gen.Div)***

(ii) that "matters law not ***fully settled*** by the jurisprudence should not be disposed of at this stage of the proceedings";

- ***R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*** (1991) 5 O.R. (3d) 778 (C.A.)

(iii) and that to strike, the Defendant must produce a "decided case ***directly on point*** from the same jurisdiction demonstrating that the very same issue has been ***squarely dealt with and rejected***";

- ***Dalex Co. v. Schawartz Levitsky Feldman*** (1994) 19 O.R. (3d) 463 (Gen. Div).

(d) and that, in fact, the Court ought to be generous in the drafting of pleadings and not strike but allow amendment before striking.

- ***Grant v. Cormier – Grant, et. al*** (2001) 56 O.R. (3d) 215 (Ont. C.A.)
- ***TD Bank v. Delloitte Hoskins & Sells*** (1991) 5 O.R. (3d) 417 (Gen. Div.)

- **Declaratory Relief Sought**

4. It is submitted that the Declaratory relief is plead with respect to the material facts and available to the Plaintiffs.

5. The Plaintiffs submit that Declaratory relief goes to the crux of the constitutional right to judicial review, which right the Supreme Court of Canada has re-affirmed in ***Dunsmuir:***

> **28** By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.
>
> ...
>
> **31** The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*Executors of the Woodward Estate v. Minister of Finance*, [1973] S.C.R. 120, at p. 127 [page213]). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". ***In short, judicial review is***

> ***constitutionally guaranteed in Canada,*** particularly with regard to the definition and enforcement of jurisdictional limits...

6. This Court, in ***Singh v. Canada (Citizenship and Immigration), 2010 FC 757,*** re-affirmed the ample and broad right to seek declaratory relief, in quoting the Supreme Court of Canada in ***Solosky***:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a "real issue" concerning the relative interests of each has been raised and falls to be determined.
>
> ***- Canada v. Solosky, [1980] 1 S.C.R. 821, @p. 830***

7. More recently, the Supreme Court of Canada, in the ***Manitoba Metis*** case reaffirmed the breadth of the right to declaratory relief to rule that it cannot be statute-barred:

> [134] This Court has held that although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute: *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1, [2007] 1 S.C.R. 3; *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181. ***The constitutionality of legislation has always been a justiciable question:*** *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, at p. 151. ***The "right of the citizenry to constitutional behaviour by Parliament" can be vindicated by a declaration that legislation is invalid, or that a public act is ultra vires:*** *Canadian Bar Assn. v. British Columbia*, 2006 BCSC 1342, 59 B.C.L.R. (4th) 38, at paras. 23 and 91, citing *Thorson*, at p. 163 (emphasis added). An "issue [that is] constitutional is always justiciable": *Waddell v. Schreyer* (1981), 126 D.L.R. (3d) 431 (B.C.S.C.), at p. 437, aff'd (1982), 142 D.L.R. (3d) 177 (B.C.C.A.), leave to appeal refused [1982] 2 S.C.R. vii (*sub nom. Foothills Pipe Lines (Yukon) Ltd. v. Waddell*).
>
> ...
>
> [140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Charter* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. ***The courts are the guardians of the Constitution and, as in Ravndahl and Kingstreet, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less:*** see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.
>
> ...
>
> [143] ***Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause***

> ***of action, and courts make declarations whether or not any consequential relief is available.*** As argued by the intervener Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: factum, Assembly of First Nations' at para. 31. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.
>
> - ***Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14***

8. It has been long-stated, by the Supreme Court of Canada that "The constitutionality of legislation has always been a justiciable issue".

    - Thorson v. AG of Canada [1975] I SCR 138, @ p. 151
    - Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, @paragraph 134

9. It is further submitted that, with respect to the mandatory order sought against Crown actions, including the named word, based on constitutional grounds, that such remedies are available, pre as well as post-***Charter***.

10. It has always been trite law, even prior to the ***Charter***, that where constitutional rights are engaged, the Courts may issue ***mandamus*** to the exercise of the highest order of discretion, namely royal ***fiat***.

    - ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC)
    - ***Canada (Prime Minister) v. Khadr***, [2010] 1 S.C.R. 44

wherein the Court ruled @ pp. 545-6:

> All executive powers, whether they derive from statute, Common Law or prerogative, must be adapted to conform with constitutional imperatives.
>
> ...
>
> I need not consider which of these views should prevail in ordinary cases. For whatever discretion there may be in a non-constitutional matter, in a case like the present, the discretion must be exercised in conformity with the dictates of the Constitution, and the Crown's advisers must govern themselves accordingly. Any other course would violate the federal structure of the Constitution ... .

- ***Air Canada*** v. ***A.G.B.C.*** [1986] 2 S.C.R. 539 (SCC) which ruling has been echoed by the Supreme Court of Canada in the ***Reference re Secession of Quebec***.

- ***Reference re Secession of Quebec***, [1998] 2 S.C.R. 217, paragraphs 32, 44, 70-72.

11. It is further submitted that other relief for misfeasance public office is properly plead and remedies available.

- Roncarelli v. Duplessis, [1959] S.C.R. 121

- Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263, 2003 SCC 69

12. It is further submitted that relief by way of the tort of conspiracy is also properly plead and available as set out, **inter alia**, by the Supreme Court of Canada.

- Hunt v. Carey Canada Inc [1990[2 S.C.R. 959

13. It is lastly submitted that all other relief, including in monetary damages, without proof of **mala fides**, has been plead and available.

- Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28

14. It is further submitted that the Respondents intend to file a full written argument as permitted by the **Rules**, for the return date of the within application.

- **General Principles as Applied to Covid-19 Litigation**

15. It is further submitted that jurisprudence, both in Canada and abroad, to the same issue set out in the within claim, clearly weighs against striking this claim, whether in whole or in part.

16. Thus, the United States Supreme Court, struck, as unconstitutional measures against bearing church gatherings on constitutional provisions indistinguishable from s.2 of the Canadian ***Charter***.

- 592 U. S. ____ (2020)

17. Recently, the Indian Supreme Court struck as unconstitutional, the Covid-vaccine measures as unconstitutional for offending a provision of their constitution protecting bodily integrity, indistinguishable from s.7 of the Canadian ***Charter***:

- Jacob Puliyel Vs. Union of India & Ors.

Wherein, it has already been established, in Canadian jurisprudence that any medical treatment without the informed, voluntary, consent violates s.7 of the ***Charter*** and not saved by s.1:

> ***- Fleming v. Reid (1991), 48 O.A.C. 46 (CA)***
>
> ***- Carter v. Canada (Attorney General), 2015 SCC 5, [2015[1 S.C.R. 331***

Wherein, the Supreme Court of Canada, in ***Carter*** stated:

> [67] The law has long protected patient autonomy in medical decision-making. In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also R. v. Parker (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in Fleming v. Reid (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., Ciarlariello v. Schacter, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; Malette v. Shulman (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and Nancy B. v. Hôtel-Dieu de Québec (1992), 1992 CanLII 8511 (QC CS), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).

Moreover, the Indian Supreme Court, ruled, such their equality provision, indistinguishable from s.15 of the ***Charter***, that, based on the scientific evidence, drawing a distinction on discriminating as between "vaccinated" and "unvaccinated" individuals were unconstitutional measures because the vaccinated could equally transmit and receive the Covid-19 virus. In fact, this Indian Supreme Court decision heavily relies on jurisprudence from other common-law jurisdictions including the USA, Australia and New Zealand.

18. In Ontario, attempts at moving to strike applications, ***in limine***, challenging the Covid-measures, have been dismissed.

- Sgt. Julie Evans et al. v. AG Ontario et al.

- M.A. v. De Villa, 2021 ONSC 3828

19. The Ontario Court has also recently ruled that these issues of Covid-measures are not to be dealt with on a perfumatory matter, assuming and adopting the bald-stated positions of public health officials, but to be dealt with, like any other case, on the available evidence and material bearing on the issue(s) before the Court.

- J.N. v. C.G., 2022 ONSC 1198

20. It is further submitted that the B.C. Supreme Court recently dismissed a motion to strike B.C's Covid-measures, **albeit** in standing, pointing out the complexity of the issues that the Covid-measures present.

- Canadian Society for the Advancement of Science in Public Policy v. Henry, 2022 BCSC 724

21. Other jurisdictions in Europe, and the United States of America, have also struck down Covid-measures as unconstitutional.

- Notice of Civil Claim

- **Complaints that a notice of civil claim is too extensive, complex, and prolix**

22. It is lastly submitted that the Defendants assertions that the notice of civil claim is too extensive, complex, and prolix, and therefore should be wholly struck, without prejudice is, with respect, a ludicrous submission because:

(a) the Supreme Court of Canada in ***Hunt v. Carey*** has already ruled that complexity or novelty is **not** a basis to strike a claim;

(b) the extent and complexity of the claim is appropriately proportionate to the extent and complexity of the issues at hand - the purported global pandemic, these scientific/medical bases or non-basis of the measures, it's history, and the constitutional violations imposed in Canada and abroad.

The facts in the Notice of Civil Claim are both appropriately and necessarily plead in order to support the relief sought by the Plaintiff, which action is the Plaintiffs' constitutional right to bring.

23. The facts plead, for the purpose of this motion, must be taken as proven. As proven, the facts more than ground a claim that cannot and should not be struck.

PART III: ORDER SOUGHT

24. The Respondents (Plaintiffs) request:

(a) That the Applicants'(Defendants') motion to strike be dismissed;
(b) Costs of this motion; and
(c) Such further and other relief as this Honourable Court may grant,

All of which is respectfully submitted

Date: May 20th , 2022

Signature of
[ ] plaintiff [x]lawyer for plaintiff(s)

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TAB 4

No. VLC-S-S217586
Vancouver Registry

In the Supreme Court of British Columbia

BETWEEN:

Action4Canada, Kimberly **Woolman**, The Estate of Jaqueline **Woolman**, Linda **Morken**, Gary **Morken**, Jane **Doe #1**, Brian **Edgar**, Amy **Muranetz**, Jane **Doe #2**, Ilona **Zink**, Federico **Fuoco**, **Fire Productions Limited**, **F2 Productions Incorporated**, Valerie Ann **Foley**, Pastor Randy **Beatty**, Michael **Martinz**, Makhan S. **Parhar, North Delta Real Hot Yoga Limited,** Melissa Anne **Neubauer,** Jane **Doe #3**

Plaintiffs

-and-

Her Majesty the Queen in right British Columbia, Prime Minister **Justin Trudeau,** Chief Public Health Officer **Theresa Tam**, Dr. Bonnie **Henry**, Premier John **Horgan**, Adrian **Dix**, Minister of Health, Jennifer **Whiteside**, Minister of Education, Mable **Elmore**, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike **Farnworth**, Minister of Public Safety and Solicitor General
British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar **Alghabra**, Minister of Transport, **Vancouver Island Health Authority**, **The Royal Canadian Mounted Police** (RCMP), and the **Attorney General of Canada,** Brittney **Sylvester,** Peter **Kwok, Providence Health Care, Canadian Broadcasting Corporation, TransLink (British Columbia)**

Defendants

BOOK OF AUTHORITIES

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INDEX

TAB

1. *A.G. Canada v. Inuit Tapirasat of Canada [1980] 2 S.C.R. 735*
2. *Nelles v. Ontario (1989) 60 DLR (4th) 609 (SCC)*
3. *Operation Dismantle Inc. v. The Queen [1985] 1 S.C.R. 441*
4. *Hunt v. Carey Canada Inc [1990] 2 S.C.R. 959*
5. *Dumont v. A.G. Canada [1990] 1 S.C.R. 279*
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19. *Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14*
20. *Thorson v. AG of Canada [1975] 1 SCR 138*
21. *Air Canada v. A.G.B.C. [1986] 2 S.C.R. 539 (SCC)*
22. *Canada (Prime Minister) v. Khadr, [2010] 1 S.C.R. 44It*
23. *Reference re Secession of Quebec, [1998] 2 S.C.R. 217*
24. *Roncarelli v. Duplessis, [1959] S.C.R. 121*
25. *Odhavji Estate v. Woodhouse [2003] 3 S.C.R. 263, 2003 SCC 69*

26. *Vancouver (City) v. Ward, 2010 SCC 27, [2010] 2 S.C.R. 28*
27. *592 U. S. ____ (2020)*
28. *Jacob Puliyel Vs. Union of India & Ors.*
29. *Sgt. Julie Evans v. AG Ontario*
30. *M.A. v. De Villa, 2021 ONSC 3828*
31. *Canadian Society for the Advancement of Science in Public Policy v. Henry, 2022 BCSC 724*
32. *J.N. v. C.G., 2022 ONSC 1198*
33. *Fleming v. Reid (1991), 48 O.A.C. 46 (CA)*
34. *Carter v. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331*

TAB 5

S-217586
Vancouver Registry

In the Supreme Court of British Columbia

(BEFORE THE HONOURABLE MR. JUSTICE A. ROSS)

Vancouver, B.C.
May 31, 2022

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JACQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL

BRITISH COLUMBIA FERRY SERVICES INC. (OPERATING AS BRITISH COLUMBIA FERRIES), OMAR ALGHABRA, MINISTER OF TRANSPORT, VANCOUVER ISLAND HEALTH AUTHORITY, THE ROYAL CANADIAN MOUNTED POLICE (RCMP), AND THE ATTORNEY GENERAL OF CANADA, BRITTNEY SYLVESTER, PETER KWOK, PROVIDENCE HEALTH CARE, CANADIAN BROADCASTING CORPORATION, TRANSLINK (BRITISH COLUMBIA)

DEFENDANTS

PROCEEDINGS IN CHAMBERS

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In the Supreme Court of British Columbia

(BEFORE THE HONOURABLE MR. JUSTICE A. ROSS)

Vancouver, B.C.
May 31, 2022

BETWEEN:

ACTION4CANADA, KIMBERLY WOOLMAN, THE ESTATE OF JACQUELINE WOOLMAN, LINDA MORKEN, GARY MORKEN, JANE DOE #1, BRIAN EDGAR, AMY MURANETZ, JANE DOE #2, ILONA ZINK, FEDERICO FUOCO, FIRE PRODUCTIONS LIMITED, F2 PRODUCTIONS INCORPORATED, VALERIE ANN FOLEY, PASTOR RANDY BEATTY, MICHAEL MARTINZ, MAKHAN S. PARHAR, NORTH DELTA REAL HOT YOGA LIMITED, MELISSA ANNE NEUBAUER, JANE DOE #3

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT BRITISH COLUMBIA, PRIME MINISTER JUSTIN TRUDEAU, CHIEF PUBLIC HEALTH OFFICER THERESA TAM, DR. BONNIE HENRY, PREMIER JOHN HORGAN, ADRIAN DIX, MINISTER OF HEALTH, JENNIFER WHITESIDE, MINISTER OF EDUCATION, MABLE ELMORE, PARLIAMENTARY SECRETARY FOR SENIORS' SERVICES AND LONG-TERM CARE, MIKE FARNWORTH, MINISTER OF PUBLIC SAFETY AND SOLICITOR GENERAL

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Counsel for the Federal Defendants:	**A. Gatti** **D. French**
Counsel for Island Health and Providence Health Care:	**T.J. Wedge** **L. Miller (video)**
Counsel for TransLink and Peter Kowk:	**T. Delaney** **J. Hamilton**
Counsel for B.C. Ferries:	**C. Bildfell**

INDEX

SUBMISSIONS FOR PROVINCIAL DEFENDANTS BY CNSL M. WITTEN: 3

SUBMISSIONS FOR FEDERAL DEFENDANTS BY CNSL A. GATTI: 29

SUBMISSIONS FOR ISLAND HEALTH AND PROVIDENCE HEALTH CARE BY CNSL T. WEDGE: 34

SUBMISSIONS FOR TRANSLINK AND PETER KWOK BY CNSL T. DELANEY: 39

SUBMISSIONS FOR B.C. FERRY SERVICES BY CNSL C. BILDFELL: 42

SUBMISSIONS FOR PLAINTIFFS BY CNSL R. GLATAI: 44

EXHIBITS

Nil

RULINGS

Judgment reserved 66

Vancouver, B.C.
May 31, 2022

(THIS TRANSCRIPT CONTAINS A LARGE NUMBER OF MISSED WORDS DUE TO THE QUALITY OF THE REMOTE AUDIO)

THE CLERK: In the Supreme Court of British Columbia, at Vancouver, this 31st day of May, 2022, calling the matter of Action4Canada et al versus Her Majesty the Queen [indiscernible] et al.

THE COURT: Thank you.

Could I have introductions, please?

CNSL M. WITTEN: Good morning, Justice Ross. It's Mark Witten. Witten is spelled W-i-t-t-e-n. I am here on behalf of the defendants, applicants on the strike application, Her Majesty the Queen, Dr. Bonnie Henry, Premier John Horgan, Adrian Dix, Jennifer Whiteside, Mike Farnworth and Mable Elmore.

THE COURT: Thank you, Mr. Witten.

CNSL A. GATTI: Good morning. My name is Andrea Gatti. This is Olivia French. We both use the pronouns she/her. We are here representing Canada, and that includes the RCMP and also the named elected officials and that would be Prime Minister Justin Trudeau, Chief Public Health Officer Teresa Tam, and the Minister of Transport Omar Alghabra.

THE COURT: Thank you.

CNSL T. WEDGE: Good morning, Mr. Justice. Wedge, W-e-d-g-e, initials T.J., and on Teams is my associated Laura Miller, counsel for Vancouver Island Health Authority, and for Providence Health Care, applicants today.

THE COURT: Thank you, Mr. Wedge.

CNSL T. DELANEY: Justice, Tim Delaney, D-e-l-a-n-e-y. With me is Justin Hamilton, H-a-m-i-l-t-o-n, and we are counsel for the defendant applicants TransLink and Peter Kwok.

THE COURT: Thank you, Mr. Delaney.

CNSL C. BILDFELL: Justice Ross, it's Connor Bildfell. That's B-i-l-d-f-e-l-l, first initial C. My pronouns are he and him. I'm here for B.C. Ferries.

THE COURT: Thank you, Mr. Bildfell.

CNSL R. GALATI: Is that it for the defendants, Justice Ross?

THE COURT: I see no-one else standing.

(VIDEOCONFERENCE COMMENCES)
(CNSL R. GALATI AT REMOTE LOCATION)

CNSL R. GALATI: Okay. My name is Rocco Galati, R-o-c-c-o, G-a-l-a-t-i. I appear on behalf of all the plaintiffs. And sitting around me at my conference table here are two of my juniors and my law clerk, in case I need some physical help with some of the material. So, if you hear rustling, it's them. They will not be participating. I will [indiscernible].
THE COURT: Thank you, Mr. Galati.
Mr. Witten, are you leading the charge?
CNSL M. WITTEN: Yes, Justice. I just received notice from Mr. Galati that there may be some sort of objection to the one affidavit that is in the materials. My suggestion would be that if Mr. Galati wants to make an admissibility objection, he simply do that in the course of his submissions, and then I can respond in reply, if necessary. I do believe he wanted that noted on the record at the outset.
Is that correct, Mr. Galati?
CNSL R. GALATI: That's correct. I'm in your hands, Justice Ross. I think it's a matter that should be quickly dealt with, as a preliminary matter, but if you wish to hear my friend out and then I'll address it in response. It's all the same to me, I'm sure. And I'm sure you're more than capable in parsing it, if you [indiscernible].
THE COURT: My wife tells me I'm very good at forgetting things so if you just -- Mr. Galati, why don't you flag for me where -- what tab you will be objecting to, so that --
CNSL R. GALATI: [Indiscernible] I believe it's Tab 19 of my friend's material?
THE COURT: Rebecca Hill Number 2?
CNSL R. GALATI: Yes, that's correct. Essentially all it is, is a better affidavit attaching [indiscernible] partial printouts of my client's website and the website of which my Executive Director and Founder, with other co-directors of the Constitutional [indiscernible]. I have two basic objections to it. One, I don't see how it's admissible or

relevant in a motion to strike.

Two, it's unfair to me 'cause it almost requires telepathy to know why it's there. I don't have a hint as to what my friends intend to do with this material.

THE COURT: Okay. Thank you for that. I will keep that in mind when submissions are made in relation to it, if submissions are made in relation to it.

CNSL R. GALATI: Thank you.

THE COURT: Mr. Witten?

CNSL M. WITTEN: Thank you, Justice.

SUBMISSIONS FOR PROVINCIAL DEFENDANTS BY CNSL M. WITTEN:

CNSL M. WITTEN: So, as I indicated, I will leading us off today. The majority of the allegations in the notice of civil claim, I think it's fair to say, are directed towards the group of provincial defendants. I anticipate being around an hour in my submissions. Then, after that, the other applicant defendants will speak to their strike applications. There's significant overlap between the applications and then Mr. Galati has agreed that he will simply respond to all of these applications, likely in the afternoon session. And he has filed a joint application response to all of the applications.

In my submissions I will be largely tracking the Province's notices of application, which can be found at Tab 4 of the first volume of the Application Record, and then I'll also take you through the Hill affidavit and also, the notice of civil claim of the plaintiffs, as well, in the course of my submissions. So, if you turn to paragraph 1 of the factual basis, you can see there that we've set out that this is a 391-page notice of civil claim that attempts to challenge the scientific and legal basis for the entirety of British Columbia and Canada, and the other defendants, various responses to the COVID-19 pandemic. And part one of the claim contains over 1,300 paragraphs and subparagraphs.

Paragraph 2 simply sets out the many defendants. I won't take you through that. But fundamentally our submission is that this claim is a prolix convoluted document that is replete with groundless accusations against public official, inflammatory language and it also contains numerous what can only be called conspiracy theories. The claim -- just to provide one example, the claim characterizes the COVID-19 pandemic as a false pandemic that was designed and implemented for improper and ulterior purposes, at the behest of the World Health Organization, controlled and directed by billionaire, corporate and organizational global oligarchs --

CNSL R. GALATI: [Indiscernible] --

THE COURT: Mr. Witten. Could I just get you to pause for a moment.

Mr. Galati?

CNSL R. GALATI: Yes, sir?

THE COURT: I'm not sure if it's your microphone that we're picking up, or somebody on MS Teams, but could I get you to mute your microphone while you're not speaking? I'm happy to have you unmute whenever you wish to say anything.

CNSL R. GALATI: I can say that as my wife refers to me most times, I [indiscernible] muted.

THE COURT: Okay. We seem to be *ad idem* on that, Mr. Galati.

CNSL R. GALATI: Yes, sir.

THE COURT: I'm sorry. Madam Registrar, I'm not sure where we're getting --

THE CLERK: [Indiscernible].

THE COURT: Oh, great. Thank you very much, Madam Registrar.

Sorry, Mr. Witten. I was getting some voices in and I understand that some of the participants were not muted.

CNSL M. WITTEN: Justice, if I could just have one moment? My -- a member of my staff has a document for me. If I could just have one moment?

THE COURT: Certainly.

CNSL M. WITTEN: So, I believe where I was ticking off was paragraph 4, I had just read, organizational and global oligarchs such as Bill Gates, in order to install a new world economic order. And that is a theme that runs throughout the notice of civil claim. So, what I'd like to do is take you briefly through a few basic pleadings principles. Then I'll go to the notice of civil claim, take a tour through that, and then I'll come back to the more substantive submissions on 9-5 and its various subsections.

In summary, our position is that the plaintiff's claim is deficient in form and substance. It is a scandalous, frivolous and vexatious pleading, as those terms are understood under Rule 9-5(1). It fails to meet the basic requirements for pleadings and it is an abuse of the court's process. And for these reasons, we say the claim should be struck under Rule 9-5(1), without leave to amend.

At paragraph 6 we have replicated some sections from the *Supreme Court Civil Rules* setting out some basic rules for pleadings. You'll be familiar with these. Rule 3-1 provides that a notice of civil claim must do the following:

> (a) set out a concise statement of the material facts giving rise to the claim;
> (c) set out a concise summary of the legal basis for the relief sought.

Rule 3-7 provides that pleadings must not contain evidence, and as you'll see, there are dozens of very lengthy quotes throughout the notice of civil claim from various commentators on COVID, as well as hundreds of footnotes. Sub 9, cannot plead conclusions of law and general damages and sub 14 must not also be pleaded. There is a range of dollars figures that are being claimed on behalf of the various plaintiffs.

Paragraphs 8 and 9 set out a couple of leading paragraphs that are oft sited in strike applications. The first is a classic citation from Homalco Indian Band [as read in]:

> The function of pleadings is to clearly define the issues of fact and law to be determined by the court. The plaintiff must state, for each cause of action, the material facts. Material facts are those facts necessary for the purpose of formulating the cause of action. The defendant then sees the case to be met and may respond to the plaintiff's allegations in such a way that the court will understand, from the pleadings, what issues of fact and law it

will be called upon to decide.

And in my submission the long, convoluted, speculative, conspiratorial narratives that are found in the notice of civil claim are in no sense a pleading of material facts that is required. And a very helpful paragraph that was recently provided by Justice Voith, the Court of Appeal, in the *Mercantile Office Systems* case, is replicated at paragraph 9. And there Justice Voith says [as read in]:

> None of a notice of civil claim, a response to civil claim and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances, in mandatory terms by the rules and the relevant authorities. Each requires the drafting party to concisely set out the material facts that give rise to the claim, or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

And again, I would say that the 400- page claim is replete with evidence and argument.

Turning over the page, paragraph 8, under the heading 'Application to Strike', simply sets out 9-5(1). We are relying on sub a, b, and d, as I believe the other applicants are. The claim discloses no reasonable claim or defence, unnecessary, scandalous, frivolous or vexatious. And sub (d), otherwise an abuse of the process of the court. And of course, the standard is the plain and obvious standard, the standard from the *Imperial Tobacco.*

So, with that -- with those principles in mind, I'd like to now turn to the claim itself, which is set out at Tab 1 of Volume 1 of the application record. And what I'm going to do is it's simply too large to go through in any detail, but I'm going to take you through the major headings and provide a little bit of summary. So, if you could turn to the claim at page 5, it's a section called 'The Parties'. And I should note that there is a notice of discontinuance in

respect of two plaintiffs, that we received just a couple of days ago. We've appended that at Tab 94, at the very back of Volume 3. I just note that.
But what is contained in --
CNSL R. GALATI: I'm sorry to interrupt you, but -- I normally don't. With respect to the two parties that have been discontinued, Justice Ross, there will be a fair discontinuance. Mr. Parhar has passed away, one of the plaintiffs. But I have [indiscernible] but I will be in short order.
I'm sorry for the interruption, Mr. Witten.
THE COURT: Thank you for that, Mr. Galati.
CNSL M. WITTEN: And so, in this section titled 'The Parties', this is essentially a running narrative of the individual plaintiff's experiences and encounters with various COVID measures, residential care facilities, hospitals, police officers, and it is full of evidence, quotations. And if anything, it resembles an affidavit. It's more in the nature of an affidavit and it's very extensive. That's the first eighty pages of the claim.
If you could turn to page 85, there's a section titled 'The Facts'. Sub (a), COVID-19 Timeline.
THE COURT: Just give me one sec, if you would, Mr. Witten?
CNSL M. WITTEN: So, page 85, 'The Facts'?
THE COURT: Yes.
CNSL M. WITTEN: And here, the first fact is that in 2000 Bill Gates steps down as Microsoft's CEO and creates the Gates Foundation and launches the global alliance for vaccines and immunization. And this fact section contains many, many allegations about Bill Gates, Bill Gates' funding of vaccine initiatives and research. And, also infused is another theme here. Paragraph 45 is Gain of Function Research. So, there's some unidentified scientists, in 2002, in paragraph 45, who are said to have engaged in gain of function. That's essentially genetic modification of natural viruses.
And so, this section weaves together Bill Gates' philanthropic efforts with gain of function research. And, it goes on for a number of pages.

And ultimately, this fact section ends with the emergence of COVID and the Bill and Melinda Gates' funding for COVID research. And I'll just take you to paragraph 155, under -- yeah, paragraph 155 on page 121, just for an example, just to give you a flavour of the content here. So, if you have paragraph 155 --

THE COURT: I'm there.

CNSL M. WITTEN: The plaintiffs state and the fact is that the illegal actions and decrees issues by the defendants and other public officials who are unnamed, were done in abuse and excess of their offices, knowingly to propagate a groundless and falsely declared pandemic and generate fear and confusion on the ground, not only with the citizens, but further and moreover with enforcement officials who are pursuing, detaining, ticketing for perfectly legal conduct because of the contradictory laws and conduct of these public officials, all the while their own personal conduct clearly manifests the knowledge that the pandemic is false, the measures phony, designed and implemented for improper and ulterior purposes, at the behest of the World Health Organization, controlled and directed by billionaire corporate and organizational global oligarchs.

And that leads us to the next section, also on page 122. C, ignoring and failing to address medical experts' evidence. This is a 40-page section that includes numerous lengthy quotations from various COVID skeptical scientists and commentators, on a very wide range of topics, everything from the efficacy of masks, ventilators, PCR testing, and even the impacts of the seasons on COVID morbidity. And so, just to give you a quick example, if you could turn the page, just over to page 128 and 129, you'll see an example of the -- there's, I think, four or five pages in a row of long quotations and citations to various doctors and commentators, and that's something that comes up again and again in this claim, the pleading of evidence.

If you turn to page 160, it's the next major section of the claim. This section is titled, 'The Science and Medicine of COVID-19'.

THE COURT: Page 160?

Submissions for Provincial Defendants by Cnsl M. Witten

CNSL M. WITTEN: Page 160. This is a 20-page section. It's, in many respects, quite similar to the previous one, lengthy quotes and footnotes from COVID skeptics or COVID-19 measure skeptics, downplaying the seriousness of the virus, criticizing the measures or saying that they are unscientific. That's the flavour of this section.

Let's skep over to -- in the interest of time, page 188, Section F. And so, Section F is titled 'Global Political Economic Agenda Behind Unwarranted Measures'. And so, it starts off at paragraph 207. The plaintiff say that the fact is that the World Health Organization is not, nor ever has been an objective, independent medical body, but is riddled with overreaching socioeconomic and political dictates of its funders who inexplicably, over and above the nation states who fund it, is heavily funded and directed through its WHO Foundation and GAVI, by international billionaire oligarchs and oligarch organizations such as Bill Gates, GAVI, The World Health Economic Forum. I won't go through, but there's much more along a similar line.

I'll ask you to turn next to paragraph 208, which is just a few pages later, at page 194. So, continuing in this vein, in paragraph 208, the plaintiffs state [as read in]:

> The fact is that the nonmedical aims and objectives to declare the pandemic where something is not beyond one of many annual season viral respiratory illnesses, was to, inter alia, effect the following non-medical agendas by using COVID-19 as a cover and pretext, that it's to effect a massive gain, stock market bailout, needed because the banking system was poised to again collapse.

That's sub (a). I won't take you through sub (a) 1, 2 and 3, but I'll skip over to (b) on the next page [as read in]:

> The fact is that the pandemic pretense is there to establish a new normal of a new economic world order with a concurrent neutering of the democratic and judicial institutions, and an increase in dominance of

> the police state, massive and concentrated push for mandatory vaccines of every human on the planet Earth, with concurrent electronic surveillance by means of proposed vaccine chips, bracelets and immunity passports, contract tracing via cellphones, surveillance with the increased 5-G capacity, the elimination of cash currency and the installation of strictly digital currency to better effect surveillance, the near complete revamping of the educational system through virtual learning, closure of schools. The plaintiffs state and the fact is the benefactors of these goals and agendas are the global oligarchs who control and profit from vaccines, the technical infrastructure of information and communication such as Bill Gates, his companies and organizations, for [indiscernible] vaccination of profits with a global shift to virtual economy.

Paragraph 210 [as read in]:

> The plaintiffs state that the fact is that this agenda is well on its way to virtualizing, corporatizing and isolating even parliament and the courts to an embarrassing and debilitating degree.

Some evidence of this corruption of the court, sub (b) [as read in]:

> The Supreme Court of Canada announced virtual Zoom hearings of its appeals, its first virtual hearing on about June 10th, 2020.

This section goes on for many pages and if we go on to page 212, it goes from World Health Organization, Bill Gates, and the link is now made to Canadians, this title, paragraph -- sorry, paragraph 220 on page 212, the title is, 'The World Health Organization, Gates, Trudeau, Dr. Teresa Tam and Dr. Bonnie Henry'.

So, you can see there, in the first sentence, at paragraph 220, 220, the plaintiff state that [as read in]:

> The fact is that the connection and common agreement between Gates, Trudeau, Tam, in addition to their statements and actions in furthermore of that agreement, as outlined.

And there's various citations as evidence of that. So, this section tries to draw the Canadian Public Health officials, like Dr. Bonnie Henry and Dr. Teresa Tam, into this global conspiracy.

If you turn to page 221 there's a very lengthy section on Dr. Bonnie Henry. It contains some -- it can only be characterized as wild and spurious allegations against her. If you turn to page 240, paragraph 293, now, that simply contains a quote that 82 percent of women --

THE COURT: Just give me on second, if would, Mr. Witten? Sorry. Page 240?

CNSL M. WITTEN: Carry on to paragraph 293. Paragraph 293 on page 244.

THE COURT: I'm there.

CNSL M. WITTEN: So, this is another theme that runs throughout the claim. Bonnie Henry was in Pakistan, working with the World Health Organization to [indiscernible] eradicate polio in 2000, and through this -- this, through a vaccination program without the informed consent of the recipients. And this, notwithstanding the fact that according to the World Health Organization every polio case, since 1979, has been the result of the polio vaccine itself and not naturally occurring. And I'm not going to get into that, but don't believe polio to have been eradicated. But more importantly, this allegation around international work is again picked up at paragraph 299, where it is said to be experimental medical treatment contrary to the Nuremberg Code, the Helsinki Declaration. It constitutes a crime against humanity under the *Criminal Code*. And then paragraph 300 also says that Dr. Bonnie Henry, by authorizing vaccines for children age twelve to seventeen, without the need for their parent's consent, sub (d) goes on to say that in the absence of informed consent, this is also medical experimentation and a crime against humanity, a violation of the *Criminal Code*, and also the *War Crime and Crimes Against Humanity Act*, and that's an allegation that's repeated

later in the claim more explicitly. To be clear, these are spurious, baseless allegations.
THE COURT: Please continue, Mr. Witten.
CNSL M. WITTEN: Yes. I will continue. I will skip over sub (g). It's just a brief section on consequences and violation of constitutional rights. The next major section is sub (h). It picks up at page 254 [as read in]:

> COVID-19 vaccine -- we do not get back to normal until we have a vaccine.

The section is --
THE COURT: Just give me one second, Mr. Witten. Thank you. Go ahead.
CNSL M. WITTEN: That was page 254. Excuse me.
THE COURT: I'm there.
CNSL M. WITTEN: [As read in]:

> We do not get back to normal until we have the vaccine.

This section canvasses a range of topics about vaccines, theories about vaccine dependency for society. It gets into topics like microchipping and total surveillance.
If you turn to paragraph 308, just a couple pages over, there is a section titled -- this is on page 259, paragraph 308.
THE COURT: Yes.
CNSL M. WITTEN: [As read in]:

> Microchipping, community passports, social contact, vaccines, surveillance and 5-G. The plaintiffs state that, and the fact is, this global vaccination scheme which is being propelled and pushed by the defendants is with the concurrent aim of total and absolute surveillance of the plaintiffs and all citizens.

There is a brief section on the media, pages 303 to 308, and then there is a summary that starts at page 309, so you're going to have to skip about forty pages ahead, in the claim. So, this is a summary, beginning at page 309 [as read in]:

> In summary, the plaintiffs state that the COVID-19 legislation, regulation, bylaws, etc., violate constitutional rights.

And then there's some examples [as read in]:

> Conduct of Justin Trudeau, the British Columbia Premier John Horgan, and other co-defendants constitute a dispensing of parliament under the pretense of royal prerogative, contrary to the plaintiff's constitutional rights to a parliament.

I'll get into this in the Legal Basis section, but I think this is -- this is what we would characterize as really an incomprehensive submission that's guised in constitutional and legal language. But there's really no way to respond to that using known doctrines of law.

Sub (b) and sub (c), over on the next page, allege various *Charter* violations, division of powers violations. So, there is certainly reference to legal doctrines and legal language there. But then sub (b) gets back into conspiracy. Sub (d), that the COVID pandemic was pre-planned and executed as a false pandemic, through the World Health Organization, by billionaire corporate organizational oligarchs. I believe I've taken you through those allegations already. Various aims such as *de facto* elimination of small businesses, concentration of power, and even sub (6), the neutering of the parliament and the courts is all wrapped up in this alleged global scheme.

So, that is -- that is part one. That's part one of the claim. Part two begins on page 312. And this section -- this is the relief sought section. It seeks over two hundred orders, I believe, if you include all of the subparagraphs. And what these orders seek is declarations endorsing the various theories that have been advance in part one, declaring *Charter* breaches or that there's no emergency, and also matters of science, of policy, declarations, masks don't work, or PCR testing is false, declarations that the measures are causing more harm than good. It goes on through seeking mandamus orders, prohibition orders, hundreds of thousands of dollars for the plaintiffs. There is a truly enormous range of declarations that are sought and the section is very repetitive, very confusing to make your way through it, and really unwieldly as a legal document.

The legal basis starts at page 256 and it's quite similar to part two.

THE COURT: Page 256?

CNSL M. WITTEN: Three hundred and fifty-six, Justice Ross.

THE COURT: Thank you.

CNSL M. WITTEN: Page 356 is the legal basis section, which continues on to page 391. It seeks a wide variety of declarations again, some relating to legal concepts like *Charter* breaches, others seeking endorsement of the theories, such as the global conspiracy or that various measures are unscientific or don't work. And I think there's really only one other paragraph that I'd like to take you to. It picks up on the theme, the allegations against Dr. Bonnie Henry. This is actually back in part two, paragraph 293. Flip back to paragraph 293, which is on page 319. I'm actually not going to read this aloud. I'm going to let -- I'm just going to let you read this paragraph, paragraph 293.

THE COURT: I've read it.

CNSL M. WITTEN: Thank you.

So, that concludes the tour of the notice of civil claim. And so, I'd like to turn back into the Province's notice of application, which was at Tab 4 of Volume 1. So, I'll pick up with Rule 9-5(1)(a). This is our submission, that the notice of civil claim discloses no reasonable claim. The first few paragraphs here, we deal specifically with allegations that are simply non-justiciable, that are allegations of violations of the *Criminal Code* or doctrines unknown to law, or international law that simply can't be adjudicated in a domestic court. And so, I will deal first with that set of allegations, which are, again, sprinkled throughout the 400-page claim.

So, picking up at paragraph 11, we say [as read in]:

> The claim is premised upon non-justiciable questions and relies heavily upon international treaties, *Criminal Code* provisions and unknown causes of action that are simply incapable of disclosing a reasonable cause of action.

Paragraph 12 sets out some examples [as read in]:

> Declarations pertaining to questions of science, public health and conspiracy theories that are simply not justiciable --

-- are the type of allegations that I'm concerned with here, and these are set out at sub (a) through (e). A number of examples.

So, sub (a) [as read in]:

> A declaration that the science and preponderance of the scientific world community is of the consensus that A, masks are completely ineffective in avoiding or preventing transmission of an airborne respiratory virus.

It's simply not justiciable in a Canadian domestic court.

Sub (b) [as read in]:

> Declaration that the declared rationales and motives, execution of COVID measures by the World Health Organization are not related to a *bona fide*, nor an actual pandemic, but for other political and socioeconomic reasons, at the behest of the organizational oligarchs.

It's simply not justiciable, not something that this court can or should entertain. It doesn't pertain to a doctrine of law. And then sub (c) -- I won't go through all of these -- a declaration that administering medical treatment without informed consent constitutes experimental medical treatment. So, those are some of the non-justiciable allegations. I won't go through sub (d) and sub (e).

Paragraph 13 deals with another category of claim that simply cannot be adjudicated in a civil action, and these are the numerous allegations in respect of the *Criminal Code.* It's trite law that cannot pursue *Criminal Code* allegations in a civil action. We've cited one case there, the *Simon v. Canada* case that stands for that proposition.

So, there are again, a number of examples provided in the sub (a) through (f). I'm providing some examples of this with citations. Crimes against humanity under the *Criminal Code of Canada* -- that's an allegation that's made repeatedly, an allegation that there's medical experimentation the constitutes criminal acts pursuant to the *War Crime and Crimes Against Humanity Act*, and also that sub (d), extra suicides and drug overdoses tied to the COVID measures constitute criminal negligence causing death. None of these disclose a reasonable claim that can be adjudicated in the B.C. Supreme Court.

Paragraph 14 deals with yet another set of non-justiciable questions, and these are violations of international legal instruments, unwritten constitutional principles and causes of action that are unknown to the law. So, sub (a) provides an example. This is a reference to an international legal instrument. Vaccine mandates violate the *Universal Declaration of Bioethics and Human Rights,* the *Nuremberg Code, Professional Codes of Ethics,* and all *Provincial Health Acts.* So, in respect of the international legal instruments we have a dualist system in Canada. Unless international law is expressly implemented it is not actionable in a domestic court. So, we've cited one case for that proposition, which is the *Li v. British Columbia* case, the 2021 BCCA 256 cite in paragraph 14.

Sub (b) is another example of allegations in respect of international legal instruments. The *Helsinki Declaration of 1960*, and the *Nuremberg Code*. So, I won't spend any more time on that. Sub (c) is an allegation in respect of unwritten constitutional principles, so there's an allegation of the measures vesting in indefinite emergency power in various defendants. It constitutes a constitutional violation of dispensing with parliament under the pretence of royal prerogative, contrary to the *English Bill of Rights*, as read into our unwritten constitutional rights, through the preamble of the *Constitution Act 1867.* And as the Supreme Court of Canada recently held in the *Toronto v. Ontario* case, these are not independent constitutional doctrines. It cannot simply violate an unwritten constitutional principle and be entitled to a *Charter* remedy under s. 24 or 52. So, that's the *Toronto v. Ontario* case, paragraph 5. And the remaining examples are simply more examples of unknown causes of action or international legal instruments that are alleged to have been violated, and I will not take you through those specific examples.

Paragraphs 15 to 17 deal with what I would say are attempts to plead causes of action that are known to law -- *Charter* breaches of s. 7 or 15, division of powers breaches. And so, in respect of these allegations that are also sprinkled throughout the claim, we say the claim fails to set out material facts which, if true, support these claims. Now, I'm not saying that it's not possible to challenge various COVID measures. Our office is defending ten other constitutional challenges in respect of various COVID measures, some very broad claims, some more narrow. So, that's not my submission. I really have two points in respect of these allegations that do concern real actionable legal documents.

The first is that -- this is set out in paragraph 16 --

THE COURT: Yes.

CNSL M. WITTEN: The general rule that facts pleaded should be accepted as true for the purposes of a strike application does not apply in -- and this is a quote from the *Willow v. Chong* case [as read in]:

> A case like this where the notice of civil claim is replete with assumptions, speculation and in some instances outrageous allegations, the law is clear that allegations based on assumption and speculation need not be taken as true.

And in my submission that reasoning applies in this case. That's the *Willow v. Chong* case.

But more fundamentally and more importantly, in my submission, the reason why this very extensive pleading does not raise a reasonable claim is because the plaintiffs have failed to plead the concise statement of material facts that is necessary to support any complete cause of action. The *Charter* claims are inextricably bound up in a prolix argumentative, speculate narrative of grand conspiracy that is simply incapable of supporting a viable cause of action. And this is, again, a quote. This is a quote from the *Fowler* case, which I will take you through [as read in]:

> It is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from another, or conjecture and conspiracy from asserted facts.

And so this the one case that I will ask you to turn up. It's contained in Volume 2 of the application record, at ^ab 23. This is the *Fowler v. Canada* case. It's a decision of former Associate Chief Justice Cullen. We'll pick up at paragraph 51, on page 7 of nine. This is a claim in negligence, harassment and defamation. Picking up at paragraph 51:

> The present case in my view represents the circumstance in which no coherent cause of action can be discerned from the pleadings or responses to the demand for further and better particulars and, in any event, those documents are so prolix, over-broad, and reliant on irrelevant recitations of evidence or narrative as to be impossible to respond to in any meaningful way. In the result, I conclude that the plaintiff’s pleadings fall afoul of Rule 9-5(1)(a) and (b).

Paragraph 52:

> While it appears that the plaintiff is seeking to make claims of negligence, harassment and/or defamation, even assuming the tort of harassment, or the conduct said to constitute it can amount to a cause of action in British Columbia, as the applicant notes, the plaintiff has not pleaded material facts which would in any event establish any such cause of action whether framed as harassment or as the intentional infliction of mental suffering.

> As to the prospect of the defamation claim being successful, I agree with the applicant's submissions that the plaintiff's pleadings and responses simply do not reach the standard of particularity, clarity or care necessary to establish such a cause of action or even enable a reasonable response.
>
> The apparent claim in negligence is similarly compromised as it relies on the plaintiff's lengthy narrative-like response to demand for particulars in which it is impossible to separate the material from the immaterial, the fabric of one potential cause of action or claim from that of another, and the conjecture and opinion from the asserted fact.

The go on to say that the pleadings simply do not meet any standard which enables or requires them to be responded to, and the claim was struck. And so, I would say that that reasoning applies with full force in this claim, in respect of the 391 pages before you. So, those are my submissions on sub (a). We say it is plain and obvious that the claim, as pleaded, fails to disclose a reasonable cause of action.

So, I'll move on to 9-5(1)(d) [as read in]:

> The notice of civil claim is scandalous, frivolous and vexatious. Paragraph 19 we set out that a pleading is scandalous if it does not state the real issue in intelligible form and would require the parties to undertake useless expense to litigate matters that are relevant to the claim.

That's the *Gill v. Canada* case. [As read in]:

> A claim is also scandalous or embarrassing if it is prolix, includes relevant facts, argument or evidence such that it is nearly impossible for the defendant to reply to the pleading and no [indiscernible/quiet voice] to be met.
>
> Pleadings that are so prolix and confusing that it is difficult, if not impossible to understand, should be struck.

And that's again, the *Gill* case. And so, at paragraph 21 we set out that this is a scandalous pleading because it is prolix, confusing, nearly impossible to respond to. Some of this will now be quite familiar to you. It's a 391-page claim. It seeks over 200 declarations. There are extensive passages of completely irrelevant information the long timeline, starting with -- from 2000, in respect of Bill Gates and his funding efforts. Bill Gates is not a party to this action. The lengthy narrative about the global political agenda and the detailed 81-page running narrative of the plaintiff's interactions, in addition to the *Criminal Code* allegations, the raising of convoluted legal arguments. That's [indiscernible]. And then, of course, there are a wide range of allegations against individuals who are simply not a party to this claim -- Facebook, Amazon, Goggle, Yahoo, Bill Gates. They're all addressed. It's all entirely irrelevant and it all goes to this being a scandalous pleading under 9-5(1)(b).

Paragraph 22 we set out that it also fails to meet the basic requirements. It's over 1,500 paragraphs. It is by no means a concise statement of the factual or legal basis. Dozens of quotations from various commentators, extensive pleading of evidence and citations to websites, articles, policy documents. And also under sub (b) is this word 'frivolous', and there's a whole other body of case law about what is a frivolous pleading. I provide a couple principles at paragraph 23 [as read in]:

> A pleading is frivolous if it is without substance, is groundless, fanciful, trifles with the court or wastes time.

We say that this claim is a frivolous pleading because it promotes fanciful, ungrounded conspiracy theories about the origins of the COVID-19 pandemic, the efficacy of COVIC-19 measures, and the motivations, the personal conduct of the provincial defendants. I've provided four examples in the subsection (a) through (d), of this allegation, the plaintiffs state -- this is sub (a) [as read in]:

> The plaintiff state the fact is that the

> illegal actions and decrees issued by the defendants and other public officials were done in abuse and excess of their offices, knowingly to propagate a groundless and falsely [indiscernible] pandemic, for improper purposes at the behest of the organizational global oligarchs.

I won't go through the sub (b) and sub (c). It's more about the new world economic order, the objective of an absolute total surveillance state. It's groundless allegations that are frivolous, they trifle and they waste the court's time.

Rule 9-5(1)(b) and (d) are what are dealt with in the next section, and so we have lumped together the assertion that the claim is both vexatious and an abuse of process. That's under -- and there's actually a typo there. It should say Rule 9-5(1)(d), not sub (a).

THE COURT: B and D?

CNSL M. WITTEN: B and D. Yes. And so, the reason why we have lumped these two together is because, in the *Dixon v. Score* [phonetic] case, it was said that there is little distinction between a vexatious action and one that is an abuse of process. The two concepts have strikingly similar features. Abuse of process is -- this is paragraph 26 [as read in]:

> It is not limited to where a claim or an issue has already been decided in other litigation. It's not just about *res judicata*, issue estoppel. It is a flexible doctrine applied by the court to values fundamental to the court system.

And so, we've included a citation from the *CUPE* [phonetic] case from the Supreme Court of Canada where the court says [as read in]:

> Canadian courts have applied the doctrine of abuse of process to preclude re-litigation in circumstances where the strict requirements of issue estoppel are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality, and

> the integrity of the administration of justice. Vexatious actions include those brought for an improper purpose, including the harassment or oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights.

And this is a quote. This is based off the *Lang Mischner* [phonetic] case, which is oft cited in vexatious litigant cases [as read in]:

> Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious.

So those are some basic principles in respect of abuse of process and vexatiousness. And so, I'll move now to application, which begins at paragraph 28. And we say there is -- there are a multitude of bases upon which to conclude that the claim is an abuse of process. And these include [as read in]:

> The attempt to use the judicial process to adjudicate non-justiciable conspiracy theories, to seek declarations on non-justiciable questions, medical science, public health policy. These are improper purposes.
>
> But more concerning -- more concerning --

And this is at paragraph 29, we say that [as read in]:

> The claims bears the hallmarks of a vexatious and abusive claim that is intended to harass and oppress the parties.

As well as non-parties, I would add. And so, in this respect, we say the claim advances against the Provincial Health Officer, without factual fact or foundation, spurious allegations of crimes against humanity in relation to the implementation of COVID-19 measures and international public health work in the early 2000's. The claim also contains numerous irrelevant allegations about alleged conflicts of interest or hypocritical conduct relating to the private lives of both parties and non-parties. I'm not going to repeat those allegations in court, but they are all cites there for you, at paragraph 29 sub (d). There are broad, sweeping criminal allegations, which are not actionable in a domestic court. But of course, that fact is probably lost on the majority of the public. But, they are not actionable in a civil action and they are made against both named and unnamed government employees and officials. So, again, we've provided a number of citations, and I won't take you through them all, at paragraph 29 sub (c). And then, in sub (d) we also say that the claim contains numerous instances of inflammatory and inappropriate language to describe the actions of the defendants.

In sum, we say that this claim has been brought for an improper purpose. To come back to that language from the *Lang Mischner* case that I spoke of just before, the plaintiffs and their counsel must -- counsel must know, or they ought to know, that a 391-page claim, seeking over 200 declarations, around criminal conduct and the efficacy of public health measures -- this is a quote -- "cannot succeed and would lead to no possible good". And I just add here, parenthetically -- I'm not going to ask you to turn up any of these cases, but Tabs 78 to 94 are all cases involving plaintiff's counsel with -- many with similarly sprawling pleadings, all of which were struck out in approximately the last six to ten years. So, some guidance -- you may find some guidance in respect of this nature of pleading from those cases, which are at Tab 78 to 94.

Paragraph 32 we say that the claim is intended, at least in part, to intimidate and harass public officials and politicians, including the Provincial Health Officer, by advancing spurious public allegations of criminal conduct, conflicts of interest, ulterior motives. And again, I'll just add, parenthetically, one of those cases that I just referenced, at Tab 76 to 86 is the *Gill v. McIver* [phonetic] case, and that case was actually struck. That was a COVID case. That was case was struck under Ontario's anti-slap legislation. It was found to be a strategic lawsuit against public participation, essentially. It was brought for improper motives. So, that's the one of those set of cases, one case that also dealt with the COVID-19 pandemic.

And so, we say that this intention is apparent from the nature of the pleadings and what is alleged, but it is also further corroborated, in our submission -- this is still at paragraph 32 -- by the plaintiff Action4Canada's simultaneous campaign to encourage individuals to serve government officials and politicians with notices of liability for their actions in responding to the COVID-19 pandemic. And these are documents that, to a layperson, might look like a real legal document. Hundreds of them have been served in the past months and a number of these are set out -- and a number of these are contained in the affidavit of Rebecca Hill. And so, I'll just take you through now, the Hill affidavit, which is found at Tab 19 of Volume 1.

And so, if you have Tab 19, the affidavit of Rebecca Hill, we can start by turning to Exhibit A. This is a printout from the Action4Canada website, and I'm actually going to -- I'm going to take you through a couple of printouts in relation to the statement of claim before I actually get to these notices of liability, but I'm just going to go through this affidavit altogether, just in the interests of time. So, starting with page 2, you can see there [as read in]:

> Action4Canada is a grassroots movement reaching out to millions of Canadians, uniting our voices in opposition to the destructive policies tearing the fabric of this nation. God keep our land glorious and free. Action4 --

The part I'm looking for is in relation to the statement of claim. That's the second last paragraph [as read in]:

> Statement of Claim Filed: Legal action against the government officially commenced. Action4Canada has commenced legal action against the B.C. and federal government. We have retained Rocco Galati, a top constitutional lawyer, who's willing to take on the defence of our *Charter* rights and freedoms in response to the extreme and destructive emergency measures of COVID-19.

And then there's a 'Donte Now' button. And the evidence appears to suggest that there was fund raising efforts for this action. If you turn over to page 16 you can see this is in Exhibit D, at page 16. You can see that Action4Canada reached a hundred percent of the legal fund financial goal. They've announced the filing of the statement of claim. There's a press conference video with Mr. Galati. And again, the promotion of the full 391-page claim in a link.

And so, the point here, leading up to the notices of liability is submitted. There is a -- nothing has happened in court on this file, up until this day, but there has been promotion. It has been promoted online and there has also been this simultaneous campaign by Action4Canada to serve notices of liability.

And so, moving now, continuing through the Action4Canada website to the notices of liability, which I guess would be the second prong of their campaign against COVID-19 measures, you can see, at page 29 in Exhibit F, some information on the notice of liability. You can see there in the picture, notice of liability, serve your employer today. And there's a pdf. Of an employer vaccine notice of liability [as read in]:

> Employers, whether medical or not, are unlawfully practicing medicine --

This is the employers.

> -- by prescribing, recommending and/or using coercion to insist employees submit to the experimental medical treatment for COVID-19, namely being injected with one of the experimental gene therapies commonly referred

> to a vaccine. According to top constitutional lawyer Rocco Galati, both government and private businesses cannot impose mandatory vaccinations. Mandatory vaccination in all employment context would be unconstitutional and/or illegal, and/or unenforceable and there's a recommendation to notify your employer today that you will hold him personally liable for any financial injury and/or loss of your personal income and ability to provide food and shelter for your family if they choose to use coercion or discrimination against you, based on your decision not to participate in the COVID-19 experimental treatments.

And then there's some explanation on how to serve this notice of liability on your employer [as read in]:

> Take action. Print it out.

And if you turn over to the next page you can actually see that there's a recommendation to video-record the serving of an employer with this -- with this document, which to a layperson would look like a legal document. And we have included just a selection of the notices of liability that made their way to the Attorney General's office, by no means a comprehensive list of them. I think we've included something like eighty, but even that was simply a selection and it only goes up to November. But just to show you an example of this document, if you could turn to page 92 of Exhibit H. So, this is the vaccine notice of liability. You can see there, at the bottom, it says, 'Source Action4Canada.com'. That's the plaintiff. And they all contain that source identifier.

And so, you can see that this is served on a Clint Parker in the Coastal Fire Centre. And so there are dozens and dozens, hundreds of these that have simply been served on various public servants and if you look at the language of the document, to a layperson this would, of course, be intimidating, perhaps stressful [as read in]:

> You are unlawfully practicing medicine by prescribing, recommending, facilitating, advertising, mandating, incentivising and using coercion to insist employees submit to any vaccine including the experimental gene therapy injections for COVID-19, commonly referred to as a vaccine.

And if you turn over to page 96, it's the last page of this notice of liability. And there's a quote, paragraph 96. Mr. Galati -- that's the third last paragraph, and then the very last paragraph [as read in]:

> I hereby notify you that I will hold you personally liable for any financial injury and/or loss of my personal income and my ability to provide food and shelter for my family.

And it goes on. So, in my submission this is an intimidation tactic. It's clear to a person with legal training that there's no legal validity to the document, but it is oppressive, intimidating for civil servants to be receiving these documents. And of course, many of them are directed towards high-ranking public officials, Dr. Bonnie Henry or the Health Minister, but many of them were simply delivered as was recommended by Action4Canada to a supervisor, and often in person. And so, we say that corroborates that this action is being brought for an improper purpose, to intimidate and to harass.

And then moving on to paragraph 33, we also submit that this claim is intended, the notice of civil claim, to consolidate, publicize --

THE COURT: Just give me one second to get back there, Mr. Witten, if you would? Thank you.

CNSL M. WITTEN: Actually, if you're still in the Action4Canada, or sorry, the affidavit of Rebecca Hill, you could just turn to the very end, Exhibit K. It should be the last tab in that binder.

THE COURT: I'm there.

CNSL M. WITTEN: And so, this is -- Ms. Hill deposes in her affidavit that she went to Mr. Galati's Twitter account and simply printed it out and appended it to an affidavit. I understand Mr.

Submissions for Provincial Defendants by Cnsl M. Witten

Galati may take issue with that. And this affidavit is cited for this purpose in our application response. And so, we note here that Mr. Galati has 58,000 Twitter followers and that the notice of civil claim, if you turn over the next page, it was promoted, sent out to his 56,000 Twitter followers. Attached is the statement of claim, notice of civil liability filed in B.C. Supreme Court, covering a comprehensive challenge to COVID measures, currently working on an injunction on vaccine passports in B.C. And this simply goes to my point that this is a legal document. It has a court stamp on it. Nothing has happened in the last eight months. I mean, Mr. Galati -- in fairness to Mr. Galati, he's had notice that we're bringing strike applications. But this is the first time we've been in court. But there has been much going on with the claim in terms of its promotion, social media and the internet.

And so, we say that is at least part of the reason why this claim was filed and that is an improper purpose. Because, of course, that court stamp, to a layperson, does give a veneer of credibility to the allegations. It looks -- or, it is an official court document. And so, we say these are improper purposes to file and prosecute a civil action. We say there can be no question that the claim is an abuse of process and permitting this litigation to proceed would violate the principles of judicial economy, the integrity of the administration of justice. And we say that providing the plaintiffs with an opportunity to redraft their pleadings would only further this abuse of the court's process. And so, that is why we are not only asking for the claim to be struck in its entirety, with costs. We are asking for no leave to amend.

And subject to any questions, those are my submissions on behalf of the provincial defendants.

CNSL M. WITTEN: So, thank you, Mr. Witten. I may have questions for you after I hear from all the parties.

Ms. Gatti?

CNSL A. GATTI: Justice Ross, my thought is I might be able to cut some of these submissions if we could

take the morning break early. I hate to be repetitive if I don't have to be.
THE COURT: Very well. We'll take fifteen minutes.
CNSL A. GATTI: Thank you very much.

(VIDEOCONFERENCE CONCLUDES)

(PROCEEDINGS ADJOURNED)
(PROCEEDINGS RECONVENED)

(VIDEOCONFERENCE RECOMMENCES)

THE COURT: Ms. Gatti?
CNSL A. GATTI: Justice Ross, again, I am Andrea Gatti and I am here for the Federal Crown, and that does --
THE COURT: Excuse me, Ms. Gatti.
CNSL A. GATTI: Yes.
THE COURT: Could I have quiet in the gallery, please? Thank you.
CNSL A. GATTI: And I am, indeed, also representing the federal public officials who have been personally named in the claim.

SUBMISSIONS FOR FEDERAL DEFENDANTS BY CNSL A. GATTI:

CNSL A. GATTI: So, Canada does have a strike application before you in the material. I don't propose you turn to it, but for the sake of the record, I just inform you that that is at Tab 9 of the joint record.
THE COURT: Could I have quiet in the gallery, please? People who won't respect the court or the -- I'm continuing to hear somebody talk, while I'm admonishing people not to talk. They will be required to leave.
Ms. Gatti, if you would just grant us one moment?
CNSL A. GATTI: Of course.
THE COURT: Thank you. So, Tab 9?
CNSL A. GATTI: For the record, that's where it is. You don't need to turn to it. I won't be referring to it.
THE COURT: Thank you.
CNSL A. GATTI: Canada does adopt the submissions of my friend from British Columbia and I only have a handful of submissions to add to those. And as I

said prior to the break, I'll endeavour not to be repetitive.

In Canada's submission the pleadings should be struck for all the reasons identified by British Columbia, but my -- the focus of my submissions is actually on the question of whether and to what extent the pleadings could even be litigated on. And it's really more of a practical problem. I intend to be maybe fifteen or twenty minutes and I'll take you, I think, to one or two cases.

Before we begin, I should note that Canada has not filed a defence in this matter and Canada's position was that the claim was just not capable of anything more than a proforma response and Canada opted to wait to see what would happen with the strike application. So, in the event that the court doesn't strike the claim and the claim proceeds in some form, Canada would seek to have the claim parties, the causes of action and the material facts clarified significantly, and of course, the time for serving and filing Canada's defence would have to be noted and extended.

As my friend, I think, very capably demonstrated in his submissions, the claim is long and it contains a number of pleadings that are convoluted and very difficult to follow. It appears to contain numerous irrelevant pleadings and it describes a vast panorama of characters and events, and several lengthy narratives. And the precise problem with this degree of breadth and the scope of it is it would engage -- it would draw all of the parties and in this case, not just the defendants, but the plaintiffs, as well, into a highly unproductive and expansive style of litigation. My submissions in this may focus a bit on the term 'scandalous', as a quality of the proceedings. And of course, that's part of the grounds to strike under Rule 9-5. But scandalous as it's defined in the case law, which is, you know, a lesser used, I think, prong of that 9-5 test, doesn't necessarily mean what it does in the vernacular, this like sense of moral outrage. But, my friend took you to the *Fowler* case and Justice Cullen does refer to a definition of scandalous. I won't -- we don't have to go back to *Fowler* but I note for you that it's at paragraph 41.

And it says in paragraph 41 that [as read in]:

> Scandalous means so irrelevant that it would involve the parties in useless expense and would prejudice the trial of the action by involving the parties in a dispute, apart from the issues.

And so, what's notable about that idea and that definition is that if we take all the facts as true, as we may or may not be bound to on a motion to strike of this kind, and even if buried in these hundreds of pages, there are properly pleaded causes of action and meritorious prejudicial claims. The very structure and the form of the claim in the proceeding hides that. And then that way the pleadings are prejudicial to both sides. And so, in that respect, as I noted earlier, Canada's specific concern is quite practical and that this pleading just simply doesn't reach a standard of clarity and care that's necessary to carve a path through litigation, and even to enable, in Canada's submission, a reasonable response.

My friend has taken us on a tour, as he described the pleadings, but I just ask you to look at it and look through the table of contents. There is such a long list of narratives that this claim touches upon that it really is impossible for anyone, I expect, except those who have drafted it and were very familiar with it, to separate what's material from not material, one cause of action from the other. And my friend has noted that there seems to be, at least, a fair amount of advocacy and conjecture to sift through. And in that *Fowler* decision Justice Cullen does refer to another decision, which is the *Homalco Indian Band* v. *British Columbia.* That decision is at Tab 26 of the joint record. But I'd like to just read a quote from that, because I find it's very helpful in this case.

So, I'm reading from paragraph 8 and it's not long. It says [as read in]:

> It appears the material facts of some of the

> causes of action are separated in the pleading and can be found only with careful study and by meticulous attention to the many internal cross-references. As well, in some instances allegations against one defendant are contained in the same paragraphs as allegations against the other defendant. Moreover, particulars are sometimes mixed with material facts and often serve as particulars of more than one material fact. Again, the nature and effect of these particulars must be discerned, if that's possible, but only through torturous analysis of the document.

And what the court reasons in *Homalco*, and what Justice Cullen, I believe, discusses in *Fowler* is who's responsibility should that be? I mean, does that fall on the court and on the defendants to effectively sift through this material and determine what's meaningful and what is the subject of proper litigation? And in that respect, I mean, this could be the subject of discovery. With discovery, document discovery alone, on this type of pleading, would have such breadth and it would take so long to even determine what's relevant, that there's no way that that would be efficient or practical for anyone. So, in Canada's view, you know, if we assume that there are meaningful and important claims within this, we need a practical solution, and the first would be, in Canada's submission, to have this omnibus claim struck and if there are abuses of power at the hands of government, then those matters should be properly litigated and not hidden, effectively, in a thicket of weeds for us to all try to figure out. And that favours everyone, including the court, the defendants and the plaintiffs.

And so, the one case I'd like to take you to on that, and that's at Tab 32 of the joint record, and my friend did refer to this earlier. So, this is a B.C. Court of Appeal case entitled *Mercantile Office Systems*. It's from 2021, so it's recent.

THE COURT: Sorry. I'm at Tab 32 and I've got Moosa [phonetic].

CNSL A. GATTI: Hmm. Let's strike that out.

THE COURT: Tab 31.

CNSL A. GATTI: Thirty-one? Thank you.

So, this is a successful appeal of a chambers judge decision dismissing a motion to strike. And I admit readily that the pleading that underlies this litigation is different than the one in many way, or in many respects, in what we're looking at here, but I take you first to the summary of the reasons of the chambers judge. And that is at paragraph 8. And I read from the second sentence. She concluded that:

> She referred to a number of relevant authorities that identified the role or function of pleadings. She concluded that the application alleged "technical deficiency 'in the air'." By this she meant that the applicants had not identified specific paragraphs as nonresponsive, argumentative or containing evidence.

And so, clearly, that's distinguishable from what the parties are arguing here. But nevertheless:

> She was of the view that the application before her was "structure-driven," in that the applicants sought to have Warranty Life organize its pleadings differently. She considered that she was being asked to "micro-manage Warranty Life's pleading style".

And I take the court to this in the event that the court should find itself at a similar crossroad, which is that if the court is not sufficiently convinced of the substantive laws of the claim, then Canada would like to highlight that the claim can still be stuck, based on these structural formal laws. And the B.C. Court of Appeal in this decision goes through a lengthy analysis to justify that reasoning. And so, that begins at paragraph 9 and it moves through analysis of the formal requirements of a pleading and the rules and culminates at paragraph 20.

And I read from paragraph 20:

> I have addressed these various Rules and

> their accompanying forms at some length because they establish how comprehensive and prescriptive the requirements for specific categories of pleadings are. These formal and content-based requirements are neither anachronistic nor technical. Instead, they are necessary and serve to further the purposes of the *Rules*. Those purposes and their importance have been expressed on numerous occasions by both this Court and by trial judges.
>
> Pleadings are foundational. They guide the litigation process. This is true in relation to the discovery of documents, examinations for discovery, many interlocutory applications and the trial itself.

And so, the analysis goes on in light of the structural requirements under the rules and ultimately overturns the dismissal of the chambers judge. But what is important about the reasoning is the very high degree of emphasis it places on the formal requirements for pleadings, and emphasizing that they're not technicalities. In apply that here, it's of Canada's view that this claim has to be struck on that basis. It merely is impractical to continue or to ask the parties to engage in a litigation of this kind that would no doubt be costly, time-consuming, and involve us in a number of pretrial motions.

And I think, subject to your questions, I'm prepared to conclude my submissions.

THE COURT: Thank you, Mr. Gatti. I may have questions for you after I've heard from all counsel.

CNSL A. GATTI: Thank you.

THE COURT: Mr. Wedge?

CNAL T. WEDGE: Wedge, initials T.J., for the record, counsel for Island Health and Providence Health Care.

SUBMISSIONS FOR ISLAND HEALTH AND PROVIDENCE HEALTH CARE BY CNSL T. WEDGE:

CNAL T. WEDGE: Mr. Justice, I, too, will strive for brevity. The Health Authorities, as I'll term them, for ease in my submissions, do adopt the able submissions from my friends from Canada and British Columbia. But I will highlight a couple of items that are particular to the Health Authority defendants in this action, and applicants today. The Health Authority's notice of application is at Tab 13. I don't propose to take you there just yet. Indeed, I'm going to start at Tab 3, which is the Health Authority's response to civil claim. And we'll flip to page 2, and I'll get there in a moment.

As with the other applicants today, the Health Authorities do ask that this matter is struck in its entirety, pursuant to Rule 9-5. In addition to the long list of deficiencies with this notice of civil claim, highlighted by my friends, the Health Authorities observe from these submissions and from the notice of civil claim that the panoply of allegations are really focussed on the *Charter* effect of the legislation and orders brought in by government to combat the COVID-19 pandemic. Now, as you'll see at page 2 of the response to civil claim, Vancouver Island Health Authority is a regional health board that's a creature of statute, the Health Authority [indiscernible]. Providence Health Care is not a legal entity. It's actually the Providence Health Care Society and that's a society pursuant to the *Societies Act*, and it provides services in concert with the Provincial Health Services Authority and Vancouver Coastal Health Authority, which are health authorities.

They're more kin to Crown Agencies or Crown Corporations. They aren't government. They are not able to pass legislation and they're not able to issue the orders at issue before the court today. As such, to the extent that the plaintiff's issues are with the legislation and the constitutionality of the legislation, if one is able to glean it out of this pleading, that's not an issue which the Health Authorities should be involved in. They implement the legislation, as is set out at paragraph 8 on page 2 of the response to civil claim, as well as page 3, paragraph 15. Now, paragraph 15 also does deal with the statutory immunities in that legislation. We don't propose for you to consider that today, Mr. Justice, or address that. But the point is to

Submissions for Island Health and Providence Health Care by Cnsl T. Wedge

highlight that what the Health Authorities were doing and what appears, on our reading of the notice of civil claim, is implementing legislation as they're required to. So, to the extent that the issue is with the legislation and the constitutionality of that legislation, that's not an issue which the Health Authorities should be involved in.

Now, particularly in respect of the claim of Woolmans, Jacqueline Woolman and the Woolman Estate, which have been discontinued, as I understand, against all the defendants, as far as Vancouver Island Health Authority can tell, those were the only plaintiffs with particular claims against the Health -- the Island Health. I'm not going to take you there, but for your ease of reference, the claims against Island Health and the factual basis are found at pages 7 to 23 of the notice of civil claim. The claims for relief start at page 342. And those are the two areas where there's particularly -- a particular identification of the Health Authority and the plaintiffs with claims against them. In the case of Providence Health Care, it's pages 32 to 37, and the relief sought is at page 46. And there appears to be a bit of a drafting error, because in the factual basis the plaintiff with the claim against Province Health is John Doe, or Jane Doe Number 3, whereas in the relief sought section there -- it's Jane Doe Number 2, as far as we can tell. There is another Jane Doe number 3with additional claims that don't appear to be directed at either Health Authority.

So, simply put, the Health Authorities aren't government. They don't pass legislation. They didn't make the health orders. As the claims and allegations, as you'll see from the relief sought, appear to only be claims under the *Charter*, and in respect of Island Health it's measures are put in place to protect senior care homes from COVID, the masking requirements, visitation requirements, etc., and in respect of Providence Health Care in respect of masking requirements at St. Paul's Hospital. These are implemented pursuant to government order. The issue should be with the legislation and not the actions of the health authorities.

Now, I'm going to go briefly to the Health Authorities notice of application at Tab 13 and I'm going to move forward to page 6, paragraphs 22 and 23. So, in the submission of the Health Authorities, first the criterium prior to these two is the absence of a claim, others that were no reasonable cause of action, the Health Authorities submit that there is no reasonable cause of action against them on the basis that they aren't the ones passing the legislation and orders that appear to be at the heart of the issues before this court. But also, that this pleading is scandalous and embarrassing. In reading paragraphs 22 and 23, at 22 it's stated [as read in]:

> A pleading is scandalous if it does not state the real issue in an intelligible form and would require the parties to undertake useless expense to litigate matters that are relevant to the claim.

Now, to the extent that there could be a conceivable claim against either Health Authority, and being this expansive claim with multiple plaintiffs against multiple defendants, Island Health would be necessarily involved in many portions of an action that would have no relevance to any claim against them. A claim is also --

THE COURT: Mr. Wedge, I just want to understand your --

CNAL T. WEDGE: Yes?

THE COURT: -- what you've told me, and I know this is factual, but --

CNAL T. WEDGE: Yes?

THE COURT: -- am I to understand that it's the Woolman plaintiffs who have discontinued and they are the only two individuals with a claim against Vancouver Island Health?

CNAL T. WEDGE: The only discernible claim. Island Health is lumped in with -- as the defendants in other sections of this pleading. So, in the submission of Island Health, with the Woolman's claims gone, the only discernible cause -- stated factual basis of the claim against Island Health has been removed by the notice of discontinuance and in that regard, in respect of Island Health in

particular, we received confirmation of the court if it isn't -- if you are inclined not to strike the whole claim, Mr. Justice, that the claim is, indeed, [indiscernible] against Island Health by operation of this notice of discontinuance in the absence of factual basis against Island Health.
CNSL R. GALATI: [Indiscernible] interrupt, Your Honour, but in fairness to my friend, this continuance was a recent development and I haven't put the facts [indiscernible], but it may very well be that my friend, Mr. Wedge, is correct and over the lunch break I'll look at it closely, more closely, and may be in a position to agree with him with respect to his clients on the factual substrata, as against his clients.
CNAL T. WEDGE: Okay.
THE COURT: And are you, Mr. -- thank you for that, Mr. Galati. Are you referring to both Providence and Vancouver Island Health Authority?
CNSL R. GALATI: Yes. [Indiscernible]. Yes, if the factual substrata [indiscernible] then my friend would be correct. There is no set, once this continued, there's be no financial substrata, and therefore, no cause of action against his client.
THE COURT: Thank you for that, Mr. Galati. We can address that after lunch.
CNAL T. WEDGE: Thank you. And for clarity, from our perspective, our understanding is that the Woolman's case is only Island Health. It's separate from that of Providence Health Care.
THE COURT: I understand that, as well. Thank you, Mr. Wedge.
CNAL T. WEDGE: And then returning to page 6, paragraph 23, also a claim is scandalous and therefore embarrassing if it prolix and includes irrelevant facts, argument or evidence, such that it is nearly impossible for the defendants to reply to the pleadings, or know the case to ...
And part of the issue, as is highlighted about the issue with the discontinuance against Island Health, is given that the claims against the Health Authorities may have specific sections devoted to them, the manner in which the pleading is drafted, with so many areas where the allegations are lumped into as being against all defendants, including the entire legal basis, it's not possible for the Health Authorities, or any of

the other non-governmental parties, to tease out what particular claims might be against them.

So, in summary, Health Authorities seeks that this matter should be struck, A, because there's no actual reasonable claim against them because they're not the ones who instituted the legislation and the orders which appear to be the heart of this matter. But B, the pleading cannot be deciphered as between which defendants ought to be actual and proper parties and what claims are made against them, which is at the heart of the pleadings itself, the ability for a defendant to respond to a pleading and only being involved in an action where the claims are actually directed at them..

Subject to any questions, those are our submissions.

THE COURT: Thank you, Mr. Wedge. And I may have questions for you after I've heard from Mr. Galati.

CNAL T. WEDGE: Thank you, Mr. Justice.

THE COURT: Mr. Delaney?

CNSL T. DELANEY: Yes.

SUBMISSIONS FOR TRANSLINK AND PETER KWOK BY CNSL T. DELANEY:

CNSL T. DELANEY: Justice, my clients are TransLink and Mr. Peter Kwok. TransLink, strictly speaking, isn't a legal entity. It's more of a trade name. The actual legal entity that operates the public transportation system in the lower mainland is the South Coast British Columbia Transportation Authority. TransLink is more of a trade name.

The allegations against my client are basically that they required one of the plaintiffs, Foley, to wear a mask while on a Sky Train and she was wrongfully arrested for that reason. There's nothing actually at all in the legal basis where I can see that my clients are specifically identified. Instead, the allegations and legal basis are more generic type allegations that things like masks aren't effective and those sorts of allegations. And the relief sought is for breach of *Charter* rights and two million dollars.

So, I adopt and will not repeat the

Submissions for TransLink and Peter Kwok by Cnsl T. Delaney

submissions of my friends so far, but I'm going to make just one submission to you, Justice, and I won't take you to my notice of application, but it's at Tab 16, so you know where it is in the materials. But the one submission I do want to make is just to pick up on what Mr. Witten was saying with respect to, well, the usual rule is that pleadings must be taken as true. That doesn't apply where the allegations are based on assumption and speculation. And the one case I do wish to take you to, Justice, is at Tab 27. It's the *Codere* [phonetic] *v. Canada Attorney General* case. And you have it, Justice?

THE COURT: I do.

CNSL T. DELANEY: All right. So, this is a decision just from earlier this year and in this case the court took judicial notice of the fact that COVID was in existence and there'd been a pandemic and things of that sort. You'll see at paragraph 1, the plaintiff in that case, Mr. Codere, sought judicial review of the federal government's requirement that all its employees be vaccinated against COVID-19. He asserts this requirement is unreasonable because he believes the virus that causes the disease does not exist. And if you go to -- over the page, to page 3, paragraph 14, this was an application to strike [indiscernible] and in fact, the pleadings were struck. And at paragraph 14 the court notes [as read in]:

> The rule that allegations must be taken to be true does not extend to facts that are manifestly incapable of being proven.

Refers to the *Imperial Tobacco* case, and then also makes the same point that my friend, Mr. Witten made in the quote from *Operation Dismantle*, that it does not require that allegations based on assumptions and speculations be taken as true. And if you go over to paragraph 23, the court then -- this is -- undertakes a review of judicial notice and at paragraph 23 notes [as read in]:

> The facts may be notorious, even when the decision maker cannot ascertain them personally. For example, in *R. v. Colaja* [phonetic] [which was a Supreme Court of

> Canada decision], the Supreme Court of Canada took judicial notice of the war in Afghanistan, even though it's highly unlikely its members, like most Canadians, travelled there to witness the hostilities. The evidence of the war is nevertheless notorious because over the years trusted sources of information have repeated mentioned it. Thus, a reasonable person would not doubt that there was a war in a distant country.

And then, if you go to paragraph 43, you'll see that the court -- actually, it begins at paragraph 40, but onwards, the court reviews a number of what I'll call COVID cases and paragraph 43 notes [as read in]:

> Courts across the country have reached similar conclusions. In *Menzori [phonetic]* the Ontario Superior Court of Justice took judicial notice of the fact that COVID-19 is caused by the SARS COVID 2 communicable and highly contagious virus. The Alberta Court of Queen's Bench noted that since early 2020 Canadians have been living in the midst of a global pandemic caused by SARS COVID 2 virus. We take judicial notice of this fact which is so notorious and indisputable as not to require proof.

And then at paragraph 45 it says [as read in]:

> Thus, Canadian courts have taken judicial notice of the fact that COVID-19 is caused by the SARS virus. While these cases are not, strictly speaking, binding on me, they are persuasive authority.

And I submit, Justice, you can do the same here and take judicial notice of these notorious facts. And I submit you should.

And those are my submissions.

THE COURT: Sorry. Just with respect to that, you say that I can take judicial notice of the existence of the pandemic, COVID. Thus --

CNSL T. DELANEY: And that it --

THE COURT: Sorry, for interrupting.

CNSL T. DELANEY: Yeah.
THE COURT: But that that -- taking such judicial notice would be a countervailing force against the assumption that the assertions in the notice of civil claim are soon to be correct?
CNSL T. DELANEY: That's exactly my submission. Now, we still face the same problem that there's -- it's quite a large, long, and you couldn't do that for --
THE COURT: I understand that you're not focussed on that issue.
CNSL T. DELANEY: Yes.
THE COURT: But that's your -- you say that that's one route?
CNSL T. DELANEY: Yes.
THE COURT: All right.
CNSL T. DELANEY: Thank you.
THE COURT: Mr. Bildfell?
CNSL C. BILDFELL: Justice Ross, I intend to be the briefest of all. I don't know if there's a prize for that, but there we have it.

SUBMISSIONS FOR B.C. FERRY SERVICES BY CNSL C. BILDFELL:

CNSL C. BILDFELL: B.C. Ferries supports and adopts the position of the applicants in this matter and we consent to the order sought. And we have nothing further to add.
THE COURT: Thank you, Mr. Bildfell. I think you win the prize, although Mr. Galati may surprise us.
CNSL R. GALATI: If I [indiscernible].
THE COURT: Mr. Galati? So --
CNSL R. GALATI: Yes, sir.
THE COURT: We have until 12:30 and then you'll have the afternoon, but leaving some amount of time for response or reply by the applicants.
CNSL R. GALATI: It's been [indiscernible]. I used to have a satellite office out of Vancouver [indiscernible] with Mr. [indiscernible]. But I have to [indiscernible] my clock. It's now 3:00 o'clock in Toronto. So, could we break for lunch until that time, [indiscernible].
THE COURT: Three thirty our time until 5:00 o'clock your time. So, our time, 12:30 to 2:00 o'clock.
CNSL R. GALATI: Is the lunch?
THE COURT: Is the lunch.

CNSL R. GALATI: And it's 12:00 o'clock right now?
THE COURT: Yes.
CNSL R. GALATI: So, if we could break for lunch now, I would agree to that. I'd [indiscernible] quicker. If that's okay, with His Honour?
THE COURT: All right. Do you -- you want to take the lunch break now and then --
CNSL R. GALATI: Yes.
THE COURT: -- I'm open. Do you want to resume at 1:30, Mr. Galati?
CNSL R. GALATI: Sure. That would be [indiscernible] in my time, yes. And then we take -- how much do I have [indiscernible]. I think it would be an hour and half and that could leave my friends half an hour for reply. Is that -- is that acceptable?
THE COURT: That seems fair to me, Mr. Galati.
CNSL R. GALATI: Thank you.
THE COURT: All right. We'll take this lunch break now and resume at 1:30.

(VIDEOCONFERENCE CONCLUDES)

(PROCEEDINGS ADJOURNED FOR NOON RECESS)
(PROCEEDINGS RECONVENED)

(VIDEOCONFERENCE RECOMMENCES)

THE CLERK: We're back on the record.
THE COURT: Thank you.
Mr. Galati?
CNSL R. GALATI: Thank you, Justice Ross. For my purposes, all we'll need is [indiscernible] application record of the plaintiffs and the white bound book of authorities [indiscernible] 34 authorities [indiscernible]. If you have them with you?
THE COURT: Thank you. I will close up everything else.
CNSL R. GALATI: Thank you. And I'm going to apply the very short, brief, clear written argument at Tab 9 of the application record. And I'll be -- I'll be sticking along with that argument in my [indiscernible] presentation.
THE COURT: All right. So, I'll open up that binder, as well.
CNSL R. GALATI: Yes. Thank you. [Indiscernible]. It's a written argument. It's not the one that’s

in the response. It's an [indiscernible] page written argument. [Indiscernible]. Thank you. All right.

SUBMISSIONS FOR PLAINTIFFS BY CNSL R. GLATAI:

CNSL R. GALATI: So, [indiscernible], Justice Ross, is first, Canada [indiscernible] as respondents and then I will address some of the submissions, mostly of Mr. Witten, [indiscernible] this morning. But I don't want to continue to [indiscernible]responses to him in my initial presentation of the case. If that's acceptable to you?
THE COURT: Absolutely.
CNSL R. GALATI: Okay. So, the first thing I would like to, you know, in my written argument I canvassed the general principles on a motion to strike. Before I get there I do want to raise this issue of the applicants' affidavit. I'm now have a better understanding of [indiscernible] to the specific -- the specific submissions speaking to the [indiscernible]. So, I'm going to take Your Honour first to pages 1 to 5 of my written argument which are the general principles on a motion to strike. [Indiscernible] to proceedings against the Crown and cases against government [indiscernible], but virtually all my cases are met with motions to strike. They're just, fair enough. You know? [Indiscernible].

So, the fact that I am [indiscernible] where ten of my cases of the over 560 reported in the jurisprudence, so we have close to 600 cases recorded, federally and provincially, in three different province. The fact that my friends selectively choose [indiscernible] to strike is somewhat concerning to me along with the other [indiscernible] submissions my friend made [indiscernible].
THE COURT: Mr. Galati, sorry to interrupt you --
CNSL R. GALATI: Right.
THE COURT: -- but until you told me that I didn't know that.
CNSL R. GALATI: Okay.
THE COURT: I didn't understand from Mr. Witten that he'd included ten cases where your pleadings have been struck. I may have missed that.

CNSL R. GALATI: [Indiscernible].
THE COURT: Oh, all right.
CNSL A. GATTI: [Indiscernible] thousand of cases in the courts. But anyway, I'll come back to that issue later. But the only reason I'm making this point is that motions to strike in our system are common [indiscernible] day-to-day issues [indiscernible], especially against government [indiscernible]. We know what the general principles are that often lead [indiscernible], and so [indiscernible] principles [indiscernible] the Supreme Court of Canada [indiscernible]. And so, pages 1 to 5 of the [indiscernible] principles and at page 2 of my written argument my expert in [indiscernible] and [indiscernible] reminds us and states [as read in]:

> I am of the view that the age of civil procedure should not act as an obstacles to a just and [indiscernible] resolution of the case.

With all due respect to my friends, [indiscernible], but the main thrust of what I heard was unsubstantiated conspiracy theories, spurious, negligent conspiracy theories. This would be too much work to try. The pleadings are complex and [indiscernible]. Of course, they are complex and [indiscernible]. They deal with the COVID-19 measures in a global – in a global [indiscernible] pandemic [indiscernible] in any other subject matter since I’ve been a lawyer. This is not the case of the milk truck hitting the bicycle. This is a case on the COVID measures that are applied provincially, federally, [indiscernible] World Health Organization. All my friends may talk about conspiracy theories. I have not led conspiracy theories. I have not led conspiracy theories. I have led conspiracies.

And you know, when I was in front of the justice I saw many a case of complex conspiracy, [indiscernible] conspiracy charge of illicit drug distribution, for instance, of illicit drugs. The notion of a conspiracy in Canadian law as a criminal and civil dimension are recognized since the assassination of Julius Caesar. Conspiracies happen. Just because [indiscernible] a conspiracy, that doesn't mean it's a conspiracy theory, 'cause you don't want to deal with it. And that's what my friends are doing -- are suggesting. Mr. Galati is off his rocker. Look at the things he's saying. Mr. Galati, on behalf of his clients says yeah, but I'm pleading facts.

The WHO is funded by GAVI and Bill Gates, number one and two founders. That's irrefutable. The WHO says that. Prime Minister Trudeau gave a billion Canadian dollars to follow his private, profitable vaccine agenda. That's indisputable. You can find that in his budget. That's not denied by the Federal Government or Prime Minister Trudeau.

Dr. Teresa Tam, our Chief Medical Officer, sat on three WHO [indiscernible] as our Chief Medical Officer. Dr. Bonnie Henry worked for the WHO. Dr. Bonnie Henry was in Pakistan in the year 2000 administering Bill Gates' polio vaccines, and in Pakistan, India and Africa, 486,000 children were injured and killed as a result of that vaccine.

The Indian Bar Association, which is not a boatload of lunatics, has filed criminal charges against Bill Gates for that vaccine campaign that was administered in 200, with the participation of Dr. Bonnie Henry. Are these unsettling allegations? Yes. Are they comfortable? No. My answer to that and the [indiscernible] conspiracy is too bad. That doesn't mean they're conspiracy theories.

We had a [indiscernible] between the WHO, Bill Gates, the [indiscernible], our Prime Minister, our Chief Medical Officer in Ottawa, and our Chief Medical Officer in British Columbia. [Indiscernible] both their actions and their statements which you must also [indiscernible] a conspiracy theory [indiscernible].

So, I take -- I take offence that I'm [indiscernible] dismissed just because Mr. Witten and his comments think this is all silly, made up stuff. Deal with the facts as pleaded [indiscernible] and then let's discuss the motion to strike. And I'm sure [indiscernible] my statement of claim on behalf of my clients. It's a [indiscernible] but everybody [indiscernible]. The COVID-19 pandemic is not a simple clear issue.

[Indiscernible] cases in B.C. and elsewhere where the pleadings are being attacked [indiscernible]. So, you're damned if you, damned if you don't. Is this a [indiscernible] pleading? Of course not. [Indiscernible]. Is it so imperfect that it should be struck in whole or in part? Maybe in part. And I'll make submissions on that. But there's no way this pleading should be struck in whole.

And so, when my friends [indiscernible] civil procedure, we have to remember what Chief Justice Lamer from the Supreme Court of Canada said [indiscernible]. This is not [indiscernible], to which I can't respond. What is it -- what is my friend saying [indiscernible] conspiracy theory, that this is a vaccine [indiscernible]? I'm [indiscernible]. This is a vaccine [indiscernible]. Is this a pandemic? Maybe. I say it's a false pandemic with alternative motives and the facts are open. [Indiscernible] Mr. Witten talks about skeptics, that I led in evidence. These aren't skeptics. These are internationally renowned world experts in their field. When I take you to the case law, I'll show Your Honour why, in their opinions, and necessary material for this statement of claim.

So, at the end of the day, now [indiscernible] page 3 of my written argument. But just because something is complex or novel is not a basis to strike. In the *Imperial Tobacco* case is a big extract at page 4, which really [indiscernible] at paragraph 21, Chief Justice McLaughlin says [as read in]:

> The motion to strike is a tool that must be used with care.

And at the other paragraph [indiscernible]. The other appellate cases that I’ve extracted are [indiscernible] and that the statement of claim should not be struck just 'cause it's rather one sided [indiscernible]. Those cases are [indiscernible]. Your Honour, I'm not going to -- I'm not going to insult the court by taking you through the cases. You can look at them [indiscernible]. And then other cases [indiscernible]. And this is important, why the jurisprudence should not be disclosed at this stage of the proceeding, and that's [indiscernible].

And then lastly, in order to strike, the Ontario courts have said that [as read in]:

> The defendant must be [indiscernible] decide the case directly on point from the same jurisdiction [indiscernible]. But no such case exists in whole or in part.

And that's the [indiscernible]. Now, [indiscernible] my final point in my submission.

So, what you have is [indiscernible], Justice Ross is a claim that [indiscernible] history in emergence [indiscernible] the virus. Then, scientific fact [indiscernible] and it must be taken as proven. No-one in the world has actually isolated the virus. The only evidence of the virus is the so-called screening test by using the PCR screening machine. [Indiscernible] page 186 of my claim. The Portuguese Court of Appeal, the Austrian Court and the German Courts have filled out the PCR machine and expert evidence that [indiscernible] it produces a 96.5 percent false positive. British Columbia [indiscernible] PCR [indiscernible] t between 45 and 47 cycles. That's [indiscernible]. And Justice Ross, these cycles are not augmented. They are exponential. So, with each cycle [indiscernible].

Now, these are not conspiracy theories. These are [indiscernible] determinations on expert evidence. Now, are you here, or is this court here [indiscernible] to determine the science [indiscernible]? No, you're not. But you are here and I'll take you to the jurisprudence -- you are here to determine and protect citizen's constitutional rights where the measures don't take into scientific inputs and opinions. That's been determined.

So, the science and the medicine that's pled is not there to ask the B.C. Supreme Court to determine that the defendants are wrong and the [indiscernible]. It's just to say, look, the legislation, the decrees, the measures and the damage has grossly overreached to the point the constitutional rights have been [indiscernible] as pleaded. And so, that's the centre of [indiscernible]. I have [indiscernible] the history of the COVID virus, the [indiscernible] COVID virus, the history of the [indiscernible] of the pandemic, the science, the medicine, the politics and the legislation and decrees [indiscernible]. Why should the [indiscernible] make this unmanageably [indiscernible]? My God, I was involved in conspiracy [indiscernible], with boxes of evidence that [indiscernible].

One famous case in Toronto when I was working with the Department of Justice [indiscernible]. We're not suggesting every case necessitates that kind of energy and I'm not suggesting this would even come close to that. But, a hard case, a complicated case, a case that's too much work and a list of resources, according to the respondent Attorney General of Canada, is not a reason to strike.

I'm now going to take you to -- my friends took you through it, but on pages 5 to 81, [indiscernible] essential material facts [indiscernible] personal circumstances for appeal from constitutional infringements suffered by the person [indiscernible] Jane Doe -- Jane Doe [indiscernible]. [Indiscernible] Justice Ross, indiscernible].

THE COURT: I'm sorry. We're getting some talking in the background. It appears that somebody who's on the -- who is linked by phone, or by MS Teams, doesn't have their microphone muted and is speaking. I apologize, Mr. Galati.

CNSL R. GALATI: Okay.

THE COURT: Madam Registrar, can we mute that person? Thank you.

CNSL R. GALATI: And so [indiscernible]. So, what we have here, Your Honour, Justice Ross, is, the various plaintiffs are constitutionally challenging, not just provisions but executive actions and inactions with respect to the COVID measures, as [indiscernible] with respect to vaccines and coercive means to enforce vaccines, contrary to voluntary consent, masking, lockdowns, social distancing in gatherings and PCR tests. Those are the five things that the plaintiffs take constitutional issue with.

And so, they declare the COVID-19 pandemic cannot be seen in isolation in the Province of British Columbia, from the federal jurisdiction of Canada, cannot be seen in isolation in Canada [indiscernible] of the pandemic, and to the advisory and the mandates put out by the World Health Organization, a UN Agency funded by a [indiscernible] private citizen, Mr. Gates and [indiscernible] GAVI. Now, that's a [indiscernible]. Now, I don't care about [indiscernible] business. They can do that. But then to say that it's a spurious conspiracy theory to say, well, Mr. [indiscernible], who doesn't have [indiscernible] of instruction as a scientist, doctor, or vaccinologist, he has no expertise whatsoever, is funding the [indiscernible] agency that makes [indiscernible]. And that's a fact.

And then we have the other connections where I, on behalf of my clients, be able to prove, on a balance of probability, a civil conspiracy, actionable [indiscernible]. Maybe not. That doesn't mean you get to strike it [indiscernible]. It's not a [indiscernible]. I have pled the actions and statements of the [indiscernible].
So, when Prime Minister Trudeau and Premier Horgan [indiscernible] from Bill Gates' quote [as read in]:

> There is no going back to normal without the vaccines.

So, am I imagining that? No. The Prime Minister and the Premier are saying that and they're giving [indiscernible]. It [indiscernible].
So, [indiscernible] doesn't examine the *Charter* infringements inflicted upon [indiscernible].

Now, let's apply the general principles in the COVID-19 context. As I've said to Your Honour [indiscernible] vaccine mandates, masking, Indiscernible] PCR testing. So, what I want to now do is take you to the [indiscernible] --

THE COURT: I think, Mr. Galati, you have -- You indicated there were five things and when I wrote it down it was four. You've just repeated those.

CNSL R. GALATI: I understand.

THE COURT: You're just repeated them as four.

CNSL R. GALATI: Sure.

THE COURT: And I just want to make sure I have everything that you're saying.

CNSL R. GALATI: Okay. [Indiscernible] I slipped on a banana. The first one is vaccines and [indiscernible] measures.

THE COURT: Yeah.

CNSL R. GALATI: For vaccines. That's one. The second is masking.

THE COURT: Yes.

CNSL R. GALATI: The third is lockdowns, lockdowns, business lockdowns [indiscernible]. The third is social distancing and [indiscernible]. And the other is the PCR testing.

Now, the various plaintiffs have personal knowledge, personal interaction with all five [indiscernible] take issue with. So, [indiscernible] on the transit system viciously assaulted my client 'cause she wasn't wearing a mask, 'cause she had a perfectly legitimate and reasonable exemption, when she gets assaulted, [indiscernible] from a transit police officer. So, that's [indiscernible], direct Your Honour to [indiscernible] argument on whether or not this relief is available. Well, paragraph 2 [indiscernible] and I say that that [indiscernible] threats of the constitutional language [indiscernible]. And often people who are not versed in constitutional law, think of judicial [indiscernible] as a procedural avenue of an application for judicial review. Judicial review is simply [indiscernible] a review of government legislation and action that will [indiscernible]. It's still judicial review.

Paragraph 6 I state [indiscernible] asking the Supreme Court of Canada stating that the [indiscernible]. I think the [indiscernible]. That case was abandoned [indiscernible]. And I extract that at paragraph 7. Then the Supreme Court of Canada also reiterated [indiscernible] constitutionality of legislation has always been a [indiscernible]. There's no such thing as an [indiscernible] question where constitutional [indiscernible] are being claimed. No such thing.

But over the page, with respect to the [indiscernible] remedies [indiscernible] Supreme Court of Canada. The first page is the [indiscernible] *v. Attorney General of British*

Columbia case, a case that [indiscernible] the Supreme Court of Canada [indiscernible] to issue [indiscernible] taxes paid by Air Canada under the provisions of [indiscernible] constitution. In *Canada v. [indiscernible],* if you recall that case, CESIS agents [indiscernible] and the Supreme Court of Canada just issued [indiscernible] under s. 7 of the *Charter.*

Now, the idea of [indiscernible]. And then [indiscernible] in 2003, the Supreme Court of Canada [indiscernible]. Well, I say [indiscernible] to my friends, although there's a technical objection to it, is that there we are really seeking damages from a *Charter* infringement. The *City of Vancouver* v. *indiscernible]* case makes it very clear that those damages belong [indiscernible] Her Majesty the Queen. [Indiscernible] infringed the constitution. [Indiscernible] what that case really sets out is that [indiscernible] need not be [indiscernible]. That's very clear, that the Supreme Court of Canada and the B.C. Court of Appeal in *Hunt v. Airy* [phonetic]. I'm sorry [indiscernible].

So that evidence and the issue of applying these general principles to COVID litigation. [Indiscernible] the areas that my clients are attacking. [Indiscernible] cases where the same objections and challenges have actually succeeded. And the first one is *United States Supreme Court* case with respect to church closings [indiscernible] Justice Ross. This is a case -- there were two cases, actually, [indiscernible] the same thing, where Governor Cuomo -- Governor Cuomo of New York closed down the churches. And the judge [indiscernible]. And I just want to read in two passages from that case. The first is [indiscernible] of the [indiscernible] decision. At the bottom of the page, the Court states [indiscernible] [as read in]:

> Members of this court are not [indiscernible] experts [indiscernible]. But even in a pandemic the constitution will not be [indiscernible].

THE COURT: Sorry. I'm at -- sorry, Mr. Galati. I'm

trying to find -- are you in the *Gorsich* [phonetic] *decision?*
CNSL R. GALATI: No, I'm in the [indiscernible] at page 5.
THE COURT: Okay. Thank you.
CNSL R. GALATI: It's the third page and it's got [indiscernible]. You see it? It's the last paragraph.
THE COURT: I see it.
CNSL R. GALATI: Right. Then I'm going to the *Gorsich* decision [indiscernible].
THE COURT: Sorry. Which tab am I at now?
CNSL R. GALATI: [Indiscernible].
THE COURT: Right.
CNSL R. GALATI: [Indiscernible] page 2 of his decision, which is a page in.
THE COURT: I have the *Gorish* [phonetic].
CNSL R. GALATI: Okay. So, page 2, at the top of the page, he states [as read in]:

> At the same time [indiscernible] passing restrictions on certain businesses he consider "essential". And it turns out that businesses together are considered essential [indiscernible] lawyers and insurance agents are all essential, too.

And then Justice [indiscernible] has a very harsh comment there and he says [indiscernible] at page, at the end of this decision, which is at page 7 of this decision we have this conclusion [as read in]:

> It is time, past time to make way for all the pandemic versus [indiscernible] challenges. It is [indiscernible] in which the constitution formulates [indiscernible] churches, playgrounds and malls.

[Indiscernible] of the Supreme Court is very simple. Yeah, you can take whatever measures you want, but they better be constitutional [indiscernible].

The other [indiscernible] that actually digs less deeply into the evidence is the very recent decision of the Indiana Supreme Court, which is [indiscernible]. [Indiscernible]. And at Tab 28 you have the recent [indiscernible] Supreme Court decision that very clearly held two things. Number one, mandatory vaccines or coercive measures to try to force people to take vaccines. [Indiscernible] which is indistinguishable from s. 7 [indiscernible] Supreme Court after this case.

Secondly, what the Indian Supreme Court also decided, based on the scientific evidence that [indiscernible] was because vaccinated people can equally transmit and receive the COVID virus, notwithstanding their vaccination, but to take measures that discriminate as between the vaccinated and non-vaccinated [indiscernible] constitution. [Indiscernible] s. 7 of our *Charter*.

So, [indiscernible] is, yeah, you can take measures but you can't force everybody to get a vaccine, nor to enforce the recent measures to do so [indiscernible] health workers, as well as basic [indiscernible]. If they're not vaccinated they can't access certain things, like [indiscernible]. [Indiscernible] constitutional provisions that are indistinguishable from ours. [Indiscernible].

THE COURT: Mr. Galati, do you have -- sorry for interrupting. On the *Indiana Supreme Court* case, do you have paragraphs that I should reference, or --

CNSL R. GALATI: For sure. I’m going to read you some [Indiscernible] if you want to note them down, paragraphs 23, 41, 54, 57, and their conclusions are neatly packaged at paragraphs 89 to the end. I’ll take you to paragraph 23 of that decision. They start their analysis by stating [as read in]:

> There is no doubt That this court has held that [indiscernible] judgment, but whatever decision of the authority is in regard to [indiscernible] are taken based on this other case.

But then they say [as read in]:

> However, this does not mean the courts have to [indiscernible], keeping in mind all the relevant facts [indiscernible].
> They say [indiscernible]for their basic

> motions of fairness, equality and constitutional [indiscernible].

At paragraph 83 the Canadian Supreme Court continues, and so, paragraph 41, the court states at 41 [as read in]:

> The court may [indiscernible] it is necessary to consider whether the right to privacy of individuals [indiscernible] public health. [Indiscernible]. It is true that the [indiscernible] individual. [Indiscernible] by nature of the individual's rights to privacy [indiscernible]. [Indiscernible]. [Indiscernible] right of individuals to choose [indiscernible]. [Indiscernible] based on access to federal [indiscernible] and federal resources for unvaccinated persons [indiscernible] vaccination and [indiscernible]. [Indiscernible].

At paragraph 54 of the decision the court states [as read in]:

> In any event [indiscernible] we're not here to be scientific or medical [indiscernible].

But then they say at paragraph 54 [indiscernible] has taken notes -- has taken notes of scientific and medical [indiscernible] and research findings in putting together its policy [indiscernible] vaccination of the [indiscernible] population. Now, my clients [indiscernible] world renowned, internationally recognized experts saying to the defendants [indiscernible]. Hold your horses. What you're doing is not right. And so, that whole [indiscernible] to the defendants' constitutional duty to consult. And this is a document [indiscernible] s. 7 of the [indiscernible] policy the government is under a constitutional duty to consult above and beyond [indiscernible] to consult. That's what the Indian Supreme Court is saying here. And that's why the pleading of the fact that so many international experts [indiscernible] conspiracy theories and purveyors of misinformation [indiscernible].

Lastly, at paragraph 57 of that decision we have the court saying [as read in]:

> [Indiscernible] with respect to [indiscernible]. All vaccinated people [indiscernible].

The facts [indiscernible] pleaded in that case, even though they filed in August. These facts were [indiscernible]. [Indiscernible] that the vaccinated [indiscernible] in the city despite being vaccinated. [Indiscernible] access to [indiscernible] care for someone who is not vaccinated.

So, I'm going to continue on, but the point I'm making here, Your Honour, with all these cases, [indiscernible] it's a two and a half page summary at paragraph 89, at the end of that decision. How can my friends [indiscernible] vaccine, vaccine [indiscernible]? How can they sit there and say this case is bad beyond doubt when the [indiscernible] is actually [indiscernible] flagging the same thing as my clients? Only on a flat Earth could they argue [indiscernible]. So, with that, if I could direct Your Honour to page 9 of my written argument? The Ontario Court of Appeal in a case called *Flemming* [phonetic] in 1991, under s. 7 of the *Charter* said:

> You cannot inject [indiscernible] patients without their consent [indiscernible].

And I'll just make you, at Tab 33, you have the Ontario Court of Appeal decision. I'll just read you the headnotes and you can read the case if you like. It's a unanimous decision, Tab 33, second page, after the L. The paragraph starts with common law.

THE COURT: Yes?

CNSL R. GALATI: At common law [indiscernible] unwanted medical treatment. A patient, in anticipation of circumstances where he or she may be unconscious or otherwise incapacitated and wasn't able to contemporaneously express his or her wishes regarding a particular form of medical treatment, [indiscernible]. [Indiscernible] instructions even in emergency. These traditional common law principles [indiscernible]. The common law right to [indiscernible] what shall be done with [indiscernible]. And then, the next paragraph [indiscernible] [as read in]:

> [Indiscernible] the appeal provisions of the act manifestly [indiscernible] s. 7 of the *Charter*. Real medical procedures are [indiscernible] which are often accompanied by severe and sometimes irreversible adverse side effects. Certification [indiscernible] COVID vaccines [indiscernible]. There are 38 pages published on Pfizer as to [indiscernible] permanent damage caused by the Pfizer vaccines. The constitutional right to refuse any and all medical treatment [indiscernible] informed consent, is a constitutional right.

If I could turn Your Honour's attention to Tab 34 [indiscernible] you'll find the Supreme Court of Canada decision of *Carter v. Canada,* an assisted suicide case of 2015. And at paragraph 67 of that decision the Supreme Court [indiscernible] that endorsement [indiscernible], which I just read to you, at paragraph 67 forward Chief Justice McLaughlin states as follows:

> The law has long protected [indiscernible] in medical decision making.

And she cites *A.C. v. Manitoba Director of Child and Family Services.* That's the case where she sets out [indiscernible] policies [indiscernible] consult. [Indiscernible] stated that this [indiscernible]. [Indiscernible]. [Indiscernible] the patient's decision. It is this same principle that is at work.

Some of us may not like this decision. Some of us may just want to do [indiscernible] and choose to make their own decisions as anti-vaccers, racists, on and on. This is not what our constitution mandates. This is not what our Supreme Court requires of us. And whether our Supreme Court has resoundingly accepted the arguments and the claims that my clients are putting forward. Now a couple of other great cases before I break to [indiscernible] Mr. Witten set straight. If I may refer you to Tab 30 of my book of authorities? Tab 30 is a case [indiscernible] on constitution. Police officers. [Indiscernible] it's a request by the Attorney General to dismiss – to dismiss it because it's spurious and vexatious. The court dismissed that request. At Tab 29 --

THE COURT: Sorry. Sorry. Just clarify. They dismissed – there was an application to dismiss and the way you described it, you said the court dismissed. But they dismissed the application, not your action; correct?

CNSL R. GALATI: They did. They dismissed the motion to strike [indiscernible].

THE COURT: Thank you.

CNSL R. GALATI: And at Tab – at Tab 29, similar [indiscernible] case, [indiscernible] a similar request was made to strike it because it was spurious and vexatious, and the Ontario Court said no, [indiscernible].

So, the other two cases at paragraph 20 of my written argument I cite your court's recent case [indiscernible] versus Dr. Henry, this is only a few weeks ago, that was an action to strike on standing. And the Supreme Court of British Columbia, at Tab 31, dismissed the motion to strike as against the [indiscernible]. [Indiscernible] the issues in this are complex. [Indiscernible].

THE COURT: Mr. Galati, something has happened to your microphone.

CNSL R. GALATI: I'm sorry. Apparently I pushed the wrong [indiscernible]. Give me the last thing you heard, Your Honour.

THE COURT: You were referring me to Justice Colville's decision in – at paragraph 20.

CNSL R. GALATI: Yeah.

THE COURT: And then, I didn't hear you when you went on, I take it, to paragraph 21?

CNSL R. GALATI: No, I [indiscernible] issues are complex. At paragraph 15 Justice Colville says [as read in]:

> [Indiscernible].

And at paragraph 39 on the issue of [indiscernible] [as read in]:

> [Indiscernible].

And then the case I really wanted Your Honour to read is the last case I'm going to refer you to. It's an Ontario Superior Court decision contained at Tab 82, which is a decision of Mr. Justice [indiscernible] -- I'm sorry. And in [indiscernible] is that contrary to Mr. Justice [indiscernible], Mr. Justice [indiscernible], with all due respect, has a lot of lofty statements that [indiscernible]. [Indiscernible] we all know that [indiscernible]. [Indiscernible] the pandemic. We can take judicial notice that there's a declared pandemic. We cannot take judicial notice of what the pandemic is [indiscernible], what the virus's competition is, who it's affecting, whether it's killed more people than not. We can't take judicial notice of [indiscernible].

Mister Justice, the Ontario Superior Court says exactly that. So, the reason this case is in court is that the issue of judicial notice on what the COVID-19 virus is, is not [indiscernible]. It's not a matter of judicial notice. It's not a [indiscernible]. So, at page 1 of this Ontario decision, the court starts off, and these are very profound, judicious statements [indiscernible]. [Indiscernible]. The Ontario Court says [as read in]:

> When they become [indiscernible] to ask questions especially in the court, and then they become unfashionable for judges to receive answers, especially when children's lives are at stake.

This was a lengthy dispute over who was going to decide vaccination or non-vaccination. [indiscernible] should judges sit back [indiscernible] evidence? And it's this information, even [indiscernible] self-serving tool [indiscernible]. I would say the same holds for conspiracy theories. [Indiscernible] never acceptable in our adversarial system.

[Indiscernible] wrong. I don't even have to explain [indiscernible].

[Indiscernible] my friend, Mr. Witten, this morning. [Indiscernible] conspiracy theories without telling me why. Tell me why the conspiracy theories and tell me why they're not factually grounded, cause of action in civil conspiracy. The Ontario Court then goes on to say, at paragraph 10 [as read in]:

> [Indiscernible] vaccination [indiscernible].

Now, answer honestly. [Indiscernible]. [Indiscernible]. Why don't these people just do what the government tells them to do? [Indiscernible] insists on evidence and that's my great concern is my point for this court, the statement of claim sets out statements of fact and must be taken as proven. If you [indiscernible] the positive action [indiscernible]. Will you succeed? That's not an issue today. That's for another day. [Indiscernible] summary motion judgment [indiscernible].

B, at paragraphs 17 to 20, the Ontario Court says [indiscernible] [as read in]:

_

> [Indiscernible]. In contrast, the [indiscernible] consideration. A, the [indiscernible]. It seems to be [indiscernible]. [Indiscernible].

And then he goes to the affidavit evidence that is provided. And then [indiscernible] and this is important. [Indiscernible] says [as read in]:

> [Indiscernible].

[Indiscernible] the substance of the [indiscernible] conspiracy theory [indiscernible]. They just dropped them [indiscernible], meaningless [indiscernible] against the action in civil conspiracy. And [indiscernible] in its entirety, but I want to take you now, because I have half an hour left, I will do my best to [indiscernible].

I want to take you now to what the Ontario Court says about judicial notice. Starting at page -- paragraph 65 of the decision, the court says --

THE COURT: I’m sorry. Which case?

CNSL R. GALATI: The same case. The [indiscernible].

THE COURT: Yes.

CNSL R. GALATI: The Ontario judgment of Justice [indiscernible] at paragraph 65. It’s at Tab 32, Your Honour.

THE COURT: I’m there.

CNSL R. GALATI: And it starts by saying that’s really what many of these things belong to, to consider how the evidence [indiscernible] paid judicial notice of the fact that other children should be vaccinated, A, because [indiscernible] judicial resource [indiscernible] that all children should be vaccinated [indiscernible]. But even if that’s not [indiscernible].

And then he cites a case –- another case from the Ontario Court [indiscernible] judicial notice. And at paragraph 67, and this is what’s important here. My friends expressly and implicitly, as every other government that’s defended these proceedings has said, hey, listen. Canada Health says so. [Indiscernible] official said so. [Indiscernible] evidence says so. You don’t want to read the internet when you’re an expert and consider it and respond to it.

Here’s what the justice of the Ontario Court had to say about that [as read in]:

> Why should we be [indiscernible]. A, that [indiscernible]. B, what about the residential school system? In that case [indiscernible]. [Indiscernible]. And [indiscernible] 1950’s Canada Public Health promotion of smoking for pregnant women for their own health.

So, my clients do not have to worship the dictates of Canada – of public health officials. Even if they did, the constitution does not ban [indiscernible] of civil servants and just happen to hold a medical degree as a public health officer, and [indiscernible] we do not have to have a blind [indiscernible] of an approach where [indiscernible] anti-vaccers [indiscernible] conspiracy case. That’s offensive beyond the pale.

So, we end here in in decision in which the court has not only substantively considered the issues and the relief sought by my clients, but they’ve actually prevailed. So, where should this [indiscernible]. That’s just how you’re treating [indiscernible] in Canada. [Indiscernible]. [Indiscernible]. That’s getting better and better [indiscernible]. [Indiscernible]. The issue here is not the choice of COVID measures, per se. It’s their enforced infringement of constitutional rights. That’s what’s at risk here.

So, I want to [indiscernible] my presentation [indiscernible]. And you know, I’m [indiscernible]. He says that international treaty provisions are not [indiscernible] in Canada. Well, in 1991 -- that’s 23 years ago, [indiscernible] in a Supreme Court case [indiscernible] in a case called *Baker*. [Indiscernible] that all domestic legislation has to be [indiscernible] in accordance with international treaty provisions, whether or not they were ratified [indiscernible] in Canada. And at that [indiscernible] in the case was the conventional [indiscernible] which Canada had not implemented in Canada and the Supreme Court of Canada [indiscernible] best interests of the child under that treaty to [indiscernible]. A few years later another case [indiscernible]. A few years later [indiscernible] same thing, the Supreme Court of Canada in a case called *Hape*, H-a-p-e, ruled that if an international [indiscernible] that specific right, without [indiscernible] is the minimum standard and protection that is to be [indiscernible] of our *Charter*. So, what’s my friend talking about, that international law provision were not [indiscernible]? They [indiscernible] specific enough [indiscernible] under *Hape*, as ruled by the Supreme Court of Canada.

The international rule of [indiscernible] in my statement of claim on behalf of my clients [indiscernible]. Now, in this case [indiscernible]. After that there’s another [indiscernible] case called *R. v. Perry*, where the

Submissions for Plaintiffs by Cnsl R. Galati

conduct of the RCMP [indiscernible]. I forget the name but [indiscernible] where the Supreme Court [indiscernible] extra territory.

So, when my friend talks about [indiscernible] international provisions, I'm afraid I have to state that this is [indiscernible]. The other thing that my friend talks about and confuses, he talks about how [indiscernible] constitutional principles are [indiscernible] litigation. I don't disagree with that. But my friend, unfortunately, doesn't understand the distinction between the unwritten constitutional principle of constitutionalism [indiscernible] unwritten recognized constitutional [indiscernible] recognized prior to the 1982 patriation.

The Supreme Court of Canada [indiscernible] constitutional rights [indiscernible] as follows. Sanctity and protection of the physical [indiscernible]. Habeas Corpus protected what [indiscernible]. We've seen that in [indiscernible] in the 1950's. The Supreme Court of Canada read in freedom of religions and free speech as a [indiscernible] constitutional right that the province [indiscernible]. So, I don't know what my friend has a problem understanding [indiscernible] unwritten constitutional rights, not principles -- rights, by recognizing prior to the *Charter.*

[Indiscernible] I may be [indiscernible] my friend [indiscernible] material on constitutional rights [indiscernible]. I have to take umbrage with these submissions [indiscernible]. [Indiscernible]. Well, I own some of the most seminal successful prosecution cases in the country. None of that is relevant. What's relevant is what my clients are asserting in this claim and the prosecution of [indiscernible] of their assertions. And this [indiscernible] transgression should be the messenger and not [indiscernible] Ontario Court in the case of [indiscernible]. We have to look at the evidence [indiscernible]. We can't just start -- Your Honour, we can't just start the allegations [indiscernible].

I apologize to the court [indiscernible] reading the statement in, but -- and I'm sure that if you read it you'll see [indiscernible] not for any reason but to stay away from these allegations [indiscernible]. It's all grounded in fact. And even if you did want to [indiscernible] they're right. [Indiscernible].

And I'm going to end with this, Your Honour. Now, I -- listen -- I understand [indiscernible]. It's not very nice of comfortable. But the law has never been about [indiscernible], especially when it comes to constitutional. You know, my friends [indiscernible] affidavit, [indiscernible] client's website. We [indiscernible] as if I had anything to do with it. [Indiscernible] publicity of these issues [indiscernible]. I just need you - I just need you to know, Justice Ross, I filed this case on August 17th, 2021. My friends [indiscernible]. We finally got the thing on [indiscernible], and then my friends submitted their motion to strike. That's fine.

So, they filed it in January, returnable February 22nd, while Mr. Galati is in [indiscernible]. It's not as if I [indiscernible] at all. And so, as soon as I was sent home to fully recover, [indiscernible] of March, this date had been set [indiscernible]. I asked my friends for their indulgence and they said no. They didn't see [indiscernible]. Okay? [Indiscernible].

So, [indiscernible] and sat on the case, is out there. [Indiscernible]. And I say that with all due respect. So what if my clients are publicizing [indiscernible]? [Indiscernible] not to make public statements about our case, and I understand my friends' [indiscernible]. They probably are, too. But I'm not [indiscernible] professional conduct. Sometimes I [indiscernible] efforts, if I don't publicize for my client when there are vested issues of public interest. And [indiscernible]. And let's remember [indiscernible] did this [indiscernible]. Ms. [indiscernible] did this while she successfully petitioned the Supreme Court of Canada for assisted suicide. Ms. Carter did that while she successfully petitioned for assisted suicide. Ms. [indiscernible] did this[indiscernible]. There is nothing wrong with the plaintiffs taking issues of public interest. We're not in an army here. The plaintiffs have rights to assert and [indiscernible]. [Indiscernible] my friend, M. Witten's sense of propriety? No. [Indiscernible]. Like, what's it here for? You know?

Okay. So, [indiscernible] notices of liability. [Indiscernible]. And, yeah, they're right. [Indiscernible] says you type in the name Rocco Galati and this is what came up. A few tweets [indiscernible] which I founded in November of 2004 which [indiscernible]. It showed Rocco Galati [indiscernible] over the lunch break, 757,000 recorded [indiscernible] hits. [Indiscernible] this type of evidence is really – there's no place for this type of evidence. This affidavit should be struck. It's inadmissible. This doesn't happen and it's really, with all due respect, it's offensive to me [indiscernible]. I've litigated thousands of cases successfully. And I have to put up with this kind of aspersion in open court?

I'm sorry. You know, I'm not going to demand Mr. Witten give me an apology, [indiscernible] this type of [indiscernible] aspersion. Okay. I have [indiscernible]. So, nothing to do with the case before me [indiscernible]. But I've got to tell you [indiscernible] and I had seventeen federal [indiscernible] judges [indiscernible] legally [indiscernible].

You know, sensationalizing the messenger does not mean the messenger ain't right. And so, [indiscernible]. This case has merit. The facts really [indiscernible]. Now, I think Your Honour [indiscernible]. I can accept that.

So, if you decide [indiscernible] in the court, it should not be [indiscernible]. It should be [indiscernible] on behalf of my client. And with that, I thank you for your patience in listening to me. If I sound [indiscernible] I'm only concerned [indiscernible]. You know? And thank you very much for [indiscernible].

THE COURT: Thank you, Mr. Galati.

I note the time. We normally take a fifteen-minute break at 3:00 o'clock. We started early. So, we'll take a fifteen-minute break now.

Mr. Witten, do you think that you'll -- the applicants will be able to complete any reply by

4:00 o'clock?

CNSL M. WITTEN: Justice Ross, I don't have anything to say in reply. I'm content to rest on my submissions in the main. I'm not sure about the others.

THE COURT: I'll go party by party.

CNSL A. GATTI: No reply [indiscernible] Canada.

THE COURT: Thank you, Ms. Gatti.
Mr. Wedge?

CNAL T. WEDGE: Mr. Justice, no reply for [indiscernible] Health Authorities.

THE COURT: Thank you, Mr. Wedge.
Mr. Delaney?

CNSL T. DELANEY: No reply.

THE COURT: And finally, [indiscernible], it's going to be odd for you to talk now.

UNIDENTIFIED SPEAKER: No reply.

THE COURT: All right. Thank you very much. We are adjourned.

CNSL R. GALATI: [Indiscernible]. Your Honour, I'm sorry. In terms of housekeeping, with Mr. Wedge, I promised I would [indiscernible].

CNAL T. WEDGE: [Indiscernible].

THE COURT: All right. I will reserve and we are adjourned.

(VIDEOCONFERENCE CONCLUDED)

(PROCEEDINGS ADJOURNED AWAITING DECISION)

TRANSCRIBER: M. Pedersen

I hereby certify the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability.

M. Pedersen

M. Pedersen
Court Transcriber

All of which is respectfully submitted.

Dated this day of , 2022.

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Court of Appeal File No. CA48578

COURT OF APPEAL

BETWEEN:

Action4Canada et al.

Appellants

- and -

His Majesty et al.

Respondents

APPEAL BOOK

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